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Federal Department of Economic Affairs FDEA
State Secretariat for Economic Affairs SECO

Preventing corruption – Information for Swiss businesses operating abroad

A brochure by the State Secretariat for Economic Affairs (SECO), in collaboration with: The Federal Office of Justice, The Federal Department of Foreign Affairs, economiesuisse, and Transparency International Switzerland

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«Bribery abroad is a criminal
offence in Switzerland.»

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Introduction

Why this brochure?

This brochure gives an overview of the problem of corruption in international business transactions and helps you cope with the pertinent regulations in Swiss criminal law. Case studies are used to illustrate concrete situations and assess their legal ramifications. The brochure highlights the effects of corruption on your business and proposes possible measures to prevent and actively combat this type of corrupt practices.

Business activities abroad

Corruption is a real problem for many Swiss companies operating abroad. In international markets, they are under pressure: competition is stiff, the order situation tough, and margins tight. The legal situation, conventions and political circumstances in a foreign country are sometimes quite elusive. For a company, much can depend on

whether a particular contract can be won, a licence is granted, or a product can be marketed in good time. Influential people may offer to help you accordingly. Perhaps you know of competitors who promote their businesses with gifts or disguised payments – who bribe. What do you do?

In order to make the right decisions in such circumstances, you, as a company representative, must be able to adequately assess the consequences of your actions. It is particularly important that the company management takes a clear stand.

Strengthening the fight against corruption

The fight against corruption has been intensified substantially on national and international levels over the last few years.

The international community has committed itself in a number of international treaties to establish corrupt practices at home and abroad as criminal offences.

At the same time, the community has agreed on a wide range of further measures to improve prevention, detection, and sanctioning of corruption. In so-called country evaluations, individual states are monitored as to how they comply with their international commitments and where additional efforts

are necessary. Thus the aim is to create a level playing field in relation to corruption for companies operating internationally.

This also applies to Switzerland. Whoever bribes an official at home or abroad, or bribes a private person in a business context, commits an act that is a criminal offence in Switzerland. Companies as well as private persons can be liable to prosecution.

Even what may be legally permissible in Switzerland can bring a company into disrepute. It may be that advantages granted to persons abroad contravene the rules and regulations of another state. Or they may be viewed as unethical in the public opinion.

Wherever the masculine or feminine gender is used in this brochure, the respective form includes the reference to the other as well.

¹ The three most important anti-bribery treaties to which Switzerland is a Party are (status of ratification as of the beginning of 2008):

- The 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. In addition to the 30 OECD member countries, Argentina, Brazil, Bulgaria, Chile, Estonia, Slovenia, and South Africa have acceded to the Convention.
 - The 1999 Criminal Law Convention of the Council of Europe on Corruption, which includes thirty-six Member States.
 - The 2003 United Nations Convention against Corruption. Approximately 100 States have ratified this Convention.
-

What is corruption?

Corruption means any abuse of a position of trust in order to gain an undue advantage. This involves the conduct of both sides: that of the person who abuses his position of trust as well as that of the person who seeks to gain an undue advantage by this abuse.

Corruption can occur in relation to officials as well as between private persons. It is particularly prevalent in certain kinds of transactions (for example, when awarding public contracts), in certain economic sectors (for example, in extractive industries), and in certain countries (see the annual indices of Transparency International). Corrupt practices can range from small favours in anticipation of a future advantage to the payment of large sums of money to senior members of governments.

The focus of this brochure is the bribery of foreign public officials and private persons in international business transactions.

«Corruption means any abuse of a position of trust in order to gain an undue advantage.»

Why fight corruption?

For a long time and almost everywhere, the fight against corruption was restricted to domestic occurrences. The bribery of public officials and private persons abroad was either ignored or considered a necessary evil allowing to hold one's own against competition. The opening up and liberalisation of markets as well as public pressure have changed this perception. Internationally, the combat against corruption has consistently gained in importance in recent years.

Corruption gives rise to substantial economic and social costs. It thus needs to be fought worldwide, in spite of differences in cultures and traditions.

Social and political reasons

- In many countries, corruption is one of the primary obstacles to development.
- Corruption distorts access to public services, leads to unlawful enrichment of individuals and causes tension in the social structure.
- Corruption undermines the rule of law and provides fertile ground for organised crime.
- Corruption weakens trust in public institutions and puts the principles of democracy at risk.

Economic reasons

- Corruption leads to squandering of public and private resources.
- Corruption shakes the confidence of investors and results in long-term capital investments in particular being transacted elsewhere.
- Corruption impedes transparency and distorts competition.

Business reasons

- A Swiss company that bribes a public official or private person abroad commits a criminal offence that is punishable (also) in Switzerland. Certain governments and international organisations, such as the World Bank, publish lists of companies that have been found guilty of corruption. Access to public services and international projects may be denied to these companies. In Switzerland, for instance, the violation of anti-corruption clauses that are used in the context of development cooperation or export risk insurance can lead to the termination of contracts, penalties for breach of contract, or exclusion from future contracts.
- Under certain circumstances, a company that has paid bribes can also be subjected to a civil action, brought about, for example, by a competitor who has lost a bid.
- The reputation of a company can be seriously damaged in the eyes of investors, business partners, and the public at large if it becomes known that the company committed an act of corruption. It takes years to build up a good reputation, but it may take only one corruption scandal to ruin it quickly.
- A company that corrupts others encourages distrust and unethical conduct within its own ranks. Whoever tolerates corruption in his own company, or even condones it, fosters a climate in which other offences also thrive.
- Once a company makes a corrupt payment, it lays itself open to blackmail by those who know about it.

Revised Swiss criminal law on corruption

Overview

Between 2000 and 2006, Switzerland extended and tightened its criminal law on corruption in three stages. New is, among other things, that the bribery of foreign public officials is now regarded as a criminal offence and that not only individuals, but also companies can be prosecuted for corruption.

There are thus several distinctions in Swiss criminal law on corruption that should be noted.

Bribing public officials and private persons:

- The bribery of public officials is governed by the Swiss Criminal Code (StGB), which defines a public official as a «member of a judicial or other authority, a public employee, an expert, translator or interpreter employed by any authority, an arbitrator or a member of the armed forces» (Article 322^{ter} StGB), but also includes a private person who carries out a public function (Article 322^{octies}, paragraph 3, StGB). Persons in this category

are «foreign public officials» when they act for a foreign State or an international organisation (Article 322^{septies} StGB).

- The bribery of private persons is regulated by the Federal Law against Unfair Competition (UWG; Article 4a). Unlike the bribery of public officials, the bribery of private persons is pursued under criminal law only on complaint (Article 23 UWG).

Active and passive bribery

- Active bribery – in the case of a public official – is an act by which an official is offered, promised, or granted an undue advantage, for his own benefit or for the benefit of any third party, for the commission or omission of an act in relation to his official duties that is contrary to his duties or depends on the exercise of his discretionary powers (Article 322^{ter} StGB). Active bribery in the private sector is described in a similar fashion in Article 4a, paragraph 1, section a, UWG.

- Passive bribery occurs when a person solicits, elicits a promise of or accepts an undue advantage, for his own benefit or for the benefit of a third person, for the commission or omission of an act that is contrary to his duties or depends on the exercise of his discretionary powers (Article 322^{quater} StGB; Article 4a, paragraph 1, section b, UWG).

Bribery and giving or accepting of an advantage:

- In bribery, the undue advantage is connected to a specific act or omission. The relationship is one of exchange.
- Giving or accepting of an advantage refers to unlawful favours, which, for public officials, are not connected to a specific official act but rather are granted or received with a general view to the future execution of official duties (Article 322^{quinquies} to 322^{sexies} StGB). In Switzerland, the giving and accepting of such advantages are only punishable when a Swiss public official is concerned.

In all cases of corruption (bribery as well as the giving or accepting of advantages, according to Articles 322^{ter} through 322^{septies} StGB), criminal prosecution, judicial proceedings or the imposition of a penalty can be waived in de minimis cases (Article 52 StGB). Furthermore, advantages are not undue when allowed by staff regulations or when they are of minor value in conformity with social custom (Article 322^{octies}, paragraph 2, StGB).

The requirement that the act be penalised also in the foreign State where the offence took place (Article 6, paragraph 1, and Article 7, paragraph 1, StGB) will likely be met in most cases of corruption.

Criminal liability

In cases of corruption, it is primarily the individual («natural person») who is liable to punishment and is prosecuted. In the case of bribing public officials either at home or abroad, individuals are sentenced to prison for a term of up to five years or fined (Article 322^{ter} and Article 322^{septies} StGB). Bribery in the private sector results in imprisonment for up to three years or a fine (Article 23 UWG). Criminal liability lies not only on management and staff, but also on those who otherwise act on behalf of the company. Thus to oversee that management complies with laws, statutes, regulations, and orders is a non-transferable duty of the board of directors (Article 716a, Swiss Code of Obligations (OR)).

A company («legal entity») that «has not undertaken all requisite and reasonable organisational precautions» required to prevent the bribery of public officials or persons in the private sector is subject to criminal prosecution and a fine of up to five million Swiss francs, according to Article 102, paragraph 2, StGB. This liability applies regardless whether an individual can be called to account or not.

«In addition to individuals, companies can also be liable and penalised for bribery committed both at home and abroad.»

Case study – test yourself by assessing the situation

Using the following fictitious case with several variations, you can test and deepen your understanding of the issue. See if you can assess the various situations and weigh up the consequences. Media coverage of cases of corruption may also give you clues about the risks in practice.

Initial situation

Your company wants to strengthen its presence in Country X. To this end, management has decided to set up a subsidiary in Country X. Your inquiries indicate that the process of setting up a company there is very complicated and can take more than a year.

Various scenarios

1

Your goal for the subsidiary is to start operations as soon as possible. According to reports, other foreign companies have succeeded in being entered in the register of companies within a few weeks without fulfilling all the necessary requirements in return for a payment of approximately USD 100,000 to a certain government agency. You commission your project leader to submit a corresponding offer to this agency.

An «undue advantage» is being offered for an unlawful transaction by an official: The registration of a subsidiary without fulfilling all the statutory requirements. It is irrelevant whether money actually changes hands – the offer or promise alone is sufficient – or whether the government office has already been bribed by other companies. This is a case of (active) bribery of a foreign public official, which is a criminal offence in Switzerland.

2

Would the legal situation be judged differently if the money was not offered to the government agency, but rather the family of the responsible civil servant would be offered a beach vacation or an education for a child in Switzerland?

3

Would the legal situation be evaluated differently if the payment were not offered by your company, but rather asked for by the government agency?

The «undue advantage» can be of any kind. This can include, for example, a valuable object as a gift or an excessive fee for a service that has been performed. Granting an advantage to a third party is specifically mentioned in the law as a variety of bribery.

If your company responds to the request of the government agency, this likewise amounts to the offence of bribery of a foreign public official under Swiss law.

4

Would the legal situation be judged differently if your project leader himself did not contact the government agency directly, but rather commissioned a local agent to “take care of” the registration of your subsidiary within a few weeks in return for USD 100,000?

5

Would the legal situation be judged differently if you did not want to set up a subsidiary in Country X for the time being, yet with a view to an eventual future need, you instruct your local representative to present an expensive gift each year to the head of the government agency?

The agent, who is not part of your organisation, is supposed to attempt to induce the government office to perform an official act contrary to duty. If you hazard the consequences of or even instigate persons to bribe others, then you are jointly responsible.

Such an annual gift is likely to be an «undue advantage». The question here is whether there is a sufficient connection between the benefit granted and a future official act. Under Swiss law, the act may be classified as criminal bribery or as the granting of an advantage, which - in case of a foreign public official - is not punishable. However, the granting of advantages may be punishable under the laws of Country X.

6

For almost a year, your company has undertaken all the necessary steps to have the subsidiary registered in Country X in the proper way. The certification of the required documents and the entry into the register of companies are only a matter of form, although in Country X, they are particularly time-consuming. The responsible authority is overburdened, and a delay of several more weeks is expected. To speed the process up, you send USD 10,000 to the responsible authority.

Here the expedition of an official procedure is purchased. The preferential timing disadvantages other applicants directly, because their applications remain waiting, as a result of which they may suffer losses. The payment also influences the discretion of a public official, which is again a case of criminal bribery under Swiss law.

7

Would the legal situation be judged differently if the registration were overdue even according to local custom, only the affixing of a stamp were still required, and you were to send USD 100 to the responsible public official so that he would finally handle the matter?

In this case, too, the official act in question is a mere formality. Nevertheless, the overdue registration is a legal administrative act that does not lie within the discretion of a public official anymore. If a small sum of money is paid so that the public official actually does the work that your company has a right to, this is considered as a minor facilitation payment. According to Swiss law, this is regarded as «the granting of an advantage» and not the payment of a bribe. In contrast to the granting of an advantage to a Swiss public official, the granting of an advantage to a foreign public official is not a punishable offence in Switzerland. However, the possibility of penalisation in the country where the act has occurred needs to be given attention. Furthermore, it can be in the interest of your company in general to refrain from making even small facilitation payments abroad.

8

In the meantime, your subsidiary in Country X has been registered and is now operational. It participates in the bidding on a major public purchase by the local authorities of the capital city. It would be a significant success for your subsidiary if it could land such a purchase order so shortly after its establishment. The subsidiary attempts to influence the decision to award the bid in its favour by paying USD 100,000 to a high-ranking person in the city administration. This action becomes public. From company headquarters in Switzerland, you respond to questions from the media by saying that a code of conduct is in force in all parts of your company that declares «all forms of corruption are unacceptable». If the subsidiary in Country X has nevertheless offered a bribe, this has been done without the knowledge or instruction of headquarters. The Swiss parent company therefore maintains that it cannot be accused of having acted unlawfully. Is this sufficient?

Companies are responsible for taking «all required and reasonable organisational precautions» to prevent the corruption of public officials or private persons «in the company» (Article 102 StGB). Up to the time of printing this brochure, what this means has not been detailed by Swiss courts. A section alone in the company's internal code of conduct, according to which no form of corruption is tolerated, will likely not be sufficient. In a case such as this, the question of whether the criminal liability extends to the foreign subsidiary of a Swiss company has to be judged on the specific facts and circumstances.

9

Would the legal situation be judged differently if your subsidiary in Country X had not bribed an official of the city's government in connection with a public purchase, but rather the purchasing agent of a company in the private sector?

Bribery in the private sector abroad is also a criminal offence in Switzerland. The company's liability likewise falls under Article 102 StGB. However, in Switzerland a complaint must be lodged in order to prosecute for bribery in the private sector. Such complaint could be lodged, for example, by the management of the purchasing company, which has discovered the corrupt conduct of its agent and wants to demonstrate that it is serious about combating corruption. For the rest, reference is made to what has been indicated above in scenario 8.

10

Your subsidiary in Country X participated in a proper way in the public bidding process mentioned above, and its offer was very well placed in comparison with others. Nevertheless, the city government favoured the less attractive offer of another company from Country Y. From documents that were leaked to you, it emerges that the bid was accepted as a result of bribery by your competitor. What can you do?

A formal appeal under the law of Country X against the awarding of the bid could be considered. In Country X, there may also be a credible reporting authority or anti-corruption agency to which reports about such incidents can be transmitted. When the corrupt conduct is punishable in Country X or in Country Y, a criminal complaint can be filed in either country. If none of these avenues seem reasonable or yield the intended result, you can address the Swiss diplomatic representation on site or SECO in Bern. The Swiss authorities may then contact the authorities of the country in question in a manner appropriate to the given circumstances.

«Don't allow yourself to be unpleasantly surprised!»

What can you actually do?

In advance

Corruption is one of the most challenging problems for many Swiss companies operating abroad. Depending on the sector or country, it is more or less likely that you or your competitors will be exposed to corruption. Don't allow yourself to be unpleasantly surprised! Especially as a member of management, but also as an employee, it is your responsibility to be adequately informed and to react appropriately. This is the only way for you to counter the risk of corruption effectively.

Inform yourself

Every anti-corruption strategy begins with information. Find out what corruption is about, where it arises and in what forms, what the risks are, and what you can do about it. Timely knowledge can keep you out of trouble.

In Switzerland

This brochure offers an introduction to the problem of bribery in international business transactions.

If you would like to know more about the efforts of the international community to combat corruption in international business transactions, the OECD Anti-corruption Convention, or about the Swiss federal law on unfair competition, please contact SECO. The Federal Office of Justice can provide you with information about the overall legal situation in Switzerland. More about the information and support that Swiss diplomatic representations abroad offer can be obtained from the Swiss Federal Department of Foreign Affairs.

The umbrella organisation for Swiss companies, *economiesuisse*, and the Swiss branch of the International Chamber of Commerce, ICC Switzerland, have long standing experience with regard to the problem of corruption. The leading international non-governmental organisation against corruption,

Transparency International, is also represented in Switzerland and can offer you further information as well.

The addresses of all these organisations can be found at the end of this brochure.

Part of your company's preparation should include getting a picture of local conditions and rules in the country where the business activities will take place. In addition to the information on countries provided on SECO's website, the relevant chambers of commerce may also offer assistance. For information on specific markets, the Osec Business Network Switzerland is another source of information. The addresses of chambers of commerce and further organisations in specific countries can be found in SECO's country information files.

Various other organisations, in particular the World Bank (www.doingbusiness.org), provide easily accessible practical information about business activities in foreign markets. Furthermore, the

Internet portal www.business-anti-corruption.com specifically offers information for companies with regard to the prevention of corruption in certain countries. Transparency International publishes an annual survey on the level of corruption in approximately 180 countries (www.transparency.org).

On site

Find out about the legal system and customs in the place where you wish to operate. The tasks of Swiss representations abroad (embassies, «Swiss Business Hubs», consulates, or offices of Swiss Development Cooperation) include monitoring developments on site and supporting Swiss businesses with information about local conditions and practices. If necessary, you will be referred to suitable advisors, for example, to a chamber of commerce or a trusted lawyer of the Swiss diplomatic representation.

Take appropriate measures

In certain markets and business sectors, it can be especially difficult to stay away from corrupt practices. It is therefore all the more important to recognize the risks in advance and to take appropriate precautions.

The form and range of measures against corruption can vary quite considerably. It will depend on how large your company is, how it is structured, and the countries and sectors in which it operates. For a smaller company, where all matters end up on the manager's desk, a far simpler set of policies will suffice than for a multinational enterprise with thousands of employees working in many different locations.

The following points should be taken into account in the development of an anti-corruption strategy. Various organisations offer specific suggestions in this respect, such as the International Chamber of Commerce's (ICC) Corporate Practices Manual, Transparency

International's Business Principles, and the Internet portal www.business-anti-corruption.com.

Organisational measures

- Ensure transparent business processes. Document and keep records of procedures and archive them.
- Ensure that every employee's competencies are clearly specified in his job description.
- Identify activities and jobs that are especially at risk in relation to corruption. By applying the principle of dual control and by requiring the counter-signature of commitments the risks can be reduced.
- Add an integrity clause to your contracts (e.g., order and employment contracts).
- Particular due diligence has to be applied for the selection and assignment of local agents.

Measures relating to staff and management

- Make your employees aware of the problems and consequences of corruption.
- Provide special training to employees who are particularly exposed. Job rotation can reduce the risk of corruption.
- Draw up and distribute a checklist compiling typical clues for corrupt activities.
- Set up a reporting mechanism (contact person, mailbox, etc.) that enables employees to report sources of problems or suspicions of corruption without taking the risk of reprisal and from which they can receive further information.
- Pay your employees appropriate salaries.

Supervisory measures

- The best intentions are of little use if they are not properly implemented and supervised. Check on compliance with directives as well as contractual and accounting provisions by conducting regular inspections and random tests.
- Test your employees' level of knowledge to identify areas of weakness.
- Evaluate problems that arise and any incidences of bribery in a systematic manner and make revisions where necessary. Compile a collection of examples for successful problem solving (best practices).

«For many Swiss companies operating abroad, corruption is a real problem.»

In specific cases

Information obtained in advance as well as preventive measures help you to make an informed assessment of the situation in an actual case. If need be, seek assistance. At the end of the day, as representative of your company, it is you that carries the responsibility.

Recognize the signs

Assist your staff with the help of a checklist to identify corruption problems in good time and to deal with them appropriately.

A checklist of warning signals

A checklist helps recognise corruption problems in one's own company, with a local partner or with a foreign authority at an early stage. If one or more signs crop up, employees should spot the risk and report the incident. Typical warning signals are:

Organisational procedures

- Inadequate administrative and supervisory resources
- Ill-defined competencies and responsibilities
- Poorly managed inventory

Operational procedures

- Irregularities or substantial delays in operational reports
- Significant and unsubstantiated deviations from operational plans
- Deficiencies in procurement processes

Financial procedures

- Non-transparent, poorly managed bookkeeping and irregularities in financial and audit reports
- Excessively high budget in relation to planned activities and unfounded changes of the budget or invoicing
- Unusual short- or long-term expenditures
- Excessive commissions

Personnel procedures

- Disregard of internal instructions
- Inappropriate salaries or commissions
- Lavish lifestyle, personal dependencies, and favouritism

Seek assistance

If your company's experience or resources are insufficient to handle a given case of corruption, ask for advice and support. Specifically, this may include consulting a lawyer, your trade association, or the relevant chamber of commerce. It can be advisable to contact the Swiss diplomatic representation in the case of corruptin committed by a competitor or when an improper request for payment is made by a foreign public official. Depending on the circumstances, the Swiss diplomatic representation will then intervene with the authorities of the respective State.

Assume your responsibility

In the end, no one can make the decision for you and your company operating abroad as to how you wish to respond to corruption. Face this responsibility with full awareness and alertness!

Code of conduct to combat corruption

Many internationally operating Swiss companies have already decided to introduce an anti-corruption code of conduct. Such a code has several advantages: Employees are confronted with the problems of corruption and their implicit consequences; they receive guidance on how to recognise corruption in good time and to fight it. Your company's business partners and clients as well as the general public perceive your company to be reliable and trustworthy.

Content

By adopting an anti-corruption code of conduct, a company undertakes to act with integrity. Normally, a code of conduct encompasses general principles, rules of conduct to prevent corruption from arising, and instructions on how to proceed in an actual case. More important than its length are its core messages, which can include the following:

- The stance of the company's management regarding corruption and the involvement and role of its employees.
- The basic principles of the company's relations to third parties (agents, clients, and suppliers).
- The company's mechanism through which corruption or suspected corruption can be reported.
- The definition of advantages that may be permitted (e.g., small gifts up to a certain value).
- The principles of handling conflicts of interest.
- The sanctions for disregarding the code of conduct.

An anti-corruption code can be part of the company's overall code of conduct or be drafted as a separate set of regulations in its own right.

Implementation

Even more important than the code of conduct is its implementation. Ensure that your employees and those who represent your company know the code and understand the company's anti-corruption policy. By signing a written agreement, your employees commit themselves to act in accordance with the code. Regular training, combined with the monitoring of practices and adaptations when necessary keeps the code up-to-date and effective.

«A company undertakes to act with integrity by adopting an anti-corruption code of conduct.»

Further information and contacts

The most recent version of this brochure can be found on the SECO website:
www.seco.admin.ch > Topics > Special Issues > Combating corruption

Legal texts

International treaties on corruption

- The OECD Convention of 1997 on Combating Bribery of Foreign Public Officials in International Business Transactions:
www.oecd.org (by topic > Governance > Fighting Corruption)
- The Council of Europe's Convention on Corruption (1999):
www.coe.int (Legal affairs > GRECO > Documents)
- The United Nations Convention against Corruption (2003):
www.unodc.org/unodc/en/treaties/CAC/index.html

Swiss law

- The Swiss Criminal Code (StGB)
 - Bribery, Articles 322^{ter} through 322^{octies}:
www.admin.ch/ch/d/sr/3/311.0.de.pdf (German)
 - Company liability, Article 102:
www.admin.ch/ch/d/sr/3/311.0.de.pdf (German)
- Federal Act against Unfair Competition (UWG):
www.admin.ch/ch/d/sr/2/241.de.pdf (German)

Contacts

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www.seco.admin.ch (Topics > Special Issues > Fight Against Corruption)

Further contacts at SECO:

- For questions in connection to the Federal Act against Unfair Competition:
Legal Department
www.seco.admin.ch (Topics > Special Issues > Unfair Competition)
- For country information:
www.seco.admin.ch (Topics > Foreign Trade > Information on countries)
- For economic cooperation and development:
www.seco.admin.ch (Topics > Foreign trade > Economic Cooperation and Development)

The Swiss Federal Office of Justice

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Further links mentioned in the brochure:

www.doingbusiness.org
www.business-anti-corruption.com

«Assume your responsibility with
full awareness and alertness!»