

---

CHAMBERS GLOBAL PRACTICE GUIDES

---

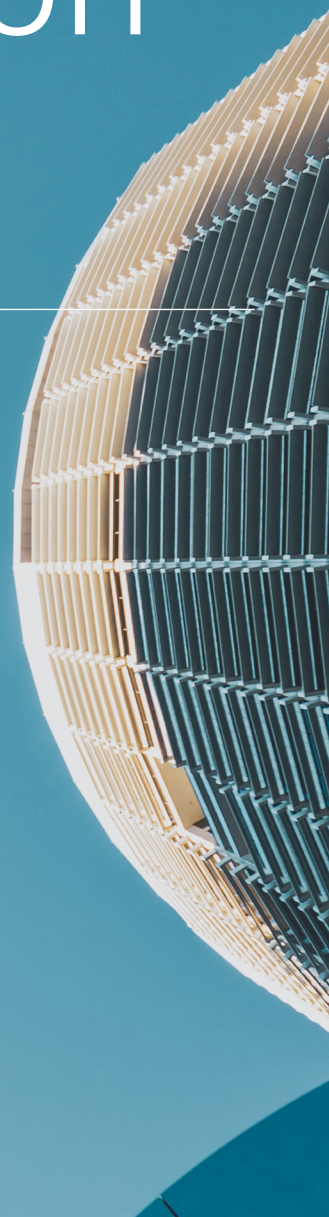
# Anti-Corruption 2024

---

Definitive global law guides offering  
comparative analysis from top-ranked lawyers

## **Switzerland: Trends & Developments**

Jean-Marc Carnicé and Dominique Ritter  
BianchiSchwald LLC



## Trends and Developments

### Contributed by:

Jean-Marc Carnicé and Dominique Ritter  
**BianchiSchwald LLC**

**BianchiSchwald LLC** was launched in January 2017 and is a merger of BCCC Attorneys-at-Law and a spin-out of Staiger Schwald & Partners. The expertise of 13 partners and 40 lawyers located in Geneva, Lausanne, Zurich, and Bern include litigation and arbitration, white-collar crime and criminal law, banking and finance, corporate, commercial and M&A, employment, intellectual property, real estate and construction, tax, and private clients. The firm's white-collar crime & international assistance team

(one partner and four highly qualified lawyers), mainly based in the Geneva office, supports clients in proceedings they face in criminal or administrative investigations by local or federal authorities. It also assists clients confronted with mutual legal assistance requests from foreign states. Recent work includes defending clients in ongoing criminal cases for corruption, private bribery, banking fraud, and money laundering, as well as requests for mutual legal assistance for transfer of documents and assets.

## Authors



**Jean-Marc Carnicé** is a founding partner of BCCC Attorneys-at-Law (2000), and heads BianchiSchwald's white-collar crime & international assistance team. He was

admitted to the Geneva Bar in 1994 and to the New York Bar in 1996. He was the chairman of the Geneva Bar from 2014 to 2016. His main activity is defending clients in white-collar crime and international assistance in criminal matters proceedings conducted by local or federal criminal or administrative authorities. Jean-Marc lectures on different white-collar crime topics within the Geneva and Swiss Bar Association. He practices in French, English, Spanish, and Italian.



**Dominique Ritter** is a managing associate within BianchiSchwald's white-collar crime & international assistance team (since 2016). She was admitted to the Geneva Bar in

1990 and to the New York Bar in 2003. Her main activity is to defend clients in criminal investigations and before local and federal criminal courts in various white-collar and business crimes such as fraud, money laundering, corruption, private bribery, and misappropriation. Dominique also has wide experience in international commercial arbitration. She practices in French and English and speaks some German and Italian.

## BianchiSchwald LLC

5, rue Jacques-Balmat  
PO Box 1203  
CH-1211 Geneva 1  
Switzerland

Tel: +41 58 220 36 00  
Fax: +41 58 220 36 01  
Email: [carnice@bianchischwald.ch](mailto:carnice@bianchischwald.ch)  
Web: [www.bianchischwald.ch](http://www.bianchischwald.ch)



### Anti-corruption Case Law in Switzerland *Overview*

The most significant anti-corruption development in Switzerland within the last year is a decision from the Federal Tribunal dated 31 October 2022 (ATF 149 IV 57) in which Articles 322quinquies and 322sexies of the Swiss Criminal Code (SCC), which punish the granting and acceptance of an advantage, were examined thoroughly. These provisions aim at protecting the impartiality of the decision-making process of the authorities as well as trust in the objectivity and non-venality of state action.

The main characteristic of these provisions, which reprove an attenuated form of corruption of Swiss public officials, is that the link between the undue advantage and the public official's action (the so-called "exchange relationship" or "principle of equivalence") is much more tenuous than in the provisions regarding bribery and may even, to some extent, be lacking.

The offences being independent of each other, the behaviour of each of the protagonists must be analysed on its own merits; depending on the case, it is possible that only the behaviour of the grantor or that of the acceptor may be punishable. Hence, for the conviction of the

acceptance of an advantage, it is not required that the reasons for which the briber grants the advantage be known.

Consequently, the mere acceptance of a gift is punishable if the public official accepts that the undue advantage be granted to him in said capacity and is conscious that this might be done to influence him when carrying out official duties in the future.

### *Content of relevant provisions (in force up to 30 June 2016)*

Article 322quinquies of the SCC condemns any person who offers, promises or gives a member of a judicial or other authority, a public official, an officially-appointed expert, translator or interpreter, an arbitrator or a member of the armed forces an advantage which is not due to him in order that he carries out his official duties.

The mirror provision of Article 322sexies of the SCC condemns the acceptance of an advantage – ie, any person who, as a member of a judicial or other authority, as a public official, officially-appointed expert, translator or interpreter, or as an arbitrator, demands, secures the promise of, or accepts an advantage which is not due to him in order that he carries out his official duties.



These provisions were amended and since 1 July 2016 also apply when the undue advantage is offered, promised or given to a third party or requested or accepted for a third party.

## *Relevant facts*

“A”, a member of the government of the state of Geneva (“government of Geneva”) travelled to the emirate of Abu Dhabi (UAE) from 26 to 30 November 2015, at the invitation of the Crown Prince of Abu Dhabi, to attend the Formula 1 Grand Prix, held annually in this emirate. His wife and their children went with him. The invitation included a business-class flight from Geneva to Abu Dhabi, accommodation in a five-star hotel as well as Royal Lounge access to the Grand Prix.

A’s chief of staff, “B”, was also invited in said capacity and received the same benefits to attend the Grand Prix. A was also accompanied by “C”, director of a real estate company in Geneva, and “D”, head of the real estate group, who intervened to obtain the invitation.

The cost of the trip fully covered by the Abu Dhabi authorities, was estimated at CHF50,000 (EUR46,301, at the time) for A and his family, and CHF10,000 (EUR9,260 at the time) for B.

The attendance at the Formula 1 Grand Prix in Abu Dhabi was first discussed in May 2015 with C and D upon A’s return from a Geneva business delegation trip to Dubai (UAE). D offered to contact his uncle, who has a special relationship with the Crown of Abu Dhabi, to enquire if A could be included on the guest list for the Grand Prix. A accepted the offer.

Emails were exchanged in mid-June 2015 between A and C showing that A intended to travel with his family and that his expectation

was to receive an official invitation via the Federal Department of Foreign Affairs. C confirmed that he was working on this scenario with D. At the end of the month, A confirmed that he would travel with his family as well as B, and assumed that the invitation would be at their own expense, at least for transportation.

Between 5 and 12 August 2015, A and C exchanged several WhatsApp messages about the upcoming trip. A mentioned that he wished to book the plane tickets quickly and insisted on paying at least economy fare for his flight after he was told that this was not necessary. At the end of the month, A wrote the following message to C: “Tell me again about the tickets, it’s making me anxious...”

On 11 September 2015, A informed the President of government of Geneva of his forthcoming semi-professional/semi-private trip to the United Arab Emirates, indicating that no expenses were borne by the state of Geneva since he was paying for it.

A received the official invitation from the Crown Prince Court on 20 September 2015 and forwarded it to C, indicating: “I have received the attached invitation; should I reply directly and how do I proceed[?]” C replied that B should take care of this and asked to review the draft answer.

By letter dated 29 September 2015 and on Department of Security and Economy letter-head, A accepted the Crown Prince of Abu Dhabi’s generous invitation and confirmed that he would be coming with his wife, their three children and his chief of staff, B.

The Emirati organisers confirmed twice (in October and November 2015) that the entire costs for

the trip (business class tickets, hotel accommodation and local travel) were borne by the Crown of Abu Dhabi.

From 26 to 30 November 2015, A, his family and B travelled to Abu Dhabi to watch the Formula 1 Grand Prix. The purpose of the trip was mainly private, A's only official meetings being a visit to a video-surveillance centre as well as a meeting with the Swiss Ambassador to the UAE. Additionally, A had a surprise encounter with the Crown Prince.

### *Proceedings*

A was sentenced by the lower criminal court of Geneva on 22 February 2021 for acceptance of an advantage in connection with the above-described trip. B was also convicted for acceptance of an advantage. D was convicted for the granting of an advantage in relation to said trip, and his employee, C, was found guilty of complicity in the granting of the advantage.

The Appellate Court reversed said decision on 13 December 2021, vacated the convictions and acquitted all four accused of the offences of accepting or granting an undue advantage.

The Public Prosecutor challenged this decision with the Federal Tribunal.

The Federal Tribunal overturned the acquittal considering that A and B accepted an undue advantage, that D provided such undue advantage, and that C was an accomplice. The case was remanded to the Geneva Appellate Court for the sentencing.

The main findings are as follows.

### *Public official*

The status of public official of A, member of the government of Geneva, and of his chief of staff, B, was not in dispute. It was not disputed either that the invitation was extended to them in said capacity.

### *The advantage received was undue*

An advantage – ie, any benefit (material or immaterial) improving the beneficiary's situation – is “undue” when the public official has no legal claim to it and has no right to accept it.

Advantages that are authorised under the regulations on the conduct of official duties as well as advantages of minor importance that are common social practice are not regarded as undue advantages (Article 322octies of the SCC in force at the time). The regulation in force in the canton of Geneva prohibits state employees to solicit or receive for themselves or others, gifts or other advantages, because of their official status.

The findings of the previous courts about the trip to Abu Dhabi being an undue advantage is upheld by the Federal Tribunal. A's attendance to some limited official meetings during his four days stay in the UAE has no influence on this result, A having conceded that the visit was mainly private, since he was travelling with his family and friends (B and C). The value of the trip (CHF50,000 for A and CHF10,000 for B) was well above gifts that could be accepted according to social usage.

### *In order to perform his official duties*

As mentioned in the overview, the particularity of these provisions when compared to active or passive corruption (Articles 322ter and 322quater of the SCC) is that there is no requirement as to the existence of a link, or so called “exchange relationship” between the undue advantage and

the public official's action or omission. It is sufficient for the advantage to be granted to the official "in order for him to perform the duties of his office" or for it to be accepted by him "in order to perform the duties of his office". Article 322quinquies targets public officials who take advantage of their office to obtain undue benefits, without going as far as accepting to be corrupted within the meaning of Article 322quater of the SCC.

For the Federal Tribunal, these provisions, aimed at behaviours of the public official to occur in the future, are likely to come into play in two instances:

- facilitation payments; or
- progressive feeding.

Facilitation payments, also known as grease payments, occur when a public official receives an advantage for performing an act that he is obliged to perform or would perform anyway and where it is ultimately intended only to guarantee or accelerate said performance. The link between the payment(s) and the public official's action is rather limited. Contrary to corruption, it is not required that the public official is led to violate the duties of his office or to abuse a discretionary power which he does not have.

Progressive feeding, also known as climate maintenance or goodwill payments, consist in providing undue advantages to a public official with the aim of attracting his goodwill and to influence him favourably in a general way, without aiming for any specific or even given consideration in return, but solely in the hope that the opportunity to "return the favour" will occur. The principle of equivalence is very limited here, as no specific link is required between the advantage and a particular act of the public official.

In addition, unlike corruption, rewards or gifts granted ex post facto will not fall within Articles 322quinquies and 322sexies of the SCC.

### *The Crown Prince's intent in extending the invitation is irrelevant*

The Federal Tribunal rules that the intent of the grantor of the undue advantage is irrelevant when deciding whether the public official committed the offence of accepting an undue advantage. Hence, the failure to establish the intent of the Crown of Abu Dhabi, in particular the absence of proof that the invitation was extended to obtain that the member of the government of Geneva and/or his chief of staff perform their official duties, had no impact on the possible mirror offence committed by the public official and could not, contrary to the Appellate Court's findings, have for consequence that there is no breach by the public official of Article 322sexies of the SCC. Such a reasoning is incorrect because it relies on the false premises that there is a need for a parallelism between the unlawfulness of the granting of the undue advantage and its acceptance by the public official. This is not the case because the two provisions are independent. Although the two offences share an axe of symmetry like Articles 322ter and 322quater of the SCC regarding corruption of a Swiss public official, they remain independent from each other. Hence, depending on the circumstances it can occur that both the public official and the party granting or promising the advantage are punishable and other instances where only one of them is punishable – ie, a public official may be found guilty even when the party granting the undue advantage is not.

Accordingly, when applying Article 322sexies of the SCC the aim pursued by the grantor or the public official is not decisive. The term "in order that" used in this provision (as well as in Arti-

cle 322quater of the SCC regarding corruption) does not express an aim that should be pursued by the public official as perpetrator of the offence but refers to the existence of an objective link between the advantage granted and the carrying out of his official duties. Link that can remain tenuous within Article 322sexies of the SCC. It is also irrelevant whether the official intends to adopt the behaviour expected of him, nor whether he indeed receives the promised benefit. Consequently, on a subjective level, it is sufficient for the public official to accept that the undue advantage is given to him ex officio in order to influence him in the performance of his official duties.

### *Question to be examined*

Consequently, the question to be decided is whether the luxurious invitation extended to A and B – ie, the accepted undue advantage – should be perceived as a scheme aimed at sustaining a future favourable climate towards the public official.

To assess this, it is enough to determine whether, objectively, the person granting the undue advantage had an interest in benefiting in the future from the goodwill of public officials, and whether, subjectively, the latter were aware of this and had therefore accepted the possibility that the undue advantage was given to them in such capacity, in order to influence them in some way in the performance of their official duties.

Based on the facts retained by the Appellate Court, the Federal Tribunal considers that both D, who was at the origin of the invitation, and the authority of Abu Dhabi, in particular the Crown family, had, through their previous ties with the canton of Geneva, an interest in maintaining or developing good relations with the government of Geneva, and in particular with A, one of its

members and his staff. Consequently, objectively an interest in benefiting in the future of their goodwill existed.

### *A and B should be found guilty of accepting an undue advantage*

The following circumstances were relevant to retain that A was aware that the invitation may have been intended in the eyes of the grantors to promote the relations that they intended to maintain in the future with the authorities of the state of Geneva and him in particular.

Firstly, A explained that he felt “uneasy” about the invitation at the time, because he could not imagine anyone other than himself, let alone a foreign state, paying for his family holidays. For the Federal Tribunal this also shows that he was aware of the undue nature of the invitation. Secondly, A was cognisant of D’s real estate activities in Geneva and the ties existing between the state of Geneva and Abu Dhabi – ie, planned co-operation in police matters.

Despite all this, A nonetheless accepted the invitation to the Grand Prix, all expenses paid, thus accepting the risk of being accused of mixing his private interests with the public interest – ie, appearing as performing his duties of councillor impartially and honestly.

For B, it was exclusively a private trip. He has not felt uncomfortable about it. He was, however, described in the letter accepting the invitation as the chief of staff of the member of the government of Geneva and it was in this capacity that he was invited and not in the capacity of a friend.

The Federal Tribunal considered that although neither the Abu Dhabi authorities nor D had any plans for B, they did have an interest in obtaining his goodwill in the exercise of his official duties.

In his position he had the capacity to advise and influence the councillor in his decision-making. Given his experience of public affairs, B was necessarily aware of this when he agreed to take part in the trip.

### *D granted an advantage to A and B although he did not personally provide it*

The Federal Tribunal also vacates D's acquittal of the offence of granting an undue advantage. The judges consider that although D could not guarantee that the invitation to the Grand Prix could be obtained through his uncle, his proposal which he subsequently worked to bring to completion, was the necessary cause of the invitation being made and thereafter accepted.

Consequently, for the Federal Tribunal D's conduct was not limited to making an offer or promise of an intangible and uncertain advantage, but his conduct, with the use of intermediaries, led to the granting of an undue advantage to A and B. It was not decisive that D did not personally grant the advantage to the public officials.

Relying on the findings of the Appellate Court, the Federal Tribunal retains that at the very least, D envisaged that the invitation would be sumptuous and essentially private and that all expenses would be borne by the Emirati authorities. Thus, he accepted that the invitation extended to A and B in their capacity of member of the government of Geneva and chief of staff was an undue advantage. Since D's interest in A and his political activities were not entirely altruistic, D could not have ignored that his intervention to obtain the invitations should help him to gain access to the councillor, should the need arise. Consequently D should have been convicted for granting an undue advantage to A and B.

### *C was only an accomplice*

The facts of the Appellate Court show that C served as a "relay" in the communications between those extending the invitation and the public officials and that he generally acted upon instructions of D, who was his boss. He was not the author of the offer to seek an invitation nor the one who initiated it. Consequently, he is not an author but only an accomplice and is to be convicted for complicity.

### *Conclusion*

The annulment of the acquittal of the acceptance of an undue advantage confirms a trend to combat bribery more actively in Switzerland, in particular the attenuated form of corruption where it is not necessary to prove the existence of a link between the undue advantage that is offered, promised or granted and the public official's response to it.

It makes clear that a public official may be convicted of accepting an undue advantage even if the person who provided the advantage did not intend to influence him.

The aim of the person granting the advantage is not decisive; it is sufficient if objectively he/she has an interest in benefiting in the future from the goodwill of the public official and subjectively whether the latter accepts that the advantage is provided because of his position with a view to influencing him in the performance of his official duties, even if it does not work.

These provisions only apply to Swiss public officials, the acceptance or the granting of an undue advantage has not been enacted as an offence in case of foreign public officials.



---

## CHAMBERS GLOBAL PRACTICE GUIDES

---

Chambers Global Practice Guides bring you up-to-date, expert legal commentary on the main practice areas from around the globe. Focusing on the practical legal issues affecting businesses, the guides enable readers to compare legislation and procedure and read trend forecasts from legal experts from across key jurisdictions.

To find out more information about how we select contributors, email [Katie.Burrington@chambers.com](mailto:Katie.Burrington@chambers.com)