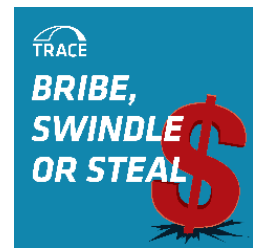


BRIBE, SWINDLE OR STEAL



Spotlight on Switzerland – Daniel Bühr

[00:00:08] Welcome back to the Podcast Bribe, Swindle or Steal. I'm Alexandra Wrage, and my guest today is Daniel Bühr. Daniel is a partner with LALIVE in Switzerland where he focuses primarily on regulatory and banking law and white collar crime and compliance. Thank you for joining me, Daniel.

[00:00:24] Thank you, Alexandra.

[00:00:26] Let's talk first about white collar crime in Switzerland more generally. The anti-bribery case has come up more recently, but Switzerland has a longer history in white collar crime, so perhaps starting with the Swiss-Post case.

[00:00:39] The first months of this year were marked by a number of corporate compliance crises. The year started with a case at the subsidiary of Swiss Post. Swiss Post is a state-owned enterprise, so the Swiss government is the owner of Swiss Post. Swiss Post also provides host car services, transport services in Switzerland. It was discovered that, during the past years, the subsidiary under-presented its annual profits in order to be in a position to ask the Swiss government and also cantons for subsidies. The media reported that the overall amount of subsidies which have been potentially collected in violation of the law amounts to roughly 100 million Swiss francs. Of course, immediately the reaction in the country was, "How's that possible?" That, over the years, such a large amount of subsidies have been collected without any control function - actually asking questions and looking for explanations. What was interesting to see is that actually all the control functions that were supposed to ask critical questions and look into the annual accounts all blamed each other. The Ministry of Transport said, "We don't have the resources. We only have two employees who are supposed to audit not only Swiss Post but many other transport companies. We can't do it, and we were never supposed to do it." Then the external audit said, "This was never in our mandate." The Federal Audit Office said, "We can only investigate if we have a mandate, if there already are suspicions," and so forth. There was a sort of a carousel of control functions where every control function moved the responsibility and the mandate to the other one - a systematic failure of controls.

[00:02:46] Whose pockets did the money end up in? This is a state-owned entity defrauding the state through this accounting fraud. Were individuals the beneficiaries?

[00:02:57] This is under investigation, and actually no one has even an idea what the response will be. Interestingly, it then became public that the Swiss Post car company had been investing massively in France in the latest years. There has been talk that prices were undercut in the market, so there are some ideas of what had happened with these hidden profits, but this is currently under investigation. This is probably less of a concern at this time, but the concern really is that, for so many years, actual practice - which was to some extent known to management and also to auditors - could continue to be practiced without being questioned.

[00:03:44] I think people imagine that the controls in place in a country like Switzerland are more robust than they are. As you know, I have a brief past on the Independent Governance Committee with FIFA, and one of the things that became clear talking to Swiss citizens about FIFA is that Switzerland is a small

country. There is a strong sense that people will point to people they know and that it becomes very insular and probably more difficult to speak out. Do you see that on the corporate side as well?

[00:04:15] Yes, I think that is that is one of the big challenges of Switzerland. We are a small pool of people, to put it like this, and we have many sizeable multinational companies. To staff the boards with the right people with the right experience is difficult already in terms of the availability of qualified people. Now, of course foreigners can sit on the boards, but still, typically, on Swiss companies, there will be a number of Swiss citizens or at least Swiss residents who are on the board. For this need of qualified board members, I think that the pool is just too small. The other topic is certainly that the way of proposing to the General Assembly's new board members in the past was that this is a hand-selected group of people who are then proposed to become board members. It's not that there are no public tenders for board members. There's no public information that the big multinational is looking for the best possible candidate. For outsiders, at least, it is a typically an intransparent process how these people are selected. My guess is that not only the selection process was not ideal in the past, but also the attitude of board members having been invited as a friend to come on board means you are a friend, and you behave like a friend, whereas in today's world, board members need to be extremely critical. They must be educated about the issues they are dealing with at board-level. In particular with regard to governance, risk and compliance management, my guess is that many boards still lack the individuals who can ask the right questions.

[00:06:11] I think that's a problem globally. Frankly, I think the evolution of boards as places where you are appointed as a great honor by somebody that you know and don't want to embarrass has become problematic in almost every country. It's always fascinating to me that people talk about the importance of diversity on boards, and of course there's something objectively good about a board that represents the entire community, but more importantly, diversity brings a greater likelihood of dissent. If you are an outsider to that board community, you are more likely to speak up. I think there is pretty good data on that. That's very helpful and very interesting about a core compliance issue and challenge in Switzerland. Let me take you back to some of the cases. Swiss Post, of course - that accounting fraud story broke this year. I think the Raiffeisen case is also this year. Can you walk us through that?

[00:07:08] The Raiffeisen case is a case which has its origins a couple of years back. There were rumors two or three years ago that the then-CEO of the third-largest bank in Switzerland, Raiffeisen group, engaged in M&A transactions, so was acquiring shares or was a shareholder in companies that were acquired by Raiffeisen group. Let's say these rumors, these media articles then didn't lead to any action. But then, suddenly, FINMA started investigating, and last year, criminal complaint against the then-ex, former CEO of Raiffeisen. On the 2nd of March this year, actually, the prosecutor in Zurich decided to put the CEO in custody. As we are speaking today, he is still in custody, which is unheard of in Switzerland. It is completely new for Switzerland that one of the former most-respected and also, one can say, highly influential managers suddenly is taken into custody for many weeks in the context of suspected misconduct with a number of acquisitions that he, as a CEO of the group, led and initiated, led and concluded. Here, of course, these are suspicions, and we will see what the outcome is, but the mere fact that such an influential person is taken into custody shows that the times have completely changed in Switzerland.

[00:08:44] The two matters that you've described involve misconduct other than bribery. To turn to bribery for a moment, it seems that Switzerland is more likely to come up in the context of bribery or

anti-bribery efforts because of its support of enforcement actions somewhere else. So, for example, the Odebrecht case - what was Switzerland's role in that case?

[00:09:08] The role of Switzerland was that Swiss prosecutors seized the servers. There was a whole business operational structure that had as a business purpose the management of funds that were then used to bribe public officials in order to win contracts.

[00:09:31] But the bribery happened somewhere else.

[00:09:33] The bribery happened in many countries as we know, meanwhile, but the servers were located in Switzerland, and some of the individuals who had a leading position in this, say, subsidiary of Petrobras - which was tasked with managing the bribery - some of these managers were taken into custody, were investigated in Switzerland, and this then led to, let's say, the Swiss part of the Odebrecht-Braskem investigation, which essentially was about all the financial data on these past transactions. A key element for the investigation of the former conduct of Odebrecht was safeguarded or seized in Switzerland and then, of course, by way of mutual legal assistance, provided to other prosecutors like in Brazil and the U.S. to investigate the headquarters and other aspects of the case.

[00:10:33] I think criminals still tend to believe that if they are conducting business in Switzerland or banking in Switzerland, they have the cloak of secrecy, and I don't think that's really the case any longer.

[00:10:44] That may have been a belief in the past, to say it diplomatically. There was certainly this belief that Switzerland is a safe place and that banking secrecy covers all sorts of activities. That actually has never been the case. Prosecutors always also historically had access to all banking information in Switzerland in case of a criminal investigation. But I think what really changed is the likelihood that such an investigation occurs. I would say that in the 70s, 80s, 90s and then way into the 2000s, there were few such investigations, and it was highly unlikely that an individual - and then after 2003, a company - will be investigated. This has simply completely changed. It took seven years for the new law on the corporate criminal offense of failing to prevent bribery or money laundering to come into effect. In 2011, there was a decision against Alstom, the decision that was at the origin of what then became the French and then the US Alstom case and so forth. The Swiss investigated Alstom and sanctioned the company with a fine of roughly 2.5 million Swiss francs and disgorged profits of 35 million. That was the first case where really a corporate was held accountable for having poor compliance processes in place, not following those processes it had in place - although they were poor, but not even following these processes - compliance officers being in a conflict of interest because they advised business and, at the same time, had the task to audit and supervise business. It was a very clear decision, and since then, we have had a number of cases. That's the new reality, that that corporates now are at risk if they have poor compliance processes in place.

[00:12:37] Because of the nature of the Swiss economy, it tends to be much more a financial center than some of the alternatives. There haven't been a lot of anti-bribery cases originating here, and Switzerland ranks 14th on the TRACE Matrix that measures the likelihood of being shaken down for bribes in Switzerland. There isn't a great likelihood of that, but the focus from a compliance perspective in Switzerland really is on anti-money laundering efforts. The level of sophistication around the compliance for AML is very high. You talk about the trend from the 70s to the current decade about enforcement. What are you seeing on the purely anti-money laundering enforcement. That is, for suspicious activity reports - SARs - is it remaining about steady? Is that increasing?

[00:13:30] The numbers have been increasing significantly year on year in the past, and the enforcement landscape and also the awareness of financial institutions has significantly changed. The recent cases we had, like 1MDB for instance, but also Petrobras, showed significant deficiencies in the AML reality at a number of banks - small banks and big banks. This is something which is now being addressed by the banks themselves. They realize that they need to do more and that they need to be disciplined in their AML work. On the other hand, also, FINMA has become much more active. FINMA, the Financial Market Supervisory Authority, meanwhile systematically investigates banks if there is information about AML deficiencies. FINMA has recently also imposed monitors in two banks to supervise them and control them for a certain period of time after the settlement or the administrative conviction by FINMA. So a lot has changed. A significant number of banks are under criminal or FINMA investigation for AML deficiencies, which is, of course, not the same situation one would demand, given the legal framework. This is a real reality which reflects the past, but I think now things are changing. Banks certainly need to do more in their compliance management and then, in my view, need to address this topic in a better, systematic way based on a sound method.

[00:15:15] Can you tell us the story, also from this year, about the arms deal relating to President Putin?

[00:15:22] Yes, sure. That was also one of the recent cases in this still-young year. There was an article in the Swiss press about a dawn raid that was recently conducted at the Swiss defense company, RUAG, which is a state-owned company, so it belongs to the Swiss Confederation. It appears that one of the employees of this company engaged in private arms deals with the presidential guard of Mr. Putin, with the involvement of a Swiss private bank, the country manager of this private bank in Russia. The interesting facts from an enforcement perspective is that, actually, the office of the attorney general dawn raided the Swiss Confederation-owned state defense company, which I think speaks very much for the independence of the Office of the Attorney General. This is certainly good news from a public governance perspective, but again, it is something, of course, the citizens in Switzerland, but also the clients and, of course, the state as the shareholder would not wish to happen. It's clearly, again, a case where compliance management was not able to prevent such a crisis and is an indication for a need for better controls and better management in the area of legal risks.

[00:16:56] So three significant scandals just this year. I know there's always this sense outside the compliance community to say three scandals in a short period of time means that the situation must be getting worse. But, of course, what it usually means is awareness is growing and that the country and the companies and banks in the country are working harder to get this issue right, and a lot more comes to the surface as a result. I've heard you say - and I thought it was very interesting - that a lot of us focus on banking secrecy because of the tax evasion component, but you have commented that it is at least as often about their criminal origins of the funds. Can you expand on that?

[00:17:35] I'm not so sure whether the criminal origin of funds is as frequent as tax evasion. My guess is that tax evasion still is, more often, the reason for not declaring assets, but in my view, this is a topic which has not adequately been addressed in the past. When Switzerland was resolving its tax avoidance disputes with the U.S., with France, and still in the process of resolving this with Germany. The general assumption always was some people do not declare their income and their assets because they want to save taxes. That was sort of the general assumption, but the other aspect to it is that a part of these non-declared assets most likely are not declared because they are of criminal origin. They are kickbacks. They are bribes people received. They are a result of mismanagement of illicit deals. This is something which has not yet really been looked at to identify, first of all, what is still the legacy portfolio of non-

declared assets? And out of this portfolio, what is the percentage of actually criminal funds and assets? Because these criminal funds and assets, they are toxic. Banks are not allowed to do a single transaction on these assets because otherwise they engage in money laundering. Essentially, all the banks that discover that they still have such a residual legacy criminal-origin asset base, they probably need to self-declare themselves to the regulator and/or to the criminal enforcement agencies because they're simply not allowed to touch the money.

[00:19:34] Sure. I think it's a really good point because people do focus on tax evasion, and there's a lot of outrage about that, but there's also sort of an underlying understanding that people will avoid taxes if they can. Some people, of course, cross the line into illegal evasion of taxes, but when the account itself is tainted as coming from criminal conduct, then that puts the bank in a very different situation, as you say. Measuring that, measuring any crime - much less the proceeds of crime - is a difficult thing to do. Shifting a little bit to a more positive note - at least what most companies will think is a more positive note. Switzerland has a new position on DPAs, on deferred prosecution agreements.

[00:20:17] Yes, absolutely. Switzerland is in the process of revising its Criminal Procedure Act, and in the frame of this revision, recently the office of the attorney general made a proposal to introduce corporate DPAs into the Swiss Criminal Procedure Act. This is a very interesting proposal, first of all, because it comes directly from the Office of the Attorney General. You can say it comes from the attorney general of Switzerland. It is a very detailed, sound concept which follows, in many aspects also, the DPAs as we know them from the U.S. and would allow companies to avoid a criminal conviction in case that they fail to prevent money laundering or bribery. This is important for undertakings because one of the biggest problems Swiss undertakings have today is, should they self-report what they actually should do in certain circumstances and be a good corporate citizen and help in the investigation and do the necessary remediation? If they do it, they still will be convicted, but if they are convicted, they may end up in blacklists. They may not be able to participate in public tenders which gives them a competitive disadvantage in comparison, for instance, to U.S. companies that self-report, cooperate and remediate. The idea is really to, first of all, give corporates an instrument to professionally and transparently deal with misconduct they discover, past misconduct; to find a quick and adequate resolution with prosecutors and, on the other hand, to find a solution, a settlement at the end of the day which does allow them to continue their business and not have the risk of being pushed out of business.

[00:22:18] Daniel, it sounds overall like you're optimistic about the direction that Switzerland is headed.

[00:22:23] Yes. I am, absolutely. I think there is there has been so much press coverage in these recent months about the governance risk and compliance challenges to Swiss companies that things will change. The awareness is bigger than ever now, and we're living in a time where companies - in particular, the large companies - are looking at their governance and their risk and compliance management also against the background of digitalization of the economy. We all know that there is a significant potential in new processes supported by digital means. For the future, we will need to employ these instruments that are on the market or will come to the market. On the other hand, everyone realizes that that you can only do this successfully if you have sound governance in place and if you have the methods in place which allow you to effectively manage these risks. I think this is understood, and now the question is: How brave and courageous are board members and executive committee members in actually accepting this challenge and taking the right decisions?

[00:23:45] That's a great note to end on, but I can't let you go without asking you from a Swiss legal perspective what you think about the FIFA case and, particularly, the involvement of the FBI from the United States?

[00:23:58] FIFA was also one of the cases that actually led to this change in the enforcement landscape. FIFA was for many years not really a focus point of Swiss prosecutors, first of all, for a lack of legal instruments because there was no adequate provision for private bribery. At the time, there was not an allegation of mismanagement fraud, et cetera. Now, as a result of the U.S. initiative to investigate certain practices of members of FIFA, let's say the enforcement direction has a bit changed. There are now also aspects of mismanagement being investigated, and the system which was practiced in the past became more and more transparent. I think it is one of the enforcement actions that really has driven and is still driving the change of the overall enforcement landscape. It is certainly an important case, but we all know this is one case out of probably hundreds of potential cases in other organizations which, in the past, may have followed or applied same practices. It's certainly an important case. It has changed the landscape, and it will continue to do so.

[00:25:31] I think you're exactly right. It's not the size or relevance of the case in its own right. It's the fact that because it was FIFA, it leapt across the divide into the popular conversation and not just the conversation that we all have as compliance professionals. Well, thank you so much. LALIVE has been our partner firm in Switzerland. We're very grateful to you, and it's been interesting to talk to you. There was a time when a conversation about compliance in Switzerland would have been very brief, but there's a lot going on. Thank you for your time.

[00:26:02] Thank you, Alexandra.