Magdalena Perkowska*

Changes in Swiss Criminal Legislation Concerning Crimes of Corruption

ABSTRACT *- Changes in Swiss criminal law concerning the penalization of corruption have been chosen as main topic of the article. The first part deals with description of shortcomings of Swiss criminal law in the field of corruption. Then the first part describes the danger of corruption in Switzerland comparing it also with Polish statistics. The second part describes penal Swiss regulations penalizing the different forms of corruption with some comparisons to Polish criminal regulations.*

INTRODUCTION

Since the mid-1990's, such international organizations as the United Nations, the World Bank, the Organization for Economic Cooperation and Development, the Council of Europe, the European Union, the International Chamber of Commerce, and the Organization of American States have exerted pressure in the international arena to combat corruption. Their efforts have resulted in the enactment of the following legal acts[1]:

– the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted by the Organization for Economic Cooperation and Development on 21 November 1997[2];

---

* **Magdalena Perkowska** graduated in 2004 from the Faculty of Law University in Białystok (Poland) writing her master thesis on Combating money laundering in Polish and Swiss law. The interest in Swiss law comes from one year scholarship at the Law Faculty of University of Fribourg in Switzerland. She continues doctoral studies in Department of Criminal Law - Institute of Criminal Law and Criminology since 2006 and preparing doctoral thesis on criminality of foreigners crossing Polish eastern border. She has been interested in criminal law and criminology. She is the author of several publications. She contributed in a number of conferences.

1 More information on this topic can be found in: E. Zielińska, ed., *Dokumenty karne. Prawo Wspólnot Europejskich a Prawo Polskie* [Criminal documentation. The law of the European Communities and the Polish law] (Warszawa: IWS, 2000).

2 M.C. Cesoni, «Faut-il crier à la corruption?» [Is it necessary to warn about corruption?], *Pladoyer – Revue Juridique et Politique* [Pladoyer – Juridical and political review] 4 (2000): 44.

- the Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union[3], adopted by the Council of the European Union on 26 May 1997;
- the Criminal Law Convention on Corruption, adopted by the Committee of Ministers of the Council of Europe on 27 January 1999;[4]
- the Civil Law Convention on Corruption, adopted by the Committee of Ministers of the Council of Europe on 4 November 1999,

In December 2000, Switzerland ratified the OECD Convention of 21 November 1997, and on 7 October 2005 – the Criminal Law Convention on Corruption of 27 January 1999.[5]

The basic document used by the Council of Europe that constituted an impulse to focus on the phenomenon of corruption is the recommendations of the 19th Conference of European Ministers of Justice that was held in Malta in 1994. On the basis of these recommendations, a multi-disciplinary Group on Corruption was established in 1994 (and started its work in March 1995). The group elaborated the *Programme of Action against Corruption*, whose implementation became one of the priorities of the Council of Europe, and which was accepted by the Committee of Ministers of the Council of Europe in November 1996. On 6 November 1997, the Committee of Ministers adopted the twenty guiding principles in the fight against corruption and, in May 1998, it decided to establish the GRECO (Group of States against Corruption), an entity for monitoring the observance of the twenty principles and the implementation of documents adopted in the framework of the Programme of Action against Corruption.

The second of the twenty guiding principles declares the need to assure coordinated criminalization of corruption on both the national and the international level. This goes along with the urgent need, included and highlighted in all the documents listed above, to adopt a binding legal instrument on the issue. Consequently, the Working Group on Criminal Law was established in the framework of the Multidisciplinary Group on Corruption. In February 1996, the Working Group began its work on the draft of an international convention. After some consultations, the draft

3 Concerning the legal initiatives of the European Community, see: A. Górski, A. Sakowicz, eds., *Zwalczanie przestępstw w Unii Europejskiej. Współpraca sądowa i policyjna w sprawach karnych*. [Combating crimes in European Union. Judicial and police cooperation in criminal cases] (Warszawa, 2006), 92-107.

4 On 6 November 1997, the Committee of Ministers of the Council of Europe adapted the twenty guiding principles in the fight against corruption and in May 1998 it decided to establish the GRECO (Group of States Against Corruption) which has the task of monitoring the observance of the twenty principles and the implementation of documents adapted in the framework of the Program of Action against Corruption.

5 Transparency International, *Global Corruption Report 2006*, 257.

was eventually adopted by the Committee of Ministers during the 103rd Session, in November 1998, and made ready for signing on 27 January 1999.

The Criminal Law Convention, which was preceded by relatively long preparatory works, undoubtedly constitutes an exceptional legal act in comparison with other acts elaborated by European organizations. According to its authors, the document is complex and ambitious, and provides for criminalization of a wide range of corruption crimes. Indeed, the Convention, unlike any other document, displays a comprehensive approach to the phenomenon of corruption, which is evident most of all in the criminalization of a large number of crimes. Such approach makes it different from documents adopted by the OECD or the European Union, which are more fragmentary in their nature.[6]

The Criminal Law Convention puts an obligation on the signatory states, in particular:

- to criminalize active and passive bribery of public officials and members of domestic public assemblies exercising legislative or administrative power;
- to criminalize active and passive bribery of foreign public officials, members of domestic public assemblies exercising legislative or administrative power, officials of international organizations, members of international parliamentary assemblies, as well as judges and officials of international courts;
- to criminalize trading in influence;
- to criminalize deeds related to accounting, to include intentional acts or omissions committed in order to commit, conceal, or disguise crimes of corruption;
- to introduce criminal liability of legal persons;
- to establish specialized entities charged with the task of combating corruption;
- to provide protection to persons who cooperate with the investigating or prosecuting authorities and to witnesses;
- to participate in the activities of the GRECO;
- to undertake international cooperation activities in prosecuting crimes of corruption.[7]

6 C. Nowak, *Dostosowanie prawa polskiego do instrumentów międzynarodowych dotyczących korupcji. Raport. Program Przeciw Korupcji* [Adjusting the Polish law to meet the requirements of the international instruments on corruption. Report. A program against corruption.] (Warszawa: Fundacja im. Stefana Batorego [Stefan Batory Foundation], 2004), 9.

7 N. Queloz, M. Borghi, M.L. Cessoni, *Processus de corruption en Suisse* [The process of corruption in Switzerland] (Bâle-Genève-Munich: Helbing & Lichtenstahn, 2000), 360. Compare: C. Nowak, *Dostosowanie* [Adjusting], 11-17.

THE ORIGIN AND THE DIRECTIONS OF CHANGES IN THE SWISS CRIMINAL LAW

The developments in the international arena were not the only reason for introducing amendments to the Swiss penal code of 1937[8] that concerned penalization of acts of corruption. The regulations that were in force between 1942 and the end of April 2000, had many shortcomings that made them difficult to apply. Most of all the laws were outdated as they were derived from the 19-century notion of a guarantee of loyalty of officials and provided for penalization of only Swiss officials, which limited the set of subjects of crime and prevented intervention by the Swiss law enforcement and administration of justice in cases of international corruption. The archaic legal regulations did not provide for liability of legal persons either.

The legal provision that penalized corruption *sensu stricto*, stipulated in art. 288 of the Swiss Penal Code (SPC) that had been in force before 30 April 2000, caused many difficulties to the practitioners of law, as it required a demonstration of a link between an offer or promise to provide benefits and the consequent breach of specific, or possible to specify, official duties. The task of law enforcement agencies and of the administration of justice was to demonstrate (with immense evidentiary difficulties) the precedence of the promise of undue benefit given to a public official or of a demand of undue benefit made by a public official in relation to the breach of official duties. Consequently, a return or a withdrawal of benefits or of compensation after the breach of official duties were not penalized. This was a significant deficiency in this linear concept of the *do ut des* type and it resulted in the administration of justice being helpless in dealing with complex and prolonged corruption processes.

A demand or an offer concerning a benefit to a third person (a natural person, *fr. proche* or a stranger) was not clearly forbidden but, in practice, penalization of such cases was accepted under the condition of proving (which was another evidentiary difficulty) that the public official gained an indirect personal benefit. Also, an offer or a promise to give benefits in exchange for actions that did not constitute a breach of official duties were not penalized.

The offense of active bribery stipulated in art. 288 of the SPC was only a misdemeanor and, consequently, the penalty was more lenient than in the case of offenses committed by public officials, which was not the most adequate solution at the end of the 20th century. Swiss criminal law completely ignored the offense of trading in

8 *Code pénal suisse du 21 décembre 1937* [The Swiss penal code of 21 December 1937], *R.O 311.0.* (henceforth called the SPC)

influence, both active and passive, which is particularly important in quasi-corrupt transactions which do not lead to a breach of official duties but result in granting undue benefits.[9]

The frequent cases of criticism on the part of the doctrine towards the provisions of the criminal law as well as numerous parliamentary questions have caused the Federal Government to order reports on corruption[10]. The more and more frequent corruption scandals, involving such persons as judges or members of the government, also played a role in this decision. The cases of corruption were not numerous, as depicted in Table 1, but due to the gravity of the scandals and the important positions of the persons involved, a decision was made to introduce changes to the laws.

Table 1. Convictions for corruption offenses in Switzerland

The legal grounds – the Swiss penal code	1998	1999	2000	2001	2002	2003	2004	2005
Art. 322[3] active bribery	0	0	0	2	7	4	7	11
Art. 322[4] passive bribery	0	0	0	0	4	0	1	0
Art. 322[5] granting benefits	0	0	0	0	1	1	0	0
Art. 322[6] receiving benefits	0	0	0	0	0	1	5	0
Art. 322[7] active bribery of foreign officials	0	0	0	1	0	0	0	0
The legal provisions not in force:								
Art. 288 active bribery	23	13	9	7	1	5	2	1
Art. 315 passive bribery	10	5	4	6	3	1	1	0
Art. 316 receiving benefits	1	0	1	0	4	1	1	0
Total	**34**	**18**	**14**	**16**	**20**	**13**	**17**	**12**

Sources: Federal Statistical Office, Criminal convictions statistics.

9 N. Queloz, M. Borghi, M.L. Cessoni, *Processus*, [The process], 355-358. Compare: U. Cassani, "Le droit pénal suisse face à la corruption des fonctionnaires" [The Swiss criminal law versus corruption of public officials], *Pladoyer – Revue Juridique et Politique* [Pladoyer – Przegląd Sądowniczy i Polityczny] 3 (1997): 44-48, and A. Héridier Lachat, "La corruption, le droit civil, le droit de la concurrence et le droit fiscal" [Corruption, the civil law, the law on competition, and the fiscal law], *Pladoyer – Revue Juridique et Politique* [Pladoyer – Juridical and political review] 3 (1997): 49-52.

10 The two reports were elaborated and published in 1996 ("Kontrole bezpieczeństwa i korupcji" [Security and corruption checks]) and in 1998 ("Zagrożenie korupcją oraz środki bezpieczeństwa w administracji federalnej" [The threat of corruption and the means of security in federal administration]).

Table 2. Convictions for corruption offenses in Poland

The legal grounds – the Polish penal code	1998	1999	2000	2001	2002	2003	2004	2005
Art. 228 § 1 venality (passive bribery)	21	44	52	55	61	45	108	116
Art. 228 § 2 incident of a lesser importance	4	3	1	1	2	4	6	3
Art. 228 § 3 "for actions that constitute a breach of law"	19	52	38	38	74	65	168	227
Art. 228 § 4 "makes performance of an official action dependent on..."	14	15	12	6	12	5	19	14
Art. 228 § 5 receiving material benefits of significant value	1	2	1	1	3	2	6	1
Art. 229 § 1 corruption (active bribery)	54	83	77	72	74	134	291	294
Art. 229 § 2 incident of a lesser importance	12	19	4	12	10	16	33	38
Art. 229 § 3 acting in order to induce to break the law	62	203	314	360	362	496	688	1027
Art. 229 § 4 offering material benefits of significant value	1	0	0	0	2	1	13	5
Total	**188**	**421**	**499**	**545**	**600**	**768**	**1332**	**1725**

Sources: Ministry of Justice statisctics

As the statistics of Transparency International on the perception of corruption published in 2007 demonstrate, Switzerland is one of the leading countries with respect to low perceived scale of corruption[11]. An analysis of efforts of the Swiss government aimed at amending the laws that penalize corruption deserves attention because this category of offenses do not constitute a significant threat to the country's law and order. The Swiss legislator has demonstrated foresight by amending those legal provisions that penalize corruption instead of waiting until the problem grows to the level that would cause a significant threat. The situation was different in the case of preventing money laundering. Table 1 confirms the fact that, in the light of court statistics, the offense of corruption do not constitute a significant threat to the legal order in Switzerland. On average, there are 15 convictions a year for offens-

11 Transparency International, *Global Corruption Report 2007. Corruption in judicial system* (Cambridge 2007), 325. See also: M. Killias, D. Ribeaud, "La corruption, Nouvelles évidence à la lumière de recherches quantitatives" [Corruption, new evidence in the light of quantitative research], *Criminoscope* 4 (1999): 1-5.

es of corruption while the police institutes between 30 and 120 preparatory proceedings. Nevertheless, the Swiss government took steps to amend the laws with the goal of increasing the effectiveness of fighting corruption.

The second stage of efforts aimed at fighting corruption was Switzerland's ratification of the Criminal Law Convention. According to the provisions of the Convention, the Federal Parliament was obligated to supplement Title 19 of the Swiss Penal Code (SPC) by introducing passage 2 to art. 322^7 of the SPC which penalizes passive bribery of foreign public officials. This amendment took effect on 1 July 2006. In spite of the ratification of the Criminal Law Convention, trading in influence still has not been penalized, as required by art. 12 of the Convention. A partial penalization of trading in influence is provided for in art. 322^6 of the SPC, which penalized giving a benefit in exchange for performing official duties. The provisions of these legal regulations do not fulfill all the requirements of the Criminal Law Convention as they cover only bilateral relations (the bribe giver and the bribe taker) while neglecting, for instance, the possibility to perform official duties for the benefit of a third party. This step taken by the legislator is incomprehensible as the Federal Council itself stated that in Switzerland there are close relations between politics, the economy, and the public administration, which result in the so-called friendly mutual favors, but, as the Council stated, this situation should not be of interest to criminal law.[12] Another important shortcoming of the Swiss legal provisions is the lack of an effective system to protect the so-called *whistleblowers* who cooperate with law enforcement agencies and administration of justice in revealing and combating corruption.[13]

The factors discussed above induced the Swiss legislator to supplement the Swiss Penal Code by adding Title 19: "Corruption" and by abolishing art. 288, 315, and 316 of the SPC with the amendment of 22 December 1999, which took effect on 1 May 2000. The catalogue of crimes of corruption starts with art. 322^3 which penalizes active bribery[14]. Consequently, the next provision of art. 322^4 penalizes passive

12 Conseil fédéral [The Federal Council], *Rapport et avant-projet relatifs à l'adhésion de la Suisse à la Convention pénale du Conseil de l'Europe sur la corruption* [A report and draft on the adoption by Switzerland of the Criminal Law Convention of the Council of Europe on corruption] (Bern, August 2003), 32. Compare: N. Queloz "Compléments récents apportés au droit pénal suisse de la corruption et développements relatifs aux relations entre juges et partis politiques" [Recent amendments in the Swiss criminal law on corruption and developments concerning relations between judges and political parties], *Justice – Justiz – Giustizia* 3 (2006): 3.

13 N. Queloz, ibid.

14 Art. 322^3 Corruption of Swiss public officials. Active corruption:
He who offers, promises, or gives an undue benefit to a member of a judicial office or another entity, a public official, a sworn-in expert, a translator or an interpreter, an arbiter, a soldier, directly to the aforementioned persons or to a third party, in exchange for taking or omitting an action related to the performance of his official duties, which would be in violation of law or dependent on his free decision, is subject to the penalty of imprisonment for a period of up to five years, or a fine.

bribery[15]. The Swiss legislator also introduced two separate types of offenses consisting in granting benefits (art. 322^5) and in receiving benefits (Art. 322^6)[16].

Before an analysis is performed of the particular provisions of the Swiss Penal Code with respect to penalization of active and passive bribery, it is worth noting that this negative phenomenon is not very common in the light of court statistics, as the table below demonstrates. On average, 15 convictions a year for crimes of corruption take place in Switzerland; the number for Poland is 911 valid convictions a year for crimes of corruption (under art. 228 and 229 of the Polish Penal Code).

ACTIVE AND PASSIVE BRIBERY IN THE SWISS PENAL CODE

The offense of active bribery is a common offense. The definition of a public official in the legal provisions that penalize active bribery and passive bribery is very broad. It includes any person, regardless of his or her status, who performs a role related to the functions of the state. According to art. 322^4 of the SPC, the perpetrator of passive bribery can be an official, a member of an office, an expert appointed by a government entity, a translator or an interpreter appointed by a government entity, or an arbiter appointed by a government entity, that is a person appointed on the basis of international conventions to resolve a conflict, or a soldier. In effect, any person who performs a public function has the status of a public official (under art. 322^8 passage 3 of the SPC).

The definition of an official is also included in art. 110 item 3 of the SPC which states that the definition of an official refers to both an official and a person employed in government administration or in entities of the administration of justice. The definition of an official includes persons who hold their posts temporarily or are temporarily employed by entities of public administration, or who temporarily perform public functions.

15 Art. 322^4 Passive corruption:
He who, being a member of a judicial office or another office, a public official, a sworn-in expert, a translator or an interpreter, an arbiter, or a soldier demands or receives an undue benefit or a promise thereof directly for himself or for a third party in exchange for taking or omitting an action related to the performance of his official duties, which would be in violation of law or dependent on his free decision, is subject to the penalty of imprisonment for a period of up to five years, or a fine.

16 Art. 322^5 Giving a benefit:
He who offers, promises, or gives an undue benefit to a member of a judicial office or another entity, a public official, a sworn-in expert, a translator or an interpreter, or a soldier, in exchange for performing official duties, is subject to the penalty of imprisonment of up to three years, or a fine.
Art. 322^6 Accepting a benefit:
He who, being a member of a judicial office or another office, a public official, a sworn-in expert, a translator or an interpreter, or a soldier demands or receives an undue benefit or a promise thereof in exchange for performing official duties, is subject to the penalty of imprisonment of up to three years, or a fine.

An official is a person who performs tasks stipulated in public law and who is subordinated to a competent government entity. It does not matter if it is an official or only a person who is employed in an office. The form of employment does not matter either. It is basically unimportant whether the official's actions result from his or her scope of competences as the representative of a public authority[17].

Defining all persons performing public tasks as possible subjects of an offense of corruption serves mostly the purpose of avoiding dilemmas of interpretation as such a person can always be considered (as the subject of an offense) due to the tasks that he or she has been entrusted with.

The Swiss definition of the subject of an offense of passive bribery is, in fact, very similar to the provisions of the Polish Penal Code of 1997[18] with respect to the definition of a public official and a person who performs a public role. However, besides these subjects, the Swiss Penal Code lists sworn experts, translators, and interpreters, while the Polish legal provisions that penalize corruption do not include those, even though these persons frequently play an important role in various procedures.

Art. 322^3 of the SPC includes only domestic public officials and, thus, only an arbiter whose arbitration court has its seat in Switzerland or a translator or interpreter who has been sworn in by a Swiss government entity or by an arbitration court that has its seat in Switzerland.

What is new in the Swiss law is that the provisions concerning domestic bribery have been extended to include foreign bribery[19]. Nevertheless, in the case of a foreign public official or an official of an international organization, art. 322^7 of the SPC is applicable, which penalizes behavior identical as in art. 322^3 of the SPC (pas-

17 Corboz B., *Les principales infractions en droit suisse. Vol. II.* [The main infractions in the Swiss law. Volume II] (Bern: Staempfli Editions SA, 2002), 578.

18 *Kodeks karny ustawa z dn. 6 czerwca 1997r.* [Penal Code, a statute of 6 June 2007], with subsequent changes. Henceforth called Polish Penal Code (PPK).

19 Art. 322^7 Corruption of foreign public officials:

He who offers, promises, or gives an undue benefit to a member of a judicial office or another office, a public official, a sworn-in expert, a translator or an interpreter, an arbiter, or a soldier acting on behalf of a foreign country or an international organization, directly or to a third party, in exchange for taking or omitting an action related to the performance of his official duties, which would be in violation of law or dependent on his free decision,

who, acting on behalf of a foreign country or an international organization as a member of a judicial office or another office, a public official, a sworn-in expert, a translator or an interpreter, or a soldier demands or accepts an undue benefit or a promise thereof directly for himself or to a third party in exchange of taking or omitting an action related to the performance of his official duties, which in violation of law or dependent on his free decision

is subject to the punishment of imprisonment of up to five years, or a fine.

sive bribery) and provides for the same penalties. It is surprising that, in the case of foreign bribery, the Swiss law does not provide for penalization for granting benefits in exchange for actions that do not breach official duties. The Swiss legislator adopted a legal provision that is in accordance with the Criminal Law Convention of the Council of Europe, adopted on 27 January 1999, and does not penalize receiving benefits by a foreign official in exchange for activities that do not constitute a breach of his or her official duties.[20] A member of a government entity is defined as any person who performs, independently or collectively, the tasks of the state that are in the scope of the executive, the legislative, or the judicial branch of the government.

The Polish Penal Code also provides for penalizing corruption of foreign officials, both active and passive, which, similarly to the case of Switzerland, is a result of adjusting the Polish criminal law to meet the requirements of the international conventions. Nevertheless, the Polish regulations penalize bribery in cases involving both breaching the law and not breaching the law (art. 228 § 5 and 229 § 5).

An offense of active or passive bribery can be perpetrated only intentionally, with direct or possible intent. It is not necessary that the subject of the offense be sure that his or her corruption activities will be effective. It suffices if the perpetrator assumes that it is possible that the public official will act in the intended manner as a result of the bribe. The Polish Penal Code provides for an identical situation and states that all kinds of corruption crimes can be perpetrated intentionally.

Placing provisions that penalize various forms of bribery in Title 19 of the Swiss Penal Code, titled simply "Corruption," does not allow for a determination of the subject of protection. However, the Federal Council, in its communique issued in April 1999, which presents the draft of the amendments to the criminal law provisions concerning corruption, stated that the goal of the proposed changes to the Swiss Penal Code is to assure impartiality and uniformity of the state's decision-making process and an abstract protection of the society's trust in objective actions taken by the state.

This attitude of the Swiss government is also reflected in the doctrine. U. Cassani states that the object of protection is the legality and the indivisibility of the decision-making process in the administration (so that the general interest does not

20 "Message du Conseil fédéral suisse du 19 avril 1999 concernant la modification du code pénal suisse et du code penal militaire (révision des dispositions pénales applicables à la corruption) et l'adhésion de la Suisse à la Convention sur la lutte contre la corruption d'agents publics étrangers dans les transactions commerciales internationales» [Message of the Federal Council of 19 April 1999 on amendments to the Swiss military penal code (revision of penal measures for corruption) and the adoption by Switzerland of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions], *R.O.* 99.026. Compare: G. Arzt, „Nowe prawo antykorupcyjne w Szwajcarii" [New anticorruption law in Switzerland], Jurysta [Jurist] 7/8 (2001): 12.

become subordinated to individual interests) and the guarantee of equality of all citizens.[21] According to B. Corboz, another goal of the legal provisions is to guarantee free competition.

N. Queloz, M. Borghi, and Meuer-Bisch go so far as to say that corruption constitutes a breach of human rights, as it transgresses the fundamental principles of a lawful state. A guarantee to respect the equality of all citizens is violated each time that, as a result of illegal actions, the interests of small groups begin to dominate over the interest of the society[22].

To summarize, the goal of the regulations that penalize corruption is to protect citizens from illegal purchase of public actions and from the risk of influencing the decision-making process.

The behavior of the perpetrator of an act of active corruption consists in proposing, promising, or granting a benefit with the goal of causing the public official to breach his or her official duties or, in a situation where the official is to make an autonomous decision, to make a decision that is advantageous to the perpetrator. It does not matter who initiates such behavior of the perpetrator.[23] Also, the benefit or the promise of the benefit does not have to come from the perpetrator who, in such cases, may be just an intermediary.

An offense is committed at the moment that the perpetrator, even with the mediation of a third party, offers to give an undue benefit, promises to give such a benefit, or gives such a benefit. The offense is committed also in situations where the official refuses to accept the benefit[24] and in situations where the perpetrator does not have the intent to keep the promise. According to the doctrine of the Polish criminal law, the giving of the benefit is considered to be effected at the moment it reaches the intended recipient. Similarly, a promise to give a benefit becomes effected at the moment its recipient becomes aware of it. As long as the benefits transferred by the bribe giver have not reached the recipient, the act of the perpetrator does not pass the stage of attempt.[25]

21 U. Cassani, ibid., 44.
22 N. Queloz, "Le problème de la corruption en droit pénal Suisse, en particulier dans le domaine de la construction" [The problem of corruption in the swiss criminal law, especially in the construction branch], *Rèvue Pénal Suisse* [Swiss Criminal Review] 115 (1997), 412.
23 ATF 118 IV 316 and 77 IV 48
24 ATF 126 IV 145
25 A. Wąsek, *Kodeks karny. Część szczególna. Tom II. Komentarz do artykułów 222-316* [Penal code. The detailed part. Volume II. A commentary to articles 222 – 316] (CH-Beck 2006), 3rd edition, 73. Compare: M. Surkont *Łapownictwo* [Bribery] (Warszawa, 1999), 86.

The Polish laws concerning bribery of all types defines giving or promising to give benefits as acts that meet the criteria of this offense. The provisions of art. 229 § 1 of the Penal Code do not include offering benefits as an act that meets the criteria of the offense.

The first connotation of the term "undue benefit" is a direct transfer (from hand to hand) or a bank transfer of a sum of money. The granting of money may take a more or less disguised form, for instance that of remuneration for a fictitious service. The benefit does not have to be transfered in cash and may consist in selling a good for a lower price, providing a remuneration in kind, or providing support during elections.

In Swiss law, the essence of the definition of a benefit is an objective and permanent improvement of the legal, economic, or personal situation of the beneficiary. The benefit must be undue, which means that a public officer has no right to accept it. The Polish doctrine also supports the objective evaluation of a benefit, especially a personal one.[26]

The legal provisions concerning corruption do not cover benefits that are acceptable according to the existing regulations and small benefits that are commonly acceptable and do not breach the social rules (art. 322^8 passage 2). Therefore, it is necessary that internal regulations be very precise with respect to acceptable benefits. The benefits given in accordance with the social rules cannot be generally criticized. The exclusion in art. 322^8 passage 2 of the SPC indicates that the legislator's aim is not to penalize insignificant behavior that does not defame public offices. The Polish doctrine states that, if a behavior that has been confirmed by the tradition, is commonly accepted, and does not breach the principles of behavior accepted by the society, is considered to be a custom, then it can serve as a criterium not only to differentiate a tip from a bribe, but also to set the scope of an acceptable "property benefit" such as a symbolic souvenir presented, as a custom, during a visit or a small gift presented as a custom (e.g. a pen).[27]

The undue benefit does not have to be used directly by the official and may also be dedicated to a third party (a relative, a friend, or a person in close relations with the official, for example a mistress). What is necessary is that the benefit be intend-

26 Ibidem, 58. Compare: J. Makarewicz, *Kodeks karny z komentarzem* [Penal code with a commentary] (Lwów 1936), 286, A. Spotowski, *Przestępstwa służbowe, nadużycia służbowe i łapownictwo* [Official crime, official abuse, and bribery] (Warszawa, 1972), 132.

27 A. Barczak–Oplustil, *Przestępstwa przeciwko działalności instytucji państwowych oraz samorządu terytorialnego*, in: A. Zoll, ed., *Kodeks karny część szczególna. Komentarz Tom II.* [Criminal code. The detailed Part. Commentary. Volume II.] (Kraków, 2006), 952.

ed to cause a certain behavior of the official, a behavior that consist in committing or omitting an act related to the official duties and that constitutes a breach of law, or to cause the official to make certain decisions that are in the official's scope of authority.

The goal of the actions of the perpetrator under art. 322^3 of the SPC is to cause a breach of official duties by a public official. The breach of duties does not have to consist in an administrative action. It suffices if, for example, the official provides information that he or she is not allowed to provide. The behavior of the official may take a form of an action or an omission. The official's breach of duties may consist in, for example, providing information that he or she is not allowed to provide or making a decision in violation of procedures in force or without the required impartiality. His or her behavior may take the form of an action or an omission.

In addition to a breach of official duties, art. 322^3 of the SPC stipulates a situation in which a public official has the freedom to make decisions, which allow him or her to make a decision that meets the expectation of the perpetrator.

It is necessary that the behavior of the official be related to his or her official duties. Inducing an official to perform actions that are not related to his or her official duties, such as taking an illegal job, does not meet the criteria to be considered as a crime of corruption. The official's behavior must be of the kind that would be meaningless if the official did not hold his official position. However, this category includes behavior that is not included in the official's duties but which his or her position allows him to perform.

The undue benefit is offered, promised, or given with the aim to induce the official to breach his or her official duties or to make a certain decision within his or her scope of authority. The benefit, in the perpetrator's intent, is to influence the actions of the official. This results in a situation where services are exchanged, with the remark that the expected actions by the official have to be adequately defined or possible to define. For the existence of the offense it is irrelevant at what moment the public official receives the benefit. What is necessary, though, is that the benefit be at least offered, promised, or given before certain actions are taken by the public official.

The offenses of active and passive bribery (art. 322^3 and 322^4 of the SPC) face a penalty of up to five years of imprisonment or a fine[28]. The minimum length of the

28 According to art. 40 of the SPC, a penalty of imprisonment is inflicted for a period between six months and twenty years, and if the statute states so, may include a sentence of life imprisonment. A fine, according to art. 34 of

penalty of imprisonment, according to art. 40 passage 1 of the SPC, is six months. The Swiss legislator provided for the same penalty in cases of active and passive penalty of foreign officials (art. 322^7 of the SPC).

According to the provisions of art. 10 passage 2 of the SPC, the offenses of active and passive bribery committed by Swiss and foreign officials constitute a felony.[29] On the other hand, offenses of giving a benefit, under art. 322^5 of the SPC, and of receiving benefits, under art. 322^6 of the SPC, face a penalty of up to three years of imprisonment and, according to the provisions of art. 10 passage 3 of the SPC, constitute misdemeanors.[30]

Polish criminal law provides for a penalty of imprisonment for the basic type of active and passive bribery in the length of six months to eight years. These penalties are higher than those provided for in the Swiss criminal law; however, unlike the Swiss criminal law, the provisions of art. 7 § 2 of the Polish Penal Code define all types of bribery as misdemeanors.

Until the end of 2006, the Swiss Penal Code provided for the principle of opportunism in prosecuting all corruption crimes, as art. 322^8 passage 1 of the SPC assumed the possibility to discontinue the proceedings and to renounce the punishment in cases where the degree of guilt of the perpetrator and the consequences of the deed are so insignificant that inflicting a punishment on the perpetrator would be unreasonable. However, on 1 January 2007, the provision of the article lost its binding force and, in the process of amending the general part of the Swiss Penal Code, art. 52 was added which introduced the principle of opportunism with regards to prosecuting all offenses.

What is foreign to the Swiss criminal law is a clause of exemption from a penalty, provided for in art. 229 § 6 of the Polish Penal Code in cases of offenses of bribery, under the conditions that a property or personal benefit is received by or promised to a public official in relation to his post, that law enforcement agencies are notified of this fact, and that all important circumstances of the offense are revealed before the law enforcement agencies gained knowledge of the fact from other sources. By introducing such a possibility, the Polish legislator assumed that breaking the

the SPC is inflicted in daily rates; the maximum number of rates is 360 if a statute does not state otherwise; the maximum value of a rate is CHF 300.

29 Art. 10 passage 2 of the SPC defines felonies as offenses that face a punishment of over three years in prison.

30 Art. 10 passage 3 of the SPC defines misdemeanors as offenses that face a punishment of no more than three years in prison or a fine.

solidarity between the participants in the corruption offense is possible only when the bribe givers are granted impunity.[31]

CORRUPTION IN THE PRIVATE SECTOR

Title 19 of the Swiss Penal Code penalizes bribery in the public sector. However, there is a number of laws that also penalize bribery in the private sector.[32] These include art. 158 passage 1 section 3 (in Title 2: Crimes against property) of the Swiss Penal Code which penalizes fraudulent management, and especially causing material damages by breaching duties, consisting in financial management by a person who performs management functions, in exchange for an undue benefit. Art. 158 passage 2 also penalizes causing a property damage by behavior consisting in breaching duties by a person who performs management functions and at the same time is authorized to represent the financial interests, in exchange for an undue benefit.

Another group of regulations penalize bribery of creditors and bribery of entities that conduct execution or liquidation. Another deed that is penalized is issuing an untrue medical opinion or medical certificate in exchange for a "special remuneration," under the condition that the doctor is not performing a public function and is not appointed as an expert because in such situations he or she would bear responsibility under art. 322^{3} or 322^{4} of the SPC, which provides for more grave penalties.

The Polish legislator, in adjusting the provisions of the Polish criminal law to meet the requirements of international conventions, introduced art. 296a into the Polish Penal Code, which penalizes active and passive bribery in the private sector. E. Pływaczewski was a proponent of some solutions in this area.[33]

The ratification of the Criminal Law Convention resulted in amending the Federal Statute on countering unfair competition of 19 December 1986.[34] The changes consisted in adding art. 4a to the Statute, which penalizes active corruption (defined as an ordinary crime) and passive corruption (which may be committed by an employee, a business partner, or a plenipotentiary) under the same conditions as those

31 R. A. Stefański, *Bezkarność sprawcy przestępstwa czynnej korupcji* [Impunity of the perpetrator of an offense of active corruption], in: *W kręgu teorii i praktyki prawa karnego. Księga pamiątkowa poświęcona pamięci profesora Andrzeja Wąska.* [In the circle of theory and practice of criminal law. A commemorative book dedicated to the memory of Professor Andrzej Wąsek] (Lublin, 2005), 336.

32 More on this subject: K.-L. Kunz, N. Capus, P. Keller, Switzerland, in: G. Heine, B. Huber, T.O. Rose, *Private Commercial Bribery. A Comparison of National and Supranational Legal Structure* (Freiburg, 2003), 435–476.

33 E. Pływaczewski, Poland, in: G. Heine, B. Huber, T.O. Rose, *Private Commercial Bribery*, 370 ff.

34 *Loi fédérale du 19 décembre 1986 contre la concurrence déloyale (LCD)* [The federal law of 19 December 1986 against unfair competition (LCD)] *RO 1988 223*. This statute took effect on 1 March 1988.

stipulated in art. $322^{3 \text{ or } 4}$ of the SPC. This offense is not prosecuted ex officio; instead, prosecution is instituted upon request. Actually, the fact that no requests for prosecution have ever been filed is criticized by a part of the doctrine.[35] G. Arzt is of a different opinion and states that, in most cases of bribery in the private sector, additional deeds committed simultaneously with bribery, such as breach of confidence, are prosecuted ex officio.[36]

Art. 4a of the Statute on countering unfair competition concerns corruption *sensu stricte* where the undue benefit is intended to induce an employee, a business partner, or a plenipotentiary in the private sector to breach his or her official duties or to take actions that are in his or her scope of authority in an improper way (in a way that is not in conformance with the general policy of the entity). At the same time, a bribe given in exchange for performing actions that are within the scope of official duties or within the scope of an authorization, or giving a present after a breach of official duties, are not prohibited either under art. 4a of the Federal Statute on countering unfair competition, or in any other provision of a statute or of the Swiss Penal Code.

Research results indicate that the so-called private bribery causes losses in the Swiss economy to the amount of billions of Swiss franks per year[37]. Nevertheless, in the last decade, there has been only one case in which the perpetrator of bribery in the private sector was convicted under the statute on countering unfair competition.

It is also disputable how to formally qualify private legal actions in a situation where, for example, a power plant whose legal form is a joint-stock company is, in fact, an entity of the private law but, economically, it is owned by the state.

Another issue also deserves consideration: if some sectors of the economy (telecommunication, supplying energy) are liberated by the state and become a part of the private sector, then it will be necessary to consider how useful it will be to maintain the distinction of official bribery as a forbidden act and to decide on defining the object of protection (violation) in the offense of bribery.[38]

The Polish criminal law defines a crime of corruption in the area of unfair competition as bribery of a person who is performing a public function, stipulated in art.

35 Compare: Processus de corruption: corruption publique, corruption privée et trafic d'influence. Notes de cours du Prof. Nicolas QUELOZ [Process of corruption: public corruption, private corruption, and trading in influence. Notes from the course of Prof. Nicolas Queloz] (February, 2007).

36 G. Arzt, ibid., 11.

37 Research on corruption offenses conducted by the team of N. Queloz, M. Borghi, M.L. Cessoni, described in: N. Queloz, M. Borghi, M. L. Cessoni, *Processus de corruption en Suisse* [Process of corruption in Switzerland].

38 G. Arzt, ibid., 11.

229 of the Polish Penal Code, performed by a natural person who is an entrepreneur, who is acting on behalf of an entrepreneur within the authority to represent the entrepreneur or to make decisions on his behalf, or to exercise control over the entrepreneur, or acting on behalf of an entrepreneur with approval of a person who is acting on behalf of an entrepreneur within the authority to represent the entrepreneur, or to take decisions on his behalf, or to exercise control over the entrepreneur.[39]

The provisions of art. 15a of the Polish Statute on combating unfair competition, unlike the provisions of the Swiss statute, covers bribery of a public official; the Swiss law, however, covers bribery of persons who are employees, business partners, or plenipotentiaries in the private sector, not the public sector. Both the Polish and the Swiss statute on combating unfair competition provide for prosecuting the deeds that are penalized in these statutes upon request of the wronged persons or entities.

AN ATTEMPT TO SUMMARIZE

The lack of penalization of the offense of trading in influence remains a shortcoming of the Swiss criminal law. Trading in influence pauses a threat to the proper functioning of the broadly-defined public administration and may affect the highest decision-making spheres in the state, as the so-called Rywin scandal demonstrated in Poland. By ratifying the Criminal Law Convention, adopted by the Council of Europe on 27 January 1997, the Swiss government made a reservation to art. 12 of the convention which introduced penalization of trading in influence; this resulted in trading in influence remaining a fully legal behavior in Switzerland. The Polish criminal law, on the other hand, has penalized trading in influence since 1938, when it was first introduced into the Polish criminal law by the decree of the 22 November 1938 on the protection of some interests of the State (Journal of Statutes no. 91, item 623).

As the results of the study conducted by Transparency International and published in its yearly report indicate, one of the most corrupt areas in the Polish administration of justice is the activity of experts appointed by courts. Consequently, it is worth considering whether the Polish criminal law should include in the group of subjects of venality the experts, the translators, and the interpreters, similarly to art. 322^3 and art. 322^4 of the SPC. The role of an expert, a translator, and an interpreter is essential an any stage of any proceeding. In a criminal procedure, an expert's deci-

39 According to art. 15a of the statute of 16 April 1993 on combating unfair competition. Dziennik Ustaw [Journal of Statutes] 153 (2003), item 1503, with subsequent changes.

sion may be the deciding factor influencing the court's decision to convict or to acquit the defendant of a charge and, therefore, an expert may also run the risk of being a target of corruption activities.

One of the provisions of the Swiss law that is worth copying in the Polish legal system is penalization of corruption offenses in the private sector, in relations between private entities, as stipulated in art. 4a of the Federal Statute on countering unfair competition of 19 December 1986.

Neither the Polish nor the Swiss legal provisions aimed at fighting the crime of corruption is free of shortcomings. Nevertheless, it is encouraging that progress is made in both countries in effective combating of this negative phenomenon. Undoubtedly, it is also important to promulgate the awareness in the society of the negative aspects of corruption and to conduct a comprehensive and effective anticorruption policy.

References

Arzt G. „Nowe prawo antykorupcyjne w Szwajcarii" [New anticorruption law in Switzerland], *Jurysta* [Jurist]. 7/8 (2001).

Cassani U. "Le droit pénal suisse face à la corruption des fonctionnaires" [The Swiss criminal law on corruption of public officials], *Pladoyer – Revue Juridique et Politique* [Juridical and political review]. 3/1997.

Cesoni M. L. "Faut-il crier à la corruption?" [Is it necessary to warn about corruption?], *Plädoyer – Revue Juridique et Politique.* 4/2000.

Corboz B. *Les principales infractions en droit suisse. Vol II.* [The main infractions in the Swiss law]. Bern: Staempfli Editions SA, 2002.

Heine G., Huber B., Rose T. O. *Private Commercial Bribery. A Comparison of National and Supranational Legal Structures.* Freiburg, 2003.

Górski A., Sakowicz A., ed. *Zwalczanie przestępstw w Unii Europejskiej. Współpraca sądowa i policyjna w sprawach karnych.* [Fighting crime in the European Union. Judicial and police cooperation in criminal cases]. Warszawa, 2006.

Héritier A. Lachat. "La corruption, le droit civil, le droit de la concurrence et le droit fiscal» [Corruption, the civil law, the law on competition, and the fiscal law]. *Pladoyer – Revue Juridique et Politique.* 3/1997.

Killias M, Ribeaud D. "La corruption, Nouvelles évidence à la lumière de recherches quantitatives" [Corruption, new evidence in the light of quantitative research], *Criminoscope*. 4 (1999).

Kistler B. «La corruption des agents publics – un phénomène en progression?» [Corruption of public officials – a growing phenomenon?]. *L'expert comptable suisse* [The Swiss expert accountant]. 1-2 (2001).

Makarewicz J. *Kodeks karny z komentarzem* [Penal law with commentary]. Lwów, 1936.

Nowak C. *Dostosowanie prawa polskiego do instrumentów międzynarodowych dotyczących korupcji. Raport. Program Przeciw Korupcji* [Adjusting the Polish law to meet the requirements of the international instruments on corruption. A report. A program against corruption]. Warszawa: *Fundacja im. Stefana Batorego* [Stefan Batory Foundation], 2004.

Queloz N. "Le problème de la corruption en droit pénal Suisse, en particulier dans le domaine de la construction" [The problem of corruption in the Swiss penal code, especially in the construction branch]. *Rèvue Pénal Suisse* [Swiss Criminal Review], 115 (1997).

Queloz N., Borghi M., Cessoni M. L. *Processus de corruption en Suisse* [The process of corruption in Switzerland]. Bâle-Genève-Munich: Helbing & Lichtenstahn, 2000.

Queloz N. «Compléments récents apportés au droit pénal suisse de la corruption et développements relatifs aux relations entre juges et partis politiques» [Recent amendments in the Swiss criminal law on corruption and developments concerning relations between judges and political parties]. *Justice – Justiz – Giustizia.* 3 (2006).

Spotowski A. *Przestępstwa służbowe, nadużycia służbowe i łapownictwo* [Official crime, official abuse, and bribery]. Warszawa, 1972.

Surkont M. Łapownictwo [Bribery]. Warszawa, 1999.

Wąsek A. *Kodeks karny. Część szczególna. Tom II. Komentarz do artykułów 222-316* [Penal code. The detailed part. Volume II. A commentary to articles 222-316]. CH-Beck, 2006, 3rd edition.

Zielińska E., ed. *Dokumenty karne. Prawo Wspólnot Europejskich a Prawo Polskie* [Penal documentation. The laws of the European Communities and the law of Poland]. Warszawa: IWS, 2000.

Zoll A., ed. *Kodeks karny, część szczególna. Komentarz. Tom II.* [Penal code, the detailed part. Commentary. Volume II]. Kraków, 2006.

W kręgu teorii i praktyki prawa karnego. Księga pamiątkowa poświęcona pamięci profesora Andrzeja Wąska. [In the circle of theory and practice of criminal law. A commemorative book dedicated to the memory of Professor Andrzej Wąsek], Lublin, 2005.

Transparency International. *Global Corruption Report 2006.* London: Pluto Press, 2006.

Transparency International, *Global Corruption Report 2007. Corruption in judicial system.*

Conseil fédéral [Federal Council]. *Rapport et avant-projet relatifs à l'adhésion de la Suisse à la Convention pénale du Conseil de l'Europe sur la corruption* [A report and draft on the adoption by Switzerland of the Criminal Law Convention of the Council of Europe on corruption]. Bern: August 2003.

Message du Conseil fédéral suisse du 19 avril 1999 concernant la modification du code pénal suisse et du code penal militaire (révision des dispositions pénales applicables à la corruption) et l'adhésion de la Suisse à la Convention sur la lutte contre la corruption d'agents publics étrangers dans les transactions [Message of the Federal Council of 19 April 1999 on amendments to the Swiss military penal code (revision of penal measures for corruption) and the adoption by Switzerland of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions].