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The 'Trends & Developments' sections give an overview of current trends and developments in local legal markets. Leading lawyers analyse particular trends or provide a broader discussion of key developments in the jurisdiction.

Trends and Developments

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CMS von Erlach Poncet (Geneva) is part of CMS, the world's sixth biggest law firm by headcount, with 4,500 lawyers operating from 74 offices in 42 countries, allowing it to offer specialist, focused advice to clients operating in complex business and constantly changing regulatory environments. Given this outstanding international profile and network, CMS is among the best firms in Switzerland when it comes to putting together teams to manage cross-border cases. Whether it is energy, financial services, infrastructure and projects, life sciences and healthcare, real estate and technology or media and telecoms, clients benefit from the firm's coverage of industry sectors by in-house experts, allowing the formation of interdisciplinary teams that combine in-depth industry knowledge and corporate crime expertise.

Authors

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Corruption – Not an Issue in Switzerland?

The consistent top ranking in Transparency International's Corruption Perceptions Index suggests that corruption is not a concern in Switzerland. Since the start of the survey by Transparency International, Switzerland has never been ranked lower than 12th, and in 2017 it improved to third place with a score of 86 out of a possible 100 points. Public authorities in Switzerland generally enjoy a high level of trust. Confidence in the judicial system is regularly rated amongst the highest in Council of Europe Member States. Other international indices – such as the World Bank's Control of Corruption Indicator and the Rule of Law Index – confirm the perception of Switzerland as a country where both the public and the private sectors are remarkably resilient against corruption.

However, perception is not necessarily equal to reality. Martin Hilti, the director of Transparency International Switzerland, has recently commented on Switzerland's current score in the Corruption Perception Index: "We have been in the top ten for years. On the other hand, this index only measures the perception of corruption, and not actually existing corruption. It does, moreover, not measure issues related to cronyism and places emphasis on the public sector, whereas in Switzerland it is mainly the private sector that is problematic. So, despite the positive aspect of these results, it is necessary to see the wider picture" [our translation].

Indeed, according to the 2017 EMEIA Fraud Survey by Ernst & Young, 18% of the individuals interviewed in Switzerland affirmed that bribery and corrupt practices were widespread in Swiss business life. This figure marks a sharp increase as compared to 2013, when only 10% considered corruption to be common in the business sector.

Also, in the public sector reality appears to differ from general perception. For example, in December 2016, several individuals were sentenced to imprisonment of up to three years for bribery of public officials between 2007 and 2010 in connection with a major IT project of the federal administration. Further, on the basis of a criminal report filed by the State Secretariat for Economic Affairs (SECO), the Office of the Attorney General of Switzerland opened a criminal investigation in 2014 against the head of department of the SECO Systems Operation and Technology unit and others on suspicion of unfaithful conduct and passive bribery in connection with the awarding of IT contracts to private vendors. Finally, convictions were handed down in cases of corruption relating to a major IT project of the Swiss tax administration for multiple unfaithful conduct, multiple acceptance of benefits and multiple granting of benefits. The latest scandal concerns a purportedly private trip of a member of the government of the canton of Geneva to Abu Dhabi at the expense of the emirate's crown prince.

However, domestic corruption continues to be perceived as being of much lesser importance than Switzerland's exposure to foreign bribery. The country's economy is highly export-oriented with exports accounting for nearly two-thirds of the GDP. Switzerland's financial centre holds a share of approximately 26% of the global market in foreign wealth management. Stable politico-judicial conditions and an open economy have, moreover, attracted a large number of multinational businesses active in international trade. These include sectors such as commodity trading or pharmaceuticals which are prone to foreign corruption.

Last but not least, Switzerland is home to many international sports associations such as FIFA, UEFA and the International Olympic Committee, to name only a few. In particular, the criminal proceedings conducted against FIFA officials since 2015 in the USA and Switzerland have revealed that non-transparent and clandestine processes have been common in sports organisations for many years and continue to be a challenge.

Strengthening of Anti-money Laundering to Combat Bribery Offences

The 2017 annual report of the Federal Office of Police notes that the Money-laundering Reporting Office (MROS) received more than 4,600 suspicious activity reports relating to money laundering during that period, which marks an increase of nearly 60% from 2016. Among the predicate offences reported, corruption was the clear leader. Statistical data provided by the Office of the Attorney General likewise show that approximately one-third of all money-laundering cases investigated at a federal level are associated with foreign bribery.

A common feature of foreign bribery is the use of (predominantly foreign) legal entities and arrangements such as domiciliary companies and trusts. Pursuant to a report of the Coordination Group on Combating Money Laundering and Terrorist Financing of November 2017, more than 38% of corruption cases involved domiciliary companies.

The rules on prevention of money laundering and, in particular, the legislative dispositive ensuring transparency of legal persons and arrangements, are therefore perceived by international organisations – including the OECD Working Group on Bribery in International Business Transactions (OECD Working Group) – as pivotal to detect and effectively combat corruption. From an OECD perspective, a major loophole of the Swiss legal framework is the continuing absence of reporting obligations for professionals such as lawyers, auditors and accountants under the Anti-Money Laundering Act (AMLA).

In line with international expectations and persistent calls for action, the government issued on 1 June 2018 a consultation draft proposing inter alia the extension of the AMLA's

scope of application to providers of certain services (defined in the consultation draft as "advisers"). Relevant services comprise: (i) establishment, management and administration of foreign companies, legal arrangements such as trusts and Swiss domiciliary companies; (ii) procurement of funds in relation to any of the activities mentioned in (i), sale or purchase of such companies or trusts; (iii) allowing one's address to be registered as the seat of a company or trust; (iv) acting as nominee shareholder for a foreign company or helping another person to such position; as well as (v) preparatory (and hence advisory or, respectively, consultancy) services in relation to any of these activities.

When establishing a business relationship, advisers shall henceforth verify the identity of the customer, establish the identity of the beneficial owner and clarify the economic background and the purpose of the services requested by the customer. Respective information needs to be recorded in writing. If the KYC obligations cannot be complied with, advisers will be prohibited from entering into, or obliged to terminate, the business relationship. The same will apply if advisers know or have reasonable grounds to suspect that a business is connected to a criminal organisation, to financing of terrorism or to money laundering. Failure to terminate the business relationship may entail a fine of up to CHF500,000. The consultation draft does not foresee a specific duty for advisers to report suspicious transactions or relationships to the money-laundering reporting office (in contrast to financial intermediaries and traders who are subject to a reporting duty pursuant to Article 9 AMLA). Advisers will, however, have to undergo compliance audits on an annual basis, and auditors shall be held to report violations of the advisor's diligence duties to the government.

The consultation draft has met stiff opposition, notably because it interferes with well-established privilege rules applying to legal advisory work. Furthermore, it ignores the fact that lawyers, notaries, auditors and other professionals are today already subject to the prohibition of money laundering as stipulated in Article 305bis of the Swiss Penal Code, which constitutes a reasonably strong incentive to stay clear from any acts that could be seen as aiding and abetting money laundering. Finally, the proposed law, as it does not provide for a reporting duty of advisors, would still fall short of what is being demanded by the OECD. It is doubtful, therefore, that the proposed legislation will stand the test of parliamentary deliberation.

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Whistle-blower Protection Still Inadequate

Another point of criticism is the absence of a concise legal framework governing whistle-blower protection. The OECD Working Group continues to consider the situation in Switzerland as critical in this regard, noting in its Phase 4 Report (adopted on 15 March 2018) that, in addition to the legal constraints resulting from the inadequate regulatory framework, whistle-blowers were still meeting almost universal mistrust in Switzerland. The evaluation team was confronted during its on-site visit in September 2017 with strong, deep-rooted cultural resistance to people who break the silence and dare to report wrongdoing.

True, in the private sector there is currently no specific law on whistle-blowing. Swiss law does not require companies to set up a specific internal unit or platform allowing employees to report confidentially.

Under the influence of public and market pressure for compliance with best practice, many corporations have nevertheless established mechanisms to encourage reporting of suspected misconduct. Recent studies show that 11% of all companies in Switzerland have introduced a reporting point. Considerable differences exist between large international corporations where the majority of the designated internal and/or external reporting points are to be found (70%) and smaller to medium-sized enterprises where such reporting points are still rare (less than 10%).

The public sector is clearly ahead of the private sector in terms of encouraging and protecting whistle-blowers. Since 2011, employees of the federal government must report criminal conduct to the penal authorities and may inform the Swiss Federal Audit Office about suspected irregularities. In 2017, the federal government also introduced an official and secured digital platform where public employees or private persons can report suspected misconduct anonymously.

The Federal Office for Police (fedpol) is operating a web-based platform for reporting on suspected corruption. The platform safeguards the anonymity of the reporting individuals and neither stores the IP addresses, time or metadata that may allow identification of the person or of computer used to make the report. Subsequently, fedpol reviews each report for criminal relevance before forwarding it to the competent internal office, external agency (eg, cantonal police) or, in case of irregularities within the federal administrative units, to the Federal Audit Office for follow-up action.

On 21 September 2018 the Swiss government has passed a draft bill, yet to be approved by parliament, to eventually introduce legislation on whistle-blowing in the private sec-

tor. Pending completion of the legislative process, an increasing number guidelines and recommendations for compliance and best practices shape the reality. Swiss companies are aware of the need to establish reporting systems, endorse company policies for transparency and to draft rule books and guidelines for their employees – not only with a view to avoiding the potentially severe consequences of corporate criminal liability, but also the often even more devastating reputational damage that may result from involvement in corrupt practices.