
Switzerland

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O. Introduction

Bribery is a main topic in the agenda of the reform of criminal law, in Switzerland as in many other countries. The Council of Europe adopted recently a Criminal Law Convention on Corruption¹, demanding in Art. 7 and 8 to penalize even active and passive *private* bribery. Yet, the new Swiss legislation deals only with the bribery of *officials* (see below, I.). Even the legitimacy to edict new and stronger criminal laws against the bribery of officials is discussed controversially². Until recently the awareness of the dangers of bribery seemed not to be very widespread in Switzerland.

For a long time, Switzerland was regarded as an island within crime-ridden nations, free from the problems other nations were troubled with – and Swiss people liked to share this prejudice. Yet, times have changed. The globalization of the markets and the need to more and more open the borders to the European Community now characterizes Switzerland as a country like others in the middle of Europe, sharing their problems. The belief to be something special is diminishing, just as local traditions and the respect of paternal authority. Scandals dealing with the misuse of power and money have become frequent. As a consequence, in the last few years new attention has grown towards the problem of bribery in Switzerland.

Recent criminological research on bribery, done mainly in the context of the National Research Programme 40 of the Swiss National Science Foundation, indicates that there is a considerable amount of unregistered bribery of officials at least at local level. Police and judicial files on bribery have multiplied in the last few years.³ Some authors proceed on the assumption of widespread corruptive activity in Switzerland⁴. In particular, in the business of construction of public buildings and roads, many indications for bribery were found.⁵ Since there is a strong network of interests between people of public relevance in the local communities, prevailingly people involved in the same academic and military circles and the same private societies or social groups⁶, such unlawful acts tend to be

1 ETS no. 173; Opening for signature: Strasbourg, 27/01/99; Entry into force (14 Ratifications): 01/07/02

2 With scepticism *Arzt* (2001)

3 *Queloz / Borghi / Cesoni* (2000: 74ff.).

4 *Imhof* (1999:125); see also *Giannakopoulos* (2001).

5 *Bircher / Scherler* (2001: 47ff.)

6 *Borghi/Queloz* (1997: 18, note 16); *Imhof* (1999:134f.).

seen as “normal”, they are tolerated and hidden within the local community⁷. Moreover, criminological research on bribery of officials has led to the conclusion that the actors themselves do not have a consciousness of the wrongful character of their doing. Either they perceive the situation as normal or they do not understand themselves as offenders, but rather as victims. In their view, they cannot behave otherwise than to follow the corrupt rules⁸. A “honest” citizen is integrated into a net of acquaintances, which is characterized by mutual favours. To maintain his social relations, influence and financial interests, he feels obliged to play the game. Hence, it is doubtful whether measures of self-regulation could be successful. This supports the awareness for the need of criminal repression.

The bribing of foreign officials does not seem to be very common in Switzerland. Following the Bribe Payers Index (BPI) 2002 of Transparency International, Switzerland belongs to one of the three countries whose companies bribe least of all abroad.⁹ Since many Swiss firms are global players, the attention to this problem is, however, increasing¹⁰.

It lacks convincing reason that Swiss criminal law does not punish private bribery explicitly. The influence of Swiss banks, enterprises and high tech industry with worldwide activities exceeds by far the influence of the Swiss federal state. Since particularly in Switzerland the risk of abuse of power in the private sector exceeds the one in the public sector, the decision to incriminate only the bribery *of officials*, and not *private* bribery, does not really make sense. Moreover, the perspective of the „New public management“, the growing privatization of tasks formerly executed by authorities of the state and the ongoing delegation of public functions to private enterprises blurs the difference between bribery in the public and the private sector.¹¹

The question whether to extend the repression of bribery of officials by criminal law to the bribery of private persons has at least recently become a topic of academic discussion¹².

7 Bernasconi (1999:172).

8 Imhof (1999:130).

9 http://www.transparency.ch/textes/bpi_02_d.doc.

10 See e. g. Pieth / Eigen (1999).

11 Dubs (2001:387).

12 Dubs (2001).

I. Criminal Law

A. Elements and Scope of the Crime

1. Relevant Provisions

At present, there is no criminal law which explicitly makes it punishable to actively bribe a private person or for such a person to passively accept a bribe. The payment of an amount to corrupt a person and induce a commercial advantage is, however, stigmatized, indirectly, under *unfair competition* (see below, II).

Recently, a new nineteenth title on Bribery with the new Articles 322ter to 322octies was added to the Swiss Criminal Code (CC)¹³ Those Articles merely criminalize forms of bribery of officials.¹⁴ Nonetheless, the Articles are applicable, even though *private persons* are being bribed or do bribe in the following four cases:

When private persons

- are carrying out public functions, regardless of the legal nature of the contractual relations between the public authority and the servant,¹⁵
- are exercising functions in enterprise bodies governed or controlled by the State (as long as it is not purely the case of tax control by the State, or re-employment limited in time as a result of a recovery plan),¹⁶
- are acting as officially mandated experts, translators, interpreters or arbitrators¹⁷,
- are acting for an international organisation.¹⁸

13 Swiss Criminal Code of 21 December 1937 (SR 311.0). 19th title, in vigour since 1. 2. 2000 (AS 2000, 1121-1126; BBl 1999, 5497)

14 Art. 322ter to Art. 322sexies CC relate to bribery of *Swiss officials*: Active Bribery (Art. 322ter), passive Bribery (Art. 322quater). Offering, promising or granting an undue advantage (Art. 322quinqies). Accepting an undue advantage (Art. 322sexies). Art. 322septies relates to bribery of *foreign officials* and Art. 322octies states the *common rules*.

15 Art. 322octies CC, para. 3.

16 Report "Bericht und Vorentwurf zur Revision des Schweizerischen Korruptionsstrafrechts", Berne, June 1998; obtainable from the Federal Office of Justice (FOJ), p. 39. Cf. Report 1998. ATF 121 IV 216ss.

17 Art. . 322septies CC.

18 Art. 322septies CC.

The fact that these categories are cases under the Articles 322ter to 322octies is in accordance with the OECD-*Convention on combating bribery of foreign public officials in international business transactions*. According to the Convention (Article 1), any "person carrying out a public function for a foreign country including for an enterprise or public organisation and civil servant or official of a public international organisation" is a material public official. The statutory definition of civil servant is provided in Article 110, para. 4 CC: "The term civil servant shall apply to the employees of public services or legal services. Persons who provisionally occupy a function or employment, or who carry out a temporary public function shall also be deemed as civil servants." Because of the specific definition of public officials in the criminal law, the Swiss Criminal Code covers institutional officials as well as material public ones.¹⁹

Although not explicitly punishable as private bribery, to bribe a private person or to accept a bribe as a private person could under specific additional conditions broadly constitute one of the following criminal offences of the Criminal Code:²⁰

- Peculation (Article 138)
- Fraud (Article 146)
- Fraudulent misuse of data processing systems (Article 147)
- Management fraud (Article 158)
- Abuse of the tax withheld from wages and salaries (Article 159)
- Receiving stolen goods (Article 160)
- Insider offence (Article 161)
- Manipulation of the stock market (Article 161bis)
- Fraudulent bankruptcy (Article 163)
- Legal persons and societies (Article 172)
- Forgery (Article 251)
- Fraudulent obtention of forged instruments (Article 253)
- Organised Crime (Article 260ter)
- Withdrawal from legal action (Article 305)
- Money laundering (Article 305bis)
- Lack of vigilance regarding financial transactions and law of communication (Article 305ter).

Bribery in the private sector is not punishable as such. However, passive bribery in the private sector will constitute a case of Article 158 CC, if the bribed person commits a management fraud in return as a *quid pro quo* for the advantages received.. This will often be the case. As a consequence, active bribery in the private sector will often be considered as an instigation to management fraud (Article

19 Message 99.026 §212.12.

20 *Tercier* in SJ 1999:239.

158 CC). Hence, in Switzerland acts of private bribery are typically criminalized as a *breach of interpersonal loyalty causing a pecuniary damage*.(see below I.2.).

2. *Elements of the Crime*

The provision penalizing Management fraud (Art. 158 CC) concerns two different groups of cases:

1. The breach of trust in a specific interpersonal relation determined for the preservation of financial interests of another person (Art. 158 para. 1 CC), and
2. the abuse of representative power of which a financial damage of the represented person results (Art. 158, para 2 CC).

The provision concerning the abuse of representative power (Art. 158, para. 2 CC) was only added in 1994 when mainly the financial crimes of the Criminal Code were revised.²¹

The breach of trust in a specific interpersonal relation determined for the preservation of financial interests of another person (Art. 158 para. 1 CC) assumes a duty to take care of the financial interests of another person as a main obligation resulting from the trust relation. Article 158, para. 1 CC is a special statutory offence demanding that the offender is seen as a guarantor for preserving one other's financial interests. Only persons with special duties of trust, e. g. as investment managers, can possibly be offenders. These duties can be established by law, official or private mandate or *negotiorum gesto*.²² Since the revision of 1994 it is further possible to be an offender according to Article 158, para. 1 *if failing to supervise* the management. Therefore, the individual's failure to supervise can be punishable under Article 158, para. 1 when committed as a member of the board of a joint-stock company or as a reviser.²³

The typical case of Art. 158 para. 1 CC (subpara 1) technically is a misdemeanour (Art. 9, para 2 CC) and provides a sanction of imprisonment up to three years. According to Art. 158 para. 1 subpara. 2 CC, the same sanction applies also to a *negotiorum gestor*.

21 *Stratenwerth* BT I (1995:§19 RN2).

22 *Stratenwerth* BT I (1995:§19 RN9/10); Müller (1997:86 and 87).

23 *Müller* (1997:87).

In case of an intention of gain (Article 158, para. 1, subpara. 2 CC), the breach of trust technically is a crime (Art. 9, para 1 CC) and provides a sanction of imprisonment up to five years. It is irrelevant whether the illegal intent regards a personal benefit or a benefit for the third party.

The abuse of representative power, from which a financial damage of the represented person results (Art. 158, para 2 CC), assumes the offender's competence to legally oblige another person. The punishable act consists in causing a pecuniary damage to the represented person with the intention to profit financially. Since Article 158, para. 2 CC regards offenders who are entitled to act legally for another person, different from para 1, in para 2 the authority to conclude a single contract is sufficient.²⁴

The abuse of representative power is technically a crime (Art. 9, para 1 CC) and provides a sanction of imprisonment up to five years.

Article 158, para. 3 CC states that management fraud - if the damaged property is owned by a relative or a member of the family - shall only be prosecuted when there has been an application.

2.1 *Protected Interests and Purpose*

Acts of private bribery are regarded as a *breach of interpersonal loyalty causing a pecuniary damage*.

2.2 *Illegal Act*

Article 158, para. 1 and para. 2 CC does not request any specific act. Basically, the fact of breaching any kind of duty is declared to be a punishable act. Even an omission could be a constituent fact.²⁵

2.3 *Illegal Contract*

Article 158 CC does not restrict the punished behavior to a determined act. Therefore, an actual action is sufficient and it is not necessary to prove an illegal contract.²⁶

24 *Stratenwerth* BT I (1995:§19 RN22).

25 *Müller* (1997:88).

26 *Vollmar* (1978:71f.).

2.4 *Danger or Harm*

The article provides that the punishable act must result in a damage or failure to increase in wealth.²⁷ The latter is the typical case.²⁸ The Federal Court has not yet decided whether the diminishing of business reputation could be a constituent result.²⁹ At least the conclusion of a contract constituting an obligation is regarded as an adequate harm.³⁰

2.5 *Specific Requirements*

Basically, all crimes and misdemeanors are subjected to the general rules of the Criminal Code (First Book: General Part, Article 1-110), even those regulated in other laws than the Criminal Code itself.³¹ Exceptions have to be mentioned explicitly in these other laws (this is for example the case for the jurisdiction under the Law against Unfair Competition, see below II.).

The Criminal Code is based on the principle that a criminal act is always punishable if committed intentionally.³² On the contrary, criminal acts that are committed as a result of negligence are punishable only when explicitly identified in the Criminal Code. Therefore, if a future regulation of private bribery does not explicitly sanction cases of negligence, only cases committed intentionally will be punishable.

Regarding Article 158, the requested mental elements are: intention towards all objective elements of the offence, Indirect intention would, however, be sufficient. The breach of trust in a specific interpersonal relation is qualified in case of an unjust intent to benefit (Article 158, para. 1, subpara. 3 CC). The abuse of representative power (Article 158, para. 2 CC) requests in any case an unjust intent to benefit.³³

Whereas the “simple” breach of trust (Article 158, para 1, subpara 1 and 2 CC) is a misdemeanour, both Article 158, para. 1, subpara. 3 and Article 158, para. 2 CC

27 *Vollmar* (1978:137); *Stratenwerth* BT I (1995:§19 RN16).

28 Decision of the Federal Court (BGE) 105 IV 314; *Trechsel* (1997:Art. 158 CC, RN 12).

29 *Trechsel* (1997:Art. 158, RN 12); Decision of the Federal Court (BGE) 121 IV 108; 123 IV 23.

30 *Trechsel* (1997:Art. 158, RN 12); Decision of the Federal Court (BGE) 100 IV 170.

31 Art. 333.

32 Art. 18, para. 1 CC.

33 *Müller* (1997:89).

technically are crimes under Article 9, para. 1 CC. It therefore follows, that they are appropriate prior offences for money laundering (Article 305bis CC).³⁴

2.6 *Responsibility and Specific Legal Conditions*

See above 2..

As to the criminal liability of legal persons see below D.2.

2.7 *Reasons for Non-punishment*

As Article 158 CC criminalizes only the breach of duties, this Article is not applicable in cases of the employer's approval.³⁵

2.8 *Extortion*

We are not aware of any cases of connection with extortion. In the literature too, there are no such indications.

3. *Case Law*

In connection with private bribery Article 158 CC was considered by Swiss courts in the following cases:

- a) In the decision of the Federal Court (BGE) 80 IV 56/57 the requirements of Article 158 were regarded as fulfilled.³⁶ In this case (1954) a director of a trust company had to sell real assets as assistant of a joint-stock company. In this function and for this purpose he put mediators in charge, which gave him a part of their provision.
- b) According to the decision of the Federal Court (BGE) 110 Ib 173, the manager's placing of major orders and the acceptance of a corruptly payed amount was a constitutive act under Article 158 Criminal Code.
- c) Additionally, the Criminal Court of the Canton Basel-Stadt has decided in 1953 that members of a board of administration of a co-operative housing society were punishable under Article 158 for breach duties statutory defined in Article 400 of the Swiss law of contract – the Obligation Code (CO, see be-

34 *Müller* (1997:88).

35 *Vollmar* (1978:133).

36 *Nienstedt* (1996:65).

low III.).³⁷ In this case, firms had to pay the above mentioned members for obtaining the mandate from the co-operative housing society.

4. *Concurrences*

Active corruption (punishable under the Law against Unfair Competition (UCL), see below II.) could be considered as instigation to management fraud according to Article 24, para. 1 and Article 158 Criminal Code.³⁸

II. **Jurisdiction**

1. *National Jurisdiction*

Every person of Swiss nationality who commits a crime abroad is punishable under the Swiss Criminal Code if the crime is punishable in both the country where it has been committed and in Switzerland. If the offender is in Switzerland and is not extradited or is extradited to Switzerland for the committed crime then the crime will be punishable in Switzerland.³⁹

2. *Jurisdiction over Non-Nationals*

According to Article 3, para. 1 CC the sanctions of the Swiss Criminal Code are imposed on anybody who commits an offence or a crime in Switzerland. This implies that the offender (irrespective if he is a citizen or non-national resident) commits the crime on Swiss territory, or at least that the effect of the crime results in Switzerland.⁴⁰ Article 7 CC covers all types of conduct which constitute the elements of an offence. Whereas the first step constituting the transition to attempt is sufficient - for example the departure to a foreign country in order to betray a secret⁴¹ - the mere decision and preparation are not sufficient.⁴² There are no decisions regarding Article 158 CC in this matter. However, the Federal Court decided in connection with misappropriation and fraud that the result is regarded as

37 *Nienstedt* (1996:66).

38 *Nienstedt* (1996:77).

39 Art. 6 and 6bis CC.

40 Art. 7 CC.

41 Decision of the Federal Court BGE 104 IV 181 (Adams); *Trechsel* (1997: Art. 7, RN 2).

42 Decision of the Federal Court BGE 104 IV 86; *Trechsel* (1997: Art. 7, RN 2).

occurred in Switzerland, if the victim is resident or has its registered office in Switzerland, even if most of the relevant acts took place outside Swiss territory.⁴³

An *extension of the scope of Swiss law* is, however, provided under a draft version of the General Part of the Criminal Code actually discussed in Parliament. For, Article 7 CC of the CC-draft proposes to extend the territorial scope in accordance with the principal of *delegated jurisdiction*. According to Swiss authorities "it is no longer justifiable today to apply Swiss law to offences committed in a foreign country only where the perpetrator or the victim have Swiss nationality or where the Swiss courts have jurisdiction under an international agreement to prosecute such offences. When considering international solidarity indispensable in the fight against criminality, our country must extend the scope of Swiss law to cases where extradition is prevented on grounds other than the nature of the offence. Under the delegated jurisdiction principle, prosecution should be initiated by the State in the territory of which the perpetrator of the offence is residing".⁴⁴

Legal assistance is generally available for illegal acts in foreign countries where an appeal to the court is provided. There is no assistance in cases where the Swiss authorities conclude that the prosecution is motivated by political issues or where the prosecution is not within the scope of international treaties such as the European Declaration of Human Rights. Further, a request for assistance is denied if the significance of the act does not justify the carrying out of the procedures. Requests for legal assistance are generally granted when the assistance is mutual. However, there are limited deviations from this principle.

The Law on Legal Assistance and Extradition in Criminal Causes (*Bundesgesetz über internationale Rechtshilfe*)⁴⁵ provides that extradition of foreigners is generally possible for all acts where the maximum sanction is one year of imprisonment under Swiss Criminal Law as well as under the criminal law of the requesting state.⁴⁶ The above mentioned law relates to all extraditions and legal assistance where there is no specific treaty on these questions in place.⁴⁷

43 Decision of the Federal Court BGE 124 IV 241.

44 Message 98.038 of September 21, 1998, 211.324.

45 Rechtshilfegesetz (IRSG) from March 20, 1981; SR 351.1.

46 Art. 35, para. 1, litera a IRSG.

47 Art. 1, para. 1 IRSG.

Extradition of a *Swiss national* is not possible under Swiss law, unless the citizen agrees in writing to his being extradited.⁴⁸ However, Swiss authorities can *investigate crimes* that were committed in a country where an extradition is not possible, if the country in which the act was committed requests such assistance.⁴⁹ The process and the sanctions are according to Swiss Law unless the foreign law allows for lower sanctions.⁵⁰

III. Enforcement

1. *Leading Principle*

Criminal investigations are generally undertaken by one of the authorities of the 26 cantons under its own rules relating to investigations.⁵¹ Only some of the cantonal procedure codes, mainly in the French speaking cantons, recognise the principle of procedural discretion.⁵² Yet, only judicial authorities, and not the police, are entitled to make use of this principle. In all 26 cantons the police must open a criminal investigation as soon as there are sufficient indications that an offence was committed.⁵³

In 1999, a legislation was ratified by Parliament to strengthen criminal investigation capabilities of the *federal* administration. The law is in effect since 2001 and allows the prosecution by federal investigators for crimes such as money laundering, organized crime, white-collar crime and *bribery* if the related cases have intercantonal or international aspects. Nevertheless, newly established federal attorneys will be forced to bring their cases to cantonal courts and cantonal rules will govern the investigation as well as the trial.⁵⁴

2. *Legal Conditions for Prosecution*

As stated in Article 158, para. 3 Criminal Code *management fraud* shall only be prosecuted when there has been an application, if the damaged property is owned

48 Art. 7, para. 1 IRSG.

49 Art. 85, para. 1 IRSG.

50 Art. 6bis, para. 1 CC; Art. 86, para. 2 IRSG.

51 Art. 123, para. 3 of the Federal Constitution of the Swiss Confederation of 18 April 1999; RS 101.

52 *Hauser/Schweri* (1999:193f.).

53 *Hauser/Schweri* (1999:321f.).

54 *Hauser/Schweri* (1999:53).

by a relative or member of the family. In all other cases, the principle of *ex officio* proceedings prevails.⁵⁵ Any person may file a complaint either in writing or orally at the relevant authority, including the police, declaring that they have knowledge of an offence.⁵⁶

For offences subject to a term of imprisonment exceeding three years the *period of limitation* for criminal prosecution is ten years.⁵⁷ The statute of limitations runs from the date when the offender has committed the offence; if there are several such occasions, it runs from the date of the last offence; and finally, if the offences have continued during a certain period, it runs from the date when such offences ceased.⁵⁸ Suspension is provided by any active investigation by a prosecuting authority or by any judicial decision concerning the perpetrator.⁵⁹

Meaning of principle of reciprocity: Basically, legal assistance shall be granted as far as possible, even if the described criminal act would not be punishable in Switzerland. But, measures of compulsion can only be applied under the assumption that the committed act would also be punishable in Switzerland. For this assumption it is sufficient that the actors of the charge would fulfil the *actus reus* of any offence penalized in Switzerland. The existence of , an identical article is not necessary.⁶⁰

3. *Role and Function of the Chamber of Commerce*

The Chamber of Commerce would not be allowed to bring a complaint to vindicate its interest in fair dealing because this is not the protected value under Article 158 CC.

(For the protection of fair conditions see A.II. below). The role of the Chamber of Commerce is important regarding the aspect of self-regulation (see below VI.).

55 Schmid (1993:24).

56 Schmid (1993:25).

57 Art. 70 CC.

58 Art. 71 CC.

59 Art. 72 CC.

60 Decision of the Federal Court BGE 109 Ib 53; Bundesamt für Polizeiwesen (1998:12).

4. *Rights of an Injured Party*

The injured party (in case of Article 158 Criminal Code the principal) can join the criminal case as *partie civile*. This shall allow him to claim its damages and to release him to sue in an additional civil suit.⁶¹

IV. Criminal Sanctions

1. *Scope and Range of Criminal Sanctions*

Under relevant criminal law the level of involvement is graded. According to the general rule (Article 63 Criminal Code) the judge will in any case graduate the imposed sanction in relation to the offender's (or accomplice's) individual guilt. Instigators are sanctioned as if they had committed the crime themselves (Art. 24, para 1 CC).. Accessories can be punished less severe (Art. 25, 65 CC). The decision as to whether somebody is an accomplice, an instigator or merely an accessory is based on both subjective (intention) and objective (grade of involvement in the act) elements.

2. *Additional Sanctions*

The Criminal Code provides additional sanctions to imprisonment such as:

- (i) the *temporary disqualification* for the convicted person to exercise his *occupation, work or business* and where the offender has been convicted to a term of imprisonment exceeding three months, if the court has reason to fear the commitment of further offences (Article 54 Criminal Code);
- (ii) *expulsion* for foreigners (Article 55 Criminal Code);
- (iii) *confiscation of patrimonial assets* under Article 59 Criminal Code. This article provides that "the court shall order the confiscation of patrimonial assets proceeding from an offence or which were intended to persuade or reward the perpetrator of the offence, if they need not be restituted to the victim in re-establishing his rights". The amount or advantage offered with the intention of bribing may be confiscated before or after its transfer, either from the active briber or from the recipient, together with the proceeds of any transaction concluded as a result of bribery, provided the bribery was the determining factor in the conclusion of the contract. Para. 2 provides that "where patrimonial assets are no longer available for confiscation, the court shall order their replacement by a compensatory claim by the State in an equivalent amount";

61 *Schmid* (1993:142).

(iv) *publication* of the judgement (Article 61 Criminal Code).

There are *no sanctions* whatsoever against *legal entities*, yet. Under the current Criminal Code the sanction of confiscation of patrimonial assets (Article 59 Criminal Code) applies to enterprises as third parties, but not as perpetrators of the offence.

However, Swiss law indirectly provides civil sanctions: Under Article 52 of the Civil Code companies and establishments with an illegal object cannot acquire legal personality. Therefore, they must be dissolved and their assets transferred to the community (Article 57, para. 3 Civil Code).

Nevertheless corporate criminal behaviour is to be introduced under the revision of the general provisions of the Swiss Criminal Code currently under discussion in parliament.⁶² By now, the law has passed a revision by the First (*Ständerat*) and Second (*Nationalrat*) Chamber of Parliament. At the same time Switzerland, as many other countries, is taking steps forward in the fight against international terrorism. Within the end of 2002 Switzerland intends to ratify the International Convention for the Suppression of the Financing of Terrorism⁶³. According to Article 5 of the said convention each State Party is required to take the necessary measures to enable a legal entity to be held liable for the financing of terroristic acts. Considered that the revision of the general provisions of the Swiss Criminal Code is not expected to be done by this year, the law creating the criminal liability of legal entities has to be anticipated and will be included into the general provisions of the present Swiss Criminal Code⁶⁴ In due time the new law will be formally reinserted into the revised general provisions of the Swiss Criminal Code⁶⁵

The new law on the “Liability of Enterprises”, actually under the preliminary review of the Parliament, consists of two articles⁶⁶. Article 100quater defines the material preconditions for punishment whereas Article 100quinquies provides special procedural rules for the position of the enterprise in a trial. The statutory

62 Message 98.038 vom 21. September 1998, 217.3.

63 Adopted by the General Assembly of the United Nations on 9 December 1999

64 New Title Six of the present Swiss Criminal Code, „Liability of Enterprises“, Art. 100quater and Art. 100quinquies

65 New Title Seven of the revised Swiss Criminal Code, „Liability of Enterprises“, Art. 102 and 102a

66 Draft Federal Law published in: Bundesblatt vom 13. August 2002, p. 5455 ff.

wording of the draft law, revised by now by both Chambers of Parliament⁶⁷, provides that:

Art. 100quater

"1. Where any crime is committed within an enterprise in the exercise of commercial activities *intra vires* the objects of the enterprise and this act cannot be imputed to any particular individual by reason of a lack of organisation in the enterprise, the enterprise shall be punished by a maximum fine of five million francs.

2. For offences under Articles 260ter, 260quinquies, 260 sexies, 305bis, , 322ter, 322quinquies, 322septies of the Swiss Criminal Code, an enterprise shall be punished independently of liability of any individual if it can be established that the enterprise has not taken all reasonable organisational measures required to prevent such an offence.

3. The court shall set the fine in particular according to the seriousness of the offence, of the lack of organisation and of the damage caused and the economic capacity of the enterprise.

4. For the purposes of this Article, enterprises shall include:

- a) legal entities of civil law;
- b) legal entities of public law except for regional corporations;
- c) companies
- d) individual enterprises."

Art. 100quinquies

"1. During a criminal procedure the enterprise shall be represented by one single person authorised to represent the enterprise in civil matters. If the enterprise desists to appoint a deputy of the said kind within a proper period, the bureau of investigation or the court will appoint a deputy within the persons authorised to represent the enterprise in civil matters.

2. A person representing the enterprise within a criminal proceeding has the same rights and duties as an accused. Other persons under para. 1 are not legally obliged to give evidence.

3. Whenever the person representing the enterprise in the criminal proceeding is subject to a criminal investigation on the same or interrelated circumstances of the case, the enterprise is required to appoint a new deputy. If necessary the bureau of investigation or the court appoints the new deputy among the persons under para. 1 or, if none is available, a suitable third person."

⁶⁷ First Chamber of Parliament (*Ständerat*): 14 December 1999, Second Chamber of Parliament (*Nationalrat*): 7 June 2001

Hence, according to para. 4 of the draft provision, the State or other local authorities (cantons, townships, etc.) are excluded under Article 100quater, but the term enterprise shall apply to public law companies.⁶⁸ The version by the Parliament underlines, contrary to the former version,⁶⁹ the requirement of an intrinsic link between the legal person and the offence. Currently, enterprises are liable only where an offence is committed in the course of operations of the enterprise. Moreover, the condition that the actual perpetrator must not be identifiable by reason of inadequate organisation has to be fulfilled. This lack may be due to negligence or intentionally organised.⁷⁰

With para. 2 the Parliament has introduced (besides the principle of subsidiary liability of the enterprise) a *primary liability of the enterprise*, though this liability is limited to certain offences, such as: participation in a criminal organisation (Article 260ter), terrorism (new Article 260quinquies), financing of terrorism (new Article 260sexies), money laundering (Article 305bis Criminal Code), as well as offences of bribery of Swiss and foreign public officials (Articles 322ter, 322quinquies and 322septies Criminal Code)⁷¹.

In any case the position which the offender occupies within the enterprise is irrelevant: it may concern any employee, and no intention or act by the enterprise itself is required.

The foreseen maximum fine of five million francs corresponds to the current maximum fine for natural persons.⁷²

B. Law against Unfair Competition

I. Elements and Scope of the Crime

1. Relevant Provisions

The Federal Law against Unfair Competition (UCL)⁷³ is designed to *protect fair and unfalsified competition* (Article 1 UCL). As such, it prohibits the imperilment of fair competition, not merely its actual destruction⁷⁴ and every act in breach of

68 Message 98.038 vom 21. September 1998, 217.421.

69 Message 98.038 vom 21. September 1998, p. 355.

70 Message 98.038 vom 21. September 1998, 217.421.

71 Message 02.052 vom 26. Juni 2002, published in: Bundesblatt vom 13. August 2002, p. 5390 ff., p. 5437.

72 Message 98.038 vom 21. September 1998, 217.422.

73 Federal Law of 19 December 1986 against Unfair Competition ("Bundesgesetz gegen den unlauteren Wettbewerb"), entering into force on 1 March 1988, AS 1988, p. 223 et seq. Message of the Federal Council in the BBl 1983 II p. 1009 et seq.

74 Pedrazzini 1992, pp. 34-35.

good faith that affects the relationship between competing parties (Article 2 UCL). In particular, procuring breach of contract is stigmatized (Article 4 UCL). Under that heading, the UCL contains a provision making *active private bribery a crime*. This provision, Article 4 lit. b UCL should have been replaced, according to the original proposal for the revision of the Criminal Code presented in June 1998, by draft- Article 4bis UCL. As this article has been criticised vehemently in the consultation, however, it has been withdrawn and will possibly be included in a future revision of the Criminal Code. At present, the relevant statute Article 4 lit. b UCL reads as follows:

A person acts unfairly if she or he:

(...)

tries, for himself or for a third party, to obtain an advantage by offering or granting any undue advantage to an employee, a mandatory or a helper of a third party, which is apt to seduce such persons to the commission or omission of an act contrary to their duty in relation to their official or commercial activities.

Article 4 lit. c UCL covers the special case, where employees, mandatories or other helpers are bribed to betray or to spy out manufacture or commercial secrets of their employee.

2. *Elements of the Crime*

2.1 *Protected Interests and Purpose*

As the UCL stigmatizes already the *imperilment* of fair competition, and not only its destruction, the attempt to bribe someone is not punished according to the general rules of the Criminal Code regulating attempts, but is itself stigmatized as a crime.⁷⁵

2.2 *Illegal Act*

Bribery designed to produce a private advantage is not stigmatized under Article 4 lit. b UCL.⁷⁶ The advantage the briber tries to obtain must concern his commercial position. The act of bribery must be committed intentionally, since "unless otherwise provided expressly by the law, a person is punishable for a crime or a misdemeanour only where such offence is committed intentionally. Any person who knowingly and willingly commits an offence, commits it intentionally." (Article

75 *Nienstedt* 1996, p. 79.

76 *Pedrazzini* 1992, p. 163.

18 Criminal Code) It suffices, however, that the briber considers it *possible* that the bribe will motivate the bribe taker to break his contract with his employer.⁷⁷

2.3 *Illegal Contract*

As with the provisions in the Criminal Code, it is not necessary to prove an illegal contractor agreement.

2.4 *Danger or Harm*

The term "undue advantage" must be understood by reference to the interpretation of the same term in the statutes stigmatizing bribery of Swiss and foreign officials (322ter and 322septies Criminal Code). Pursuant to Article 322octies para. 2 advantages of minor value in conformity with socially accepted practices are not considered as undue advantages.⁷⁸ The bribe taker is not rightfully entitled to advantages that he is not entitled to by law, contract or custom and that surpass the usual.⁷⁹ The crucial question, whether customs could lead to see the acceptance of bribes as normal, has generally been denied. The statute, however, provides no explicit answer to this question. The contract between the briber and the bribe taker is void (Article 20 para. 1 Code of Obligation), as it is against the law.

The advantage has to be offered or granted to the employee himself, not to a third party.⁸⁰

2.5 *Specific Requirements*

The bribe has to be offered to any person who has a duty of loyalty or trust towards a company or an employer ("third party"). The law mentions employees, mandatories and helpers but this list is not exclusive.⁸¹ The contract with a third party which the bribe taker is induced to breach must be a contract explicitly or implicitly including such a duty of loyalty.⁸² Even the manager or Chief Executive Officer of a legal person such as a corporation or public company can be con-

77 Müller 1997, p. 118; according to a decision of the Federal Court (BGE 100 IV 56), such a briber would act in a reckless manner and thus intentionally.

78 Müller 1997, p. 109.

79 Pedrazzini 1991, p. 353, 1992, p. 162; Tercier 1999, p. 241.

80 Pedrazzini 1992, p. 162, Tercier 1999, p. 241; *de lege ferenda*, this provision is vehemently criticized by Guyet 1994, p. 174, and Müller 1997, p. 113.

81 Müller 1997, p. 107.

82 Cf. Pedrazzini 1992, p. 160, Müller 1997, p. 64.

sidered as an employee of this legal person. Employees or mandataries of a legal person can be punished for unfair competition as principal offenders, not only as helpers, if they have acted independently.⁸³

2.6 *Responsibility and Specific Legal Conditions*

Contrary to duty are any acts of the bribe taker that would violate his duties of loyalty towards the employer.⁸⁴ If the bribe has been accepted and if this is known to the employer or mandator, the range of applicability of Article 4 lit. b UCL is excluded.⁸⁵ Neither are acts that serve the financial or commercial interests of the employer contrary to duty.⁸⁶

Passive bribery is not explicitly made a crime. Bribe takers could, however, be punished as instigators or accomplices of bribers, according to the rules of the general part of the Criminal Code.⁸⁷ In Article 24 para. 1 Criminal Code, an instigator is defined as any person who intentionally persuades another to commit an offence. If the offence is committed he is liable to the same punishment as incurred by the person who perpetrates the offence. In Article 25 Criminal Code, an accomplice is defined as any person who intentionally aids and abets in the commission of an offence. The court may, but is not obliged to, reduce the punishment for the accomplice.

II. **Jurisdiction**

1. *Civil Jurisdiction*

According to Swiss private international law (PIL),⁸⁸ civil claims of unfair competition are subject to the legislation of that state in which the effects of the undue act take place (PIL Article 136 para. 1). Statutes of foreign law will not be applied, however, if they contradict the Swiss "ordre public" (PIL Article 17), which means that punitive damages will not be accorded by Swiss courts.⁸⁹ PIL Article

83 Decision of the Federal Court in 1965 (BGE 90 IV 43).

84 *Müller* 1997, p. 116.

85 *Nienstedt* 1996, p. 78.

86 Decision of the court of appeal Fribourg of 30 april 1951, cf. *Wernli/Romy/Gautier* 1989, p. 409.

87 *Müller* 1997, p. 135.

88 Federal Law on private international law (Bundesgesetz über das Internationale Privatrecht IPRG) of 18 december 1987 (SR 291).

89 *Pedrazzini* 1992, p. 248; BGE 116 II 625

136 para. 2 states an important exception to the general rule: If the breach of law damages only the victim's commercial interests, the illegal act will be judged according to the law of the state in which the affected business establishment is located. Extra-territorial jurisdiction is made even more problematic by the fact that the UCL is designed to protect the fairness of the Swiss private market. This has been considered an important reason to include future provisions stigmatizing private bribery in the Criminal Code.⁹⁰

2. *Criminal Jurisdiction*

As the UCL contains no provisions regarding jurisdiction, its criminal sanctions follow the general rules of the Criminal Code.⁹¹ This means that all acts of bribery committed in Switzerland are stigmatized by the Article 3 UCL.⁹² According to the principles of active (Article 6 Criminal Code) and passive (Article 5 Criminal Code) personality, Swiss nationals committing acts of bribery abroad and foreigners bribing Swiss citizens (be they legal or natural) fall under Swiss jurisdiction - under the condition, however, that their acts are forbidden by the law of the country where they have been committed. If a prosecuted offence occurred in a foreign country, actions to compel production of evidence can only be undertaken if Swiss law (IRSG Article 64 para. 1) stigmatizes the offence.⁹³ Under that condition, however, the briber and the bribe taker can be extradited and the bribe can be given to the foreign country where the offence took place (Article 74a IRSG).

III. Enforcement

Article 4 lit. b UCL makes bribery an offence requiring an *application for prosecution* in the sense of Article 28 Criminal Code (Article 23 UCL). There are, however, no sentences in cases: jurisdiction on the relevant article Article 4 lit. b UCL does not exist.⁹⁴ There are at least three possible reasons for this: as the

90 *Bernasconi* 1999, p. 173.

91 Decision of the Swiss Federal Court, 20 april 1982, cf. *Wernli/Romy/Gautier* 1989, p. 121.

92 According to a decision of the Swiss Federal Court (BGE 109 IV 145), an act counts as committed in Switzerland, provided all its essential elements have taken place there, even if the effect of the act occurred elsewhere.

93 Law on International Aid in Criminal Matters (Bundesgesetz über die internationale Rechtshilfe in Strafsachen, IRSG).

94 This was mentioned in the "Bericht und Vorentwurf" (p. 51). *Pedrazzini*, in 1992, also knows of no cases where Art. 4 lit. b UCL has been applied, neither does *Müller* (1997, p. 52) nor *Bernasconi* (1999, p. 172).

UCL does not form a part of the Criminal Code, it is less well known and in general rarely applied; private bribery is punishable only dependent on the victim's complaint and thus subject only to discretionary prosecution; bribers, bribe takers, and even victims often have little interest in making cases of bribery publicly known.⁹⁵

IV. Sanctions

1. Civil Sanctions

According to Articles 9 and 10 UCL, the following persons have the right to demand civil measures:

- (i) any person who suffers a loss of custom, credit or professional reputation or whose commercial or economic interests have been damaged or endangered by an act of active bribery,
- (ii) any customers, whose economic interests have been damaged or endangered,
- (iii) any economic organisations which are competent to defend their members' economic interests according to their statutes and any organisations which protect the interests of customers,
- (iv) the State, if the act of bribery is considered to damage the reputation of Switzerland abroad and the persons having the right to claim are foreigners.

All victims can demand that the judge interdicts the act of bribery, and victims falling in categories (i) and (ii) can additionally claim that the judge awards damages or a legal redress. Generally, the complaint of an offence must address the briber or an unknown person. Article 11 UCL states an important *exception*: if the act of bribery was committed in charge of an official or commercial function, the employer of the briber may be accused and is strictly liable for the actions of his employee.

Although the mere endangerment of the economic interests is stigmatized, such endangerment must be of a certain intensity: this means in particular that share holders of a company are not considered victims of the bribery, as they are not directly concerned.⁹⁶ To obtain a compensation for damage, the victim of the act

⁹⁵ Bernasconi (1999, p. 172) speaks of an "omertà".

⁹⁶ Pedrazzini 1992, p. 227; Nienstedt 1996, p. 53; Müller 1997, p. 104; decisions of the Federal Court: BGE 90 IV 39; BGE 83 IV 105.

of bribery has to prove the damage, the bribers' fault, the existence of a causal link between the act of bribery and his damage and the unrightfulness of his action (Article 41 Code of Obligation). According to Article 9 para. 3 UCL, the victim may additionally claim a surrender of profits.⁹⁷

The *limitation period* for claims for damages according to UCL Article 9 para. 1 follows the general rules (Article 60 Code of Obligation): if the victim of the bribery has knowledge of the damage and the identity of the briber, his claims become statute-barred within one year. If he does not know either about the damage or the identity of the briber, the limitation period is ten years in any case, running from the date of the illegal act.

2. *Criminal Sanctions*

Any act of active private bribery will be punished, on accusation, according to Article 4 lit. b UWG in connection with Article 23 UWG with imprisonment or a fine up to 100.000 Swiss francs. Such a range of criminal penalties makes bribery an offence under Article 9 Criminal Code. In consequence organisations devised or designed for bribery cannot be considered "criminal" in the sense of 260ter para. 1 Criminal Code.⁹⁸ Additionally, the court must confiscate any assets that have been obtained from an act of bribery (Article 59 para. 1 Criminal Code):⁹⁹ this applies both to the bribe, which can be confiscated before or after the transferal, and the advantage obtained by the act of bribery. The confiscation is not limited to crimes committed in Switzerland.¹⁰⁰

According to Article 23 UCL, those persons who have the right to demand civil measures according to Article 9 and 10 UCL can accuse someone of active bribery.

Again, the complaint of an offence must in general address the briber or an unknown person. Article 26 UCL states an exception to this rule: if the act of bribery was committed in charge of an official or commercial function or by a mandatory, the employer of the briber will be punished according to the Administrative

97 The claim for a surrender of profits will follow the general rules about the management without mandate (CO 419 et seq.) (cf. *Nienstedt* 1996, p. 80).

98 *Müller* 1997, p. 77; *Pieth* 1992, p. 267

99 According to the wording of the law, the confiscation is left to the discretion of the judge. The Federal Court decided in BGE 119 IV 10, however, that confiscation is compulsory.

100 *Bernasconi* 1999, p. 160.

Criminal Code (ACC)¹⁰¹ if he refrained from interfering with the bribery, thereby violating a legal duty (Article 6 para. 2 ACC). If the employer is a legal person, its senior managers, executing organs and owners will be punished (Article 6 para. 3 ACC).¹⁰² If executing organs acted as joint offenders, such a detour is not necessary, as they will be punished along with the actual briber.¹⁰³ If they know about the bribery and refrain willingly from interfering with it, they are guilty of an act of bribery by omission.¹⁰⁴

The *limitation period* for criminal sanctions is, according to Article 23 UCL in connection with Article 173 Criminal Code, five years, running from the act of bribery (Article 71 Criminal Code).

The *victim* of the bribery can join the criminal case as *partie civile* claiming his damages.¹⁰⁵ Compared with the length and the costs of a civil process, this will generally be a much more efficient and less difficult way to obtain restitution. However, the victim cannot, as *partie civile*, claim a surrender of profits, as this case is not covered by Article 5 para. 4 of the Lugano Convention.¹⁰⁶

C. Civil Law

I. Prerequisites for Civil Measures

There is no statute of Swiss civil law explicitly stigmatizing private bribery.¹⁰⁷ However, a number of general provisions penalise specific forms, and special cases of bribery.

101 Federal Law on the Administrative Criminal Code (Bundesgesetz über das Verwaltungsstrafrecht, VStrR) of 22 march 1974 (SR 313.0).

102 Decision of the Federal Court (BGE 80 IV 22).

103 Decision of the Federal Court (BGE 101 IV 82).

104 Decision of the Federal Court (BGE 96 IV 155); *Pedrazzini* 1992, p. 235; *Müller* 1997, p. 129.

105 This *forum adhaesionis* is regulated in the cantonal laws on criminal procedures and is made possible by Art. 5 para. 4 of the Lugano Convention. Recently, this procedure has been simplified and generalized by the Federal Law on the Aid to Victims of Crimes (Opferhilfegesetz OHG, SR 312.5) of 4 october 1991. Its Art. 9 make it compulsory for the judge of the criminal court to decide on the victims' civil claims.

106 Cf. *Müller* 1997, p. 148.

107 Cf. *Tercier* 1999, p. 237.

The law of contract or Obligation Code (CO)¹⁰⁸ protects the subjective rights of individuals.¹⁰⁹ As a consequence, it covers bribery only insofar as the contract between the briber and the bribe taker (the bribery contract) or the contract between the employer of the bribe taker and the briber (the bribed contract) are concerned.¹¹⁰ The first contract consists of the secret or concealed granting of a material or immaterial advantage in order to induce an act contrary to the interests of the employer of the bribe taker.¹¹¹ By the second contract, the briber obtains the advantage his bribe was meant to bring about.¹¹²

1. Conditions of Civil Liability

1.1 Nullity of the Bribe Contract

The bribery contract is void according to Article 20 para. 1 Code of Obligation as it is against the law, in particular against the Civil Code¹¹³ and the UCL¹¹⁴, and *contra bonos mores*.¹¹⁵ Whatever the argumentation, the upshot is clearly the absolute *nullity of the bribery contract*.¹¹⁶

As a consequence of this

- (i) the bribe taker can get back his provisions on account of unjust enrichment (Article 62 et seq. Code of Obligation) or by *vindication* (Article 641 para. 2);
- (ii) the victim of the act of bribery can claim damages out of his contract with the bribe taker (Article 321 lit. a Code of Obligation in connection with Article

108 Federal Law of 30 march 1911 supplementing the Swiss Civil Code (SR 220).

109 *Bucher* 1988, p. 3.

110 *Tercier* 1999, p. 226.

111 *Steinbeisser* 1977, p. 7; *Héritier* 1981, p. 103; *Tercier* 1999, p. 228-229.

112 *Héritier* 1981, p. 143; *Tercier* 1999, p. 255.

113 *Steinbeisser* 1977, p. 27, *Héritier* 1981, p. 104; *Bucher* 1988, p. 257; *Nienstedt* 1996, p. 61; *Tercier* 1999, p. 243. This line of argumentation has been taken by the Swiss Federal Court (BGE 26 II 442, 95 II 37).

114 *Tercier* 1999, p. 244.

115 *Borghini/Queloz* 1997, p. 17; Public morality (*bonae mores*) includes, according to the Swiss Federal Court (BGE 115 II 232), every moral value entailed by the corpus of Swiss law in its entirety.

116 This has been stressed on 2 September 1993 by the Swiss Federal Court (BGE 119 II 380): "D'après la conception juridique suisse, les promesses de versement de pots-de-vin sont illicites, et donc nulles en vertu des articles 19 s. CO, en raison du vice affectant leur contenu (...). Selon un point de vue confirmé, elles contreviennent également à l'ordre public international..." (BGE 119 II 384-85).

321 lit. e Code of Obligation or Article 398 Code of Obligation) and out of the law of torts (Article 41 et seq., esp. Article 41 para. 2 Code of Obligation).¹¹⁷

Everyone whose situation is influenced by it can claim the absolute nullity of the bribery contract; it has to be considered by the judge *ex officio*.¹¹⁸ The briber, however, has no restitution claim as Article 66 Code of Obligation states that what has been given in order to obtain an illegal or amoral effect is no longer claimable.¹¹⁹ This is clearly the case with bribe.¹²⁰

1.2 Breach of Duty of Loyalty

The subsequent act of the bribe taker violates his contract or at least his *duty of loyalty* towards his employee.¹²¹ This duty of loyalty is explicitly stated in Swiss law for the cases of employment contracts and mandates. It is implicitly included, however, in all forms of contracts relating a potential bribe taker with a potential victim of an act of bribery. If the victim of the act of bribery and the employee have an employment contract, the acceptance of a bribe violates a basic duty of loyalty¹²² (321a Code of Obligation) and entitles the employer to the instant dismissal of his employee (337 para. 2 Code of Obligation).¹²³ Accordingly, the employee will be liable for his failure to perform (337b Code of Obligation). A duty of loyalty can also be constituted by a mandate (398 para. 2 Code of Obligation),¹²⁴ in which case the mandator has the power of revocation.¹²⁵

117 *Nienstedt* 1996, p. 67.

118 Decision of the Federal Court BGE 123 III 60.

119 The Federal Court has defended a wide interpretation of this statute (BGE 102 II 401, 95 II 37, 84 II 179). This has been vehemently criticized by *Héritier* 1981, p. 115, and considered "unsatisfying" by *Tercier* 1999, p. 254.

120 *Tercier* 1999, p. 253.

121 *Tercier* 1999, p. 230.

122 This has been explicitly stated in the report accompanying the revision of the law of employment contracts, cf. BBl 1967 II 300.

123 This has been highlighted by a decision of the Swiss Federal Court (BGE 124 III 25).

124 *Bucher* 1988a, p. 230, explains the duty of loyalty as the duty to act according to the mandator's interests.

125 Cf. decision of the Swiss Federal Court (BGE 92 II 184), *Hirzel*, 1930, p. 76, 99; *Nienstedt* 1996, pp. 54-55.

1.3 *The Validity of the Bribed Contract*

According to the general rules of Swiss civil law, the validity of the bribed contract can be questioned on three different grounds:

- (i) due to an excess of the agents' power of agency,
- (ii) due to imperfect expression of intention or
- (iii) due to the general *contra bonos mores* clause of Swiss civil law (Article 20 para. 1 Code of Obligation).

(i) In most cases, the bribe taker will be a representative of the bribery victim, competent to act in his name and on his account. His subsequent act will then at least violate the general duty of loyalty as it exceeds and is not covered by his power of agency.¹²⁶ If his commercial partner knows about this excess (which is usually the case if he tries to bribe the agent), the employer is not bound by the contract (Article 38 para. 1 Code of Obligation) unless he (either explicitly or implicitly) approves of it.¹²⁷ In addition, one could defend the interpretation that the bribed representative is in effect a representative both of the victims of the bribe and of the briber and thus be a self-contracting party.¹²⁸ The Swiss Federal Court has decided in an early leading case (BGE 33 II 566 et seq.), that self-dealing is only permitted if there is no danger of overreaching.¹²⁹ As such a danger generally will be present in cases of bribery, this line of argumentation would entail the nullity of the bribed contract.

(ii) According to Article 24 para. 1 lit. d Code of Obligation, a contract is based on an imperfect expression of intention, if one of the parties erred in an essential part of the contract. The error has to be essential both from an objective and a subjective point of view and the contracting party should have known the fact that his partner considers the relevant point to be a *conditio sine qua non*. In normal cases of bribery, these conditions are satisfied.¹³⁰ If the error is induced by fraud, the essentiality requirement is dropped (Article 28 para. 1 Code of Obligation).

126 *Tercier* 1999, p. 256.

127 *Bucher* 1988, p. 641. As such, there is no temporal limitation to his approval or disapproval of the bribed contract. It is clear, however, that the contract cannot be suspended for too long a period (cf. BGE 107 III 49).

128 *Tercier* 1999, p. 255.

129 This has been reaffirmed in BGE 82 II 393; cf. *Bucher* 1988, p. 637 et seq.

130 *Hirzel* 1930, p. 104; *Héritier* 1981, p. 148; *Nienstedt* 1996, p. 72; *Tercier* 1999, pp. 259-260. *Hirzel* and *Nienstedt* believe that a claim based on OC 20 para. 1 will only be successful if the victim can prove the causal link between the payment of the bribe and the conclusion of the bribed contract.

Fraud presupposes that the bribe taker had a duty to inform the victim of the bribe, which will be the case if he has an employment contract or a mandate with the latter.¹³¹ If the victim of an act of bribery does not want to be bound by the bribed contract, he has to claim this within a year after he has discovered that there has been such an act of bribery (Article 31 para. 2 Code of Obligation). There is no absolute limitation period.¹³²

(iii) The Swiss Federal Court has denied that bribed contracts (in contrast with bribery contracts) are absolutely void on the ground of being *contra bonos mores*.¹³³

2. *Persons Who Have the Right to Claim*

The bribed employee or agent is personally liable for the damage created by his accepting the bribe. If he acts as an organ of a legal person, this follows from the Swiss Civil Code¹³⁴ (Article 55 para. 3 Criminal Code). If the board of directors of a joint-stock company accepts a bribe, it is liable out of the Code of Obligations (Article 718 para. 3 Code of Obligation). If the executive director of a private limited company accepts a bribe, however, the company has to pay the damage (Article 814 para. 4 Code of Obligation). In the case of co-operative enterprises, Article 899 para. 3 Code of Obligation is applicable. If the bribe taker is an employee of the third party damaged by the bribery, he is strictly liable out of Article 55 Code of Obligation. If he is a mandatory, he has an obligation to restore possession to his mandator out of Article 400 para. 1 Code of Obligation. In any case, the breach of his duty of loyalty and the excess of his power of agency makes the agent liable to pay damages along the rules of the management without mandate (423 para. 1 Code of Obligation).¹³⁵ Article 400 para. 1 Code of Obligation has the following wording:

131 The applicability of the fraud provisions to cases of bribed contracts is stated by the Federal Court (BGE 47 II 86), *Hirzel* 1930, p. 119f., *Héritier* 1981, p. 146 and *Nienstedt* 1996, p. 73. The employer has a duty to provide his employer with all relevant information stemming from CO Art. 321a§1, the mandataire from CO Art. 398 para. 2 (cf. BGE 108 II 197).

132 *Bucher* 1988, p. 213, provides good arguments for the thesis that it would be contrary to good faith (cf. CO Art. 25 para. 2) to claim an imperfect expression of intention after ten years (which is the general limitation period in the CO).

133 BGE 47 II 86 and the decision of 3 September 1993 (BGE 119 II 380). See also *Borghini/Queloz* 1997, p. 17.

134 Federal Law on the Civil Code of 10 December 1907 (SR 210).

135 *Rehbinder* 1991, p. 53; *Nienstedt* 1996, p. 53.

The mandatory has to render account, on request and any time, about his management and has to render everything he obtained for whatever reason based on ("anlässlich") his management.

It has been discussed in literature whether bribes are obtained on the occasion of ("anlässlich") the management of the mandatory. In general, a broad interpretation is accepted.¹³⁶

II. Jurisdiction

1. Prerequisites for National Jurisdiction

The Swiss Civil Code, including the Code of Obligations, is applicable to all contracts concluded in Switzerland.¹³⁷ The parties of a contract can, according to Swiss private international law, agree on the applicability of Swiss law (Article 116 PIL). In a decision of 3 September 1993 (BGE 119 II 380), the Swiss Federal Court has decided that arbitration tribunals according to Article 176 et seq. PIL have the competence to judge whether or not a contract has been bribed.

2. Burden of Proof

According to the general rules of the Swiss Civil Code (Article 8) the burden of proof lies on the side of the accusing party. Several authors, however, have, *de lege ferenda*, proposed to reverse the burden of proof. It should, according to these authors, suffice to show that an employee has secretly received an advantage from another enterprise that has commercial interests in the acts of the employee.¹³⁸ The supposed bribe taker would then have to prove that he has rendered a service to this enterprise justifying his being paid for it.

D. New Developments

1. History

Switzerland signed the OECD - Convention on combating bribery of foreign Public officials in international business transactions on 17 December 1997. A preliminary draft of the implementing revision of the Swiss Criminal Code worked

136 Raflaub 1959, p. 72; Nienstedt 1996, p. 52.

137 Cf. Tercier 1999, p. 238.

138 Tercier 1999, p. 230.

out by the Federal Department of Justice and Police (FDJ) was presented to the cantons, the political parties and interested organisations in June 1998.¹³⁹ It consisted of three parts:

- (i) a revision of the Articles 288, 315 and 316 concerning the bribery of Swiss public officials, changing active bribery into a crime as is passive bribery, this modification entailing an extension of the prescription period for criminal prosecution;
- (ii) the introduction of a new offence of bribery of foreign public officials (now Article 322septies Criminal Code), which corresponds to bribery of Swiss public officials (now Article 322ter Criminal Code);
- (iii) the introduction of a new *offence of private bribery* (draft-UCL Article 4bis), replacing Article 4 lit. b UCL, and the punishment of private bribery by imprisonment or fine up to 100000 Swiss francs (draft-UCL Article 23,2).

The draft was then forwarded for consultation to the cantons, parties and associations and to other groups with a particular interest in the subject. They were all entitled to state their position and propose amendments. The general reaction was positive, in particular concerning (i) and (ii). The revision of the Federal Law against Unfair Competition (UCL),¹⁴⁰ however, has been approved only by the cantons, while the reaction of the political parties and the interested organisations was mainly negative.

Based on these results, the Federal Council decided to split the project and to enact only the first two parts of the original draft law.¹⁴¹ This means that only the statutes stigmatizing the bribery of foreign public officials were included in the revision and that the new statute concerning private bribery, draft-UCL Article 4bis (see below, V.3) was excluded. The law was published on 11 January 2000 and was put into effect on 1 May 2000. On 31 May 2000, Switzerland deposited the instrument of ratification with the OECD Secretary-General.

139 Cf. "Bericht und Vorentwurf zur Revision des Schweizerischen Korruptionsstrafrechts", Berne, June 1998; obtainable from the Federal Office of Justice (FOJ), Bern.

140 Federal Law of 19 December 1986 against Unfair Competition ("Bundesgesetz gegen den unlauteren Wettbewerb", UWG), entering into force on 1 March 1988, AS 1988, p. 223 et seq. Message of the Federal Council in BBl 1983 II pp. 1009 et seq.

141 Message on the Revision of the Federal Criminal Code of 19 April 1999 (SR 99.026).

2. *The Need for Action*

The contrast between the general agreement on the stigmatisation of the bribery of (domestic and foreign) officials and the disagreement on private bribery can be explained by a corresponding difference in the objects of legal protection. The statutes against the bribery of officials are designed to protect the confidence of the citizens in the objectivity, loyalty and fairness of its officials,¹⁴² whereas the UCL protects the public good of fair competition (see above, B.1) and the Code of Obligation the subjective rights of individuals (see above, C.1). This conflict has been discussed in connection with the question whether the proposed new Article 4bis draft-UCL should be incorporated into the Criminal Code (as it has been e.g. in Germany). This question has been denied by the political authorities in the report of the Federal Office of Justice (FOJ) proposing the revision of the Criminal Code and the UCL, as the protection of fair competition was considered more important than the protection of private fortunes.¹⁴³

As mentioned above, while active private bribery is already prohibited by the Federal law, jurisdiction on the relevant article UCL Article 4 lit. b does not exist. There is very little jurisdiction on the questions of the liability of the bribe taker to his employer or mandator and of the validity of the bribe and the bribed contracts respectively. Neither is there any jurisdiction on the liability of the briber to the employer of the bribe taker.¹⁴⁴

3. *The Proposed Statute UCL Article 4bis*

Two major modifications have been proposed by the FOJ:

- (i) the introduction of obligatory prosecution, and
- (ii) the introduction of the offence of passive private bribery.

The proposed Article 4bis is worded as follows:

Article 4bis Active and passive bribery

Unfairly acts in particular any person who

- a) offers, gives or grants any undue advantage to an employee, a mandatory or a helper of a third party for the commission or omission of an act in relation to his of-

142 *Stratenwerth* 1995, p. 340.

143 Cf. "Bericht und Vorentwurf zur Revision des Schweizerischen Korruptionsstrafrechts", p. 53.

144 *Nienstedt* 1996, p. 69 and p. 76.

ficial or commercial activities which is contrary to his duties or to the exercise of his discretionary powers;

b) requests or receives an undue advantage of any kind whatsoever, or accepts the promise of such an advantage, for him to perform or refrain from performing an act, in breach of his duties.

In its commentary, the FOJ stresses that the main target of the proposed provision is the *breach of contract* between the employer, who suffered the damage and is considered the victim of bribery, and the bribed employee or agent. If the employer bribes another employer, he is not considered liable, even if the shareholders suffer a damage (p. 53). Private bribery is only a crime if it is committed intentionally (p. 54).

The proposed new wording would have several consequences: The article 4bis would no longer be embedded within the general theme of UCL Article 4, the procuring of breach of contract. It would, therefore, no longer be necessary for the bribe taker to have a contract with the victim of the act of bribery.

4. *The Political Discussion About Private Bribery Legislation*

Article 4bis draft-UCL has been violently criticised in the consultation procedure and rejected by the main political parties.¹⁴⁵ Among those who agreed that private bribery should be made an offence, the disagreement concerned the question whether or not it should require an application for prosecution. Against the introduction of obligatory prosecution, right wing parties argue that it is up to the market to regulate itself and that the State has nothing to do with it, while left-wing parties are concerned about the possibility of the new statute being used by the employers as a means of pressure against their employees (pp. 14-15). In particular¹⁴⁶ right-wing parties (the Liberal Party FDP, the Conservative Party CVP and the People's Party SVP) criticised obligatory prosecution with the argument that private bribery, unlike theft, is not a danger to everyone, but only to major companies which can defend themselves and accordingly should have the discretion to take legal steps (pp. 85, 92, 96).¹⁴⁷ The Social Democratic Party (SPS) has even

145 Cf. " Zusammenfassung der Ergebnisse des Vernehmlassungsverfahrens über den Vorentwurf zur Revision des Schweizerischen Korruptionsstrafrechts", Berne, November 1998, obtainable from the Federal Office of Justice (FOJ), Bern.

146 Cf. " Ergebnisse des Vernehmlassungsverfahrens über den Vorentwurf zur Revision des Schweizerischen Korruptionsstrafrechts", Berne, 1998, obtainable from the FOJ, Bern.

147 Essentially the same argument is brought forward also by several cantons, by the Swiss Bankers Association (p. 124), the Swiss Society of Master Builders (p. 131), and the Swiss Union of Commercial and Industrial Enterprises - Vorort (p. 162).

rejected the UCL statute currently in force arguing that Criminal Law is not the right means to make private economy more sincere and impartial (p. 88). Among the cantons, Zurich criticised the limitation period for being too short and the fine for being too low (p. 6). Glarus, Fribourg, Basel-Stadt, Basel-Landschaft proposed to incorporate draft-UCL Article 4bis into the Criminal Code. Several cantons remarked that according to their experience private companies have not shown much interest to cooperate with the authorities in cases of bribery (Zug, p. 27, Aargau, p. 58). Like the right wing parties in general, several cantons and some employers' organisations rejected the stigmatisation of private bribery with the argument that there is no corresponding public interest (Zug, p. 27, Neuchâtel, p. 72, Centre Patronal, p. 105, Fédération Romande des Syndicats Patronaux, p. 111, Industrie-Holding, p. 121).

However, as the critics of the proposal of the revision have shown, a possible future regulation of private bribery in criminal law would necessarily demand a precise definition of the term private bribery beforehand.¹⁴⁸

5. *Future International Developments*

Notwithstanding the generally critical attitude towards the stigmatisation of private bribery, it has been underlined on all sides that a future international regulation should be closely observed. Among future developments in this area, two will be particularly significant.

On 22 December 1998, the Council of the European Community has adopted a Joint Action penalising, in its 2nd and 3rd article, active and passive corruption in the private sector. Although Switzerland is not a member of the European Community, the implementation and further development of this Joint Action will undoubtedly have an impact on Swiss legislation.

The Council of Europe has adopted a Criminal Law Convention on Corruption (ETS no. 173), which has been signed (on 24 July 2000) by 31 states and ratified by 3 states. Only 8 members, among them Switzerland, have not yet signed the convention that prohibits, in its articles 7 and 8, active and passive bribery in the private sector. The expectation of Swiss officials that the Convention will not en-

148 *Kessel/Stähli* (2000:290).

ter into force "in the near future",¹⁴⁹ will probably not be fulfilled. Therefore, a next round of legislation is to be expected.

According to Swiss officials, however, Switzerland will sign the Criminal Law Convention No. 173 and will take first steps to implement the appropriate legislation this autumn (2001). The consultation of political parties and cantons could therefore take place as early as during 2002. However, no concrete wording of the relevant statute is yet available. In view of the criticisms made to the latest revision, it is to be expected that prosecution of private bribery will not be made compulsory.

6. *Tax Deductibility*

According to permanent practice corruptly paid amounts are deductible from the tax as expenditure justified by commercial custom.¹⁵⁰

Parliamentary action¹⁵¹ over years to amend the legislation on direct taxes of the Confederation, cantons and townships so as to exclude deductibility of bribes has finally led to the adoption by the Federal Chambers of the Law of 22 December 1999 on the Prohibition of Tax Deductions for Bribes. The law entered into force on February 1, 2001.

However, bribes paid to private persons will still be deductible under this new tax law, because it provides that merely bribes paid to Swiss or foreign public officials shall not be considered as expenditure justified by commercial custom.¹⁵²

149 "Botschaft über die Änderung des Schweizerischen Strafgesetzbuches...", 19 April 1999, p. 5512.

150 ASA 15 219; Kreisschreiben der Eidgenössischen Steuerverwaltung vom 8. November 1946; Decision of the Federal Court (BGE) 124 II 29.

151 For example: 93.440 Parlamentarische Initiative Carobbio Werner: "Schmiergelder. Steuerliche Nichtanerkennung" (1993). 97.1040 Einfache Anfrage Jaquet-Berger Christiane: "Schmiergelder. Steuerabzüge" (1997). 99. 3518 Motion Jans Armin: "Schmiergelder. Keine Steuerabzüge" (1999).

152 Decision of the Federal Court (BGE) 124 II 29. Newly added paragraph to Art. 59 of the Federal Law on Direct Federal tax. Imhof (1999:137).

E. Self-Regulation: Administrative Measures

1. *Private Corporate Standards*

The Swiss Union of commercial and industrial enterprises ("Vorort") participates in the working out of guidelines by the International Chamber of Commerce.¹⁵³ On 28 May 1996, it has adopted *guidelines against private bribery*.¹⁵⁴ They propose to enact a central institution providing information and consulting for enterprises faced with corruption problems. Furthermore, they are asking for immunity from criminal prosecution in cases in which this institution has accepted the transaction.¹⁵⁵

2. *Guidelines of Swiss Federal Banking Commission Concerning the Combating and Prevention of Money Laundering*

The Swiss Federal Banking Commission (SFBC), supervisory authority of wide areas of the financial sector (banking and para-banking sector) in Switzerland, enacted March 26, 1998 guidelines against money-laundering (98/1) that also contain provisions relevant to private bribery:¹⁵⁶

"At the same time, these Guidelines pursue the goal of formalising certain principles developed by the Banking Commission concerning valuables of persons in important public office. To be mentioned in particular are the prohibition of accepting monies from cases of corruption or misuse of public assets and the care to be applied in establishing certain business relationships as well as their handling at the level of the management" (margin note 4).

Although these provisions apply only to the bribery of Swiss and foreign officials, they could be easily extended to cases of private bribery. Under the title "Guiding Principles", the following provision is to be found:

"The financial intermediaries may not accept monies of which they know or must assume that they derive from corruption or the misuse of public assets. For this reason, they shall verify with particular attention whenever they commence, directly or indirectly, business relationships with persons occupying important public functions for a foreign state or with persons and companies which clearly are related to such

153 Cf. its own statement in the "Ergebnisse des Vernehmlassungsverfahrens...", p. 168.

154 Cf. <http://www.vorort.ch/deutsch/Themen/files/BuchbeitragKorruption.htm>.

155 Cf. "Ergebnisse des Vernehmlassungsverfahrens...", p. 163.

156 Circular No. 98/1 of Federal Banking Commission dated March 26, 1998. The official version is available either in German (<http://www.ebk.admin.ch/d/publik/rundsch/98-1.pdf>) or in French (<http://www.ebk.admin.ch/f/publik/rundsch/98-1.pdf>). There is an unofficial English translation to be found under http://www.kpmg.ch/library/ebk/circulars/98_1.pdf.

holders of office, and whenever they wish to accept monies from such persons or hold them in custody" (margin note 9).

Financial intermediaries who have doubts on corruption are obliged to discontinue their business relationships (margin note 29). Unfortunately, the terms "corruption" and "misuse of public assets" do not correspond to any technical terms of Swiss law.¹⁵⁷ On a plausible interpretation, the terms apply only to crimes, i.e. criminal acts falling under Article 9 para. 1 Criminal Code.¹⁵⁸ The Federal Banking Commission, however, has developed a restrictive praxis and considers corruption in general as *contra bonos mores*.¹⁵⁹

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157 Cf. *Bernasconi* (1999: 174).

158 Cf. *Bernasconi* (1999: 177).

159 Cf. *Borghi/Queloz* (1997: 19).

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