



Switzerland Fines SBM Offshore Over Bribery

[Michele Tagliaferri](#), [Michelle Gandolfo](#)

A few months ago, the Attorney General of Switzerland (AOG) issued a summary penalty order (the Penalty Order) sentencing three Swiss subsidiaries of the Dutch-based multinational oil and gas company SBM Offshore (SBM or Company) to pay over CHF 7 million for failing to take the reasonable organizational measures required to prevent the bribery of public officials in Angola, Equatorial Guinea, and Nigeria.

The Penalty Order marks the latest chapter in a long series of enforcement actions brought against SBM by Dutch, U.S., and Brazilian authorities which resulted in a number of settlement agreements in 2014, 2017 and 2018 respectively. The criminal proceedings in Switzerland may not be the end of the bribery investigations against SBM, as there are rumors of a recent complaint filed by a human rights association against SBM before the French National Financial Prosecutor's Office.

In recent months, following the Penalty Order, the Swiss authorities brought similar cases against other companies. In this article, we briefly discuss the main aspects of the Penalty Order and consider its implications for Swiss Companies in light of the increasingly aggressive enforcement landscape in Switzerland.

The Penalty Order

The Penalty Order, issued on November 18, 2021, concludes the criminal investigation, launched by the AOG in September 2020, against the SBM's three Swiss subsidiaries: SBM Holding Inc. SA, Single Buoy Moorings Inc., and SBM Production Contractors Inc. SA.

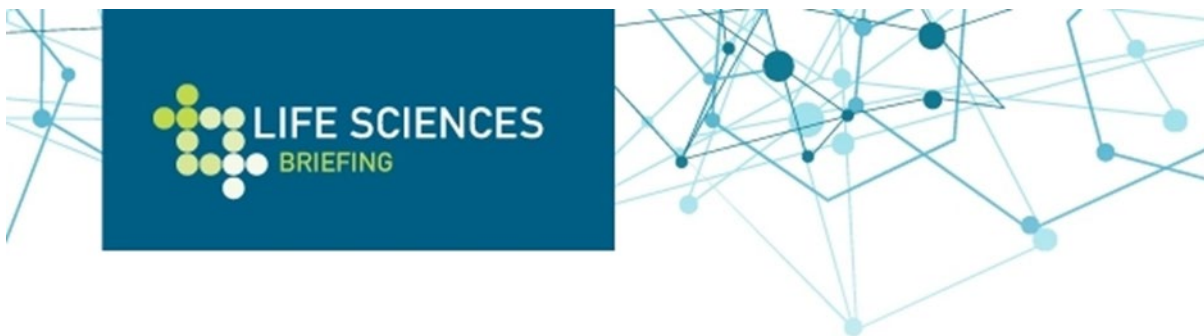
The investigation conducted by the AOG revealed that from 2006 to 2012, SBM Holdings Inc. SA made corrupt payments in excess of US\$ 23 million to public officials in Angola, Equatorial Guinea, and Nigeria to secure contracts for the SBM Offshore group. The bribery scheme entailed the involvement of intermediaries acting through shell companies, to which SBM Holding Inc. SA paid commissions under sham contracts, which were systematically forwarded to foreign public officials.

Under the Swiss Criminal Code (SCC), a company may be held liable for foreign bribery committed by its employees, irrespective of their criminal liability, if the company failed to take all the reasonable organizational measures necessary to prevent such an offense (see Article 102(2) and Article 322^{septies} SCC).

In this case, the Penalty Order states that throughout the bribery scheme, SBM's Swiss subsidiaries

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had “non-existent” or “wholly inadequate” organizational measures in place to prevent corruption, particularly with respect to the activities of third-party intermediaries.

What does this mean for companies operating in Switzerland?

The Penalty Order clearly demonstrates that Swiss authorities’ monitor foreign bribery and are committed to holding companies accountable for failing to effectively implement an adequate compliance program to meet the company’s operations and risk profile.

Corporate liability premised on companies’ “failure to prevent” offenses committed by their employees and third-party intermediaries is an increasingly common legal theory adopted by a number of countries, including the UK, Italy, and Spain.

Particularly, many of the well-known corporate liability enforcement actions brought by the UK authorities in recent years have been based on Section 7 of the UK Bribery Act, which provides that a company may be held liable for criminal offenses committed by its employees in the course of the company’s business activities, including foreign bribery, unless the company “*had in place adequate procedures designed to prevent [employees] from undertaking such conduct.*” To this end, the UK Bribery Act does not specify what measures companies must implement to avoid liability, but the UK Ministry of Justice issued clear Guidelines regarding the “*adequate procedures*” allowing companies to establish a defence against Section 7 liability.

While the Swiss regulators have not published similar guidelines, the Penalty Order provides helpful guidance in this respect, specifying that in order to avoid liability, companies must demonstrate that they have taken at least the following measures:

- conducting a risk assessment tailored to the company's business activity, context, and size
- adopting a code of conduct, policies, directives, and internal procedures specifically aimed at preventing corruption
- conducting anticorruption training and awareness campaigns
- implementing adequate internal controls and an adequate internal reporting system

More generally, the Penalty Order also clarifies that in adjudicating corporate liability cases, Swiss courts must also consider international best practice principles and standards, such as the “*Good Practice Guidance on Internal Controls, Ethics, and Compliance*” issued under the “OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions”; the document “*Preventing corruption – Information for Swiss businesses operating abroad*” developed by the Swiss State Secretariat for Economic Affairs; and the “*International Chamber of Commerce Rules on Combating Corruption.*”

Does this apply only to Swiss companies?

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With the exception of public authorities, Article 102(2) of the SCC is applicable to any legal entity. Accordingly, provided that the criminal offense, or the failure to prevent the criminal offense, occurred in Switzerland, foreign companies may also be held liable if they fail to take all necessary measures to prevent criminal offenses committed by their employees.

Importantly, under Swiss law, the application of these jurisdictional criteria is without prejudice to general principles of “*ne bis in idem*” (double jeopardy) that prevent the prosecution of any person more than once for the same criminal conduct.

The Penalty Order is a clear demonstration of Swiss authorities’ commitment to holding companies accountable for their compliance failures. Similarly to the compliance defense envisaged by the UK Bribery Act and other laws, under Swiss law companies may avoid liability if they can show that they have adopted compliance measures designed to prevent criminal offenses by their employees, in line with the international standards and best practices recommended by Swiss authorities.

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