Criminal Code

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COMMENTARY ON

Art. 28 SCC

A commentary by Lorena Gisler

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6. Criminal liability of the media

Art. 28

1 If an offence is committed and completed through publication in a medium, then, subject to the following provisions, only the author shall be liable to prosecution.

2 If the author cannot be identified or cannot be brought to court in Switzerland, then the editor responsible in accordance with Article 322bis shall be liable to prosecution. If there is no responsible editor, then the person responsible for publication in accordance with Article 322bis shall be liable for prosecution.

3 If the publication has taken place without the knowledge or against the will of the author, then the editor or, in the editor's absence, the person responsible for publication shall be liable to prosecution as the offender.

[4] The accurate reporting of public talks and official communications from a public authority may not be made subject to prosecution.

CONTENT

I. PURPOSE OF ART. 28 OF THE SCC

1 The special provision on media criminal law in Art. 28 of the SCC reflects the high importance of the **fundamental rights to communication** guaranteed by the Constitution, in particular freedom of expression and freedom of the press.

2 Under the **freedom of expression** enshrined in Art. 16, para. 1 and 2 of the FC, every person has the right to form their opinion freely and to express and disseminate it without hindrance. Freedom of the media is also one of the central aspects of freedom of expression.

3 **Freedom of the press** under Art. 17 para. 1 of the FC guarantees the unimpeded flow of information and serves to protect the free exchange of views. This encompasses not only investigative reporting but also the provision and dissemination of information and opinions to an indefinite number of recipients. The associated **freedom of media production** is, as a "fundamental social resource," a structural prerequisite for a democratic constitutional state.

4 As a source of information, the media serve as a link between the state and the public. In their **watchdog role**, they should be able to uncover abuses within the state and society without hindrance and contribute to the oversight of official activities. Furthermore, public discourse is to be ensured through freedom of expression and the associated diversity of publications.

5 This constitutional framework leads to the understanding that the media, as **vehicles of public criticism and oversight**, require a specific legal framework. Through the **cascading liability** in Art. 28 of the SCC and the associated focus on a primarily responsible person, the risk of criminal liability for those involved in the production and dissemination of media products is specifically reduced. This modification or limitation of the rules on perpetration and participation prevents a "chain reaction" of criminal liability across all stages of media production and distribution and strikes a balance between media freedom and the need for criminal sanctions.

6 Since it is often not possible to reliably determine in cases of media offenses whether and to what extent a person has contributed to the criminal publication, it is also necessary from a **criminal procedural perspective** to ensure

that criminal prosecution focuses primarily on a single person in order to prevent cumbersome and complicated proceedings to establish liability.

Without mandatory and exhaustive cascading liability, there would be a risk that participation in the dissemination of new, potentially controversial ideas would be restricted or even suppressed. This would deprive the media of their foundation as an institution of the democratic public sphere and their function as a watchdog of society. Art. 28 SCC therefore serves to **avoid repressive deterrent effects** and to protect freedom of expression and freedom of the press. 7

The purpose outlined above raises the question of whether the special provision developed for traditional media is—or should be—transferable to **social media**. Given the general accessibility of publishing opportunities on the internet and the changed media landscape, granting special treatment under Art. 28 of the SCC appears questionable and requires further research. 8

II. EXCLUSIVE CRIMINAL LIABILITY OF THE AUTHOR (PARA. 1)

A. Definition of "Media"

Art. 28 SCC requires the commission of a criminal act "through publication in a medium." Applicability is thus linked to the **use of a medium**. 9

1. Understanding of the Term in the Context of Traditional Media Structures

The term "printing press," which was central to the development of the provision, encompassed all products that could be **reproduced** in unlimited quantities by means of a mechanical process, such as brochures or posters. 10

In the 1996 revision of media criminal law, the legislature based its approach on a "comprehensive media perspective," adopting a broad and flexible understanding of the term "media" in order to account for rapid technological developments. It thereby envisaged an expansion of the scope of application to all means capable of being used for communication and thus "to all media." However, it refrained from providing a normative definition of the term. This 11 results in an **open** and **dynamic understanding of the term**, the concrete interpretation of which is left to legal doctrine and case law.

12 The majority of current legal doctrine as well as case law is based on a **functional concept of media**, which is not limited to mass media but encompasses all physical and electronic means that can be used for communication. In addition to traditional **communication vehicles**, such as newspapers, magazines, or radio, the Federal Supreme Court also considers electronic **means of communication,** such as video, teletext, or videotext, to be media. Periodicity is not a prerequisite, so that one-off or irregular media products are also covered, in particular publications in books or motion pictures. Likewise, it is irrelevant whether reproduction takes place within an organized business or outside of it.

2. Understanding of the Term in the Context of Social Media

13 The emergence of social media raises the question of whether these also fall within the scope of Art. 28 of the SCC. Based on a **broad understanding of the term**, the overwhelming majority of legal scholars assume that social media falls under the definition of a medium. However, critical voices are also being raised, calling for a restriction to commercially organized media companies or arguing that social media such as Facebook or Twitter do not, in principle, qualify as a medium within the meaning of Art. 28 of the SCC.

14 Social media is a **collective term** for a variety of digital, networked infrastructures and technologies that enable the online creation, editing, and publication of content, facilitate access to and dissemination of information, and support active participation and relationship-building among people. Social media takes various forms. In addition to social networks, microblogs, newsgroups, instant messaging services, and audiovisual media sites, hybrid forms are also possible.

15 This understanding of the term makes it clear that classifying social media as an umbrella category does not in itself allow for a direct conclusion as to whether, in a specific individual case, a media product relevant under media criminal law exists in a medium covered by Art. 28 SCC. The Federal Supreme Court emphasizes that the broad definition of “media” **does not** mean that social media must **automatically be classified as a medium**. It qualifies the independent requirement of the medium by basing the applicability of Art. 28

SCC in individual cases on whether "the media product is made available to the public." The scope of application thus shifts from the mere concept of a medium to the requirement of actual public accessibility.

To prevent this shift, the classification as a medium must be contingent on 16
whether a medium **can make** intellectual or visual content *accessible* to a larger group of persons not personally connected to one another and is therefore *suitable* **for public dissemination**. The requirement of publication, on the other hand, encompasses the concrete use of the medium and must be examined as a separate prerequisite.

B. Publication

1. Requirement of Public Access

The criminal act must be committed through publication. Publication occurs 17
when content is put into circulation and is thereby **removed** from the author's **sphere of control or influence**, as a result of which the author can no longer control the recipients' access to it.

The content must therefore be **publicly accessible** so that it can be per- 18
ceived by an indefinite number of people or a larger group of individuals who are not connected by personal relationships. Consequently, content that remains within a private sphere—where the private sphere is characterized by family and friends or a special relationship of trust—is not considered published. This includes, in particular, communication between individuals via email or text message. This requirement of public accessibility distinguishes the scope of application from direct communication, which does not fall under Art. 28 SCC.

Content is also considered published if it is made accessible to a limited group 19
of recipients, provided that it can in principle be **noticed by any interested person** within that group. This is the case, for example, when a brochure with a print run of two hundred copies is distributed in a municipality.

Actual awareness of the content is **not required**. The time-limited nature 20
of accessibility does not negate the publication. Even if content is later recalled or removed, it is considered published.

21 For **press publications**, the start of delivery—for example, by handing them over to the post office—is decisive for publication. For **electronic media**, the requirement of public accessibility is met not only on websites but also in communications in newsgroups, via apps, or through distribution via mailing lists, provided these are directed at a broad audience.

22 In the case of **social media platforms**, it is generally assumed that they are directed at the public. An exception applies if the author deliberately makes a post accessible only to a limited group of people through individual settings. Communications disseminated in closed, personally connected communication circles therefore do not fall within the scope of Art. 28 SCC. A post may therefore be considered a publication in a medium if it is directed at a **larger, non-personally connected group of people**. To date, posts on the world's largest social network, "Facebook," as well as on the microblogging platform "Twitter," have been explicitly classified as publications in a medium.

2. Limitation to media-specific involvement

23 A publication may require not only the **production** but also the **distribution** of a media product. The number of people potentially involved in this process can be large, as they do not necessarily have to be part of a media company.

24 To limit the applicability of Art. 28 SCC, **media-specific involvement** in the production or distribution of the media product is required. Anyone who participates in a publication within the typical production and distribution chain may invoke the exclusive criminal liability of the author. In the case of involvement outside this chain, the media-specific connection is absent and thus the liability privilege does not apply. In such a case, criminal liability for the media offense in question is considered under the general rules on perpetration and participation, since invoking cascade liability under Art. 28 of the SCC is excluded.

25 It must be examined on a **case-by-case basis** what constitutes media-specific involvement. This raises the central question—the answer to which varies depending on the medium—of when a publication is considered complete, since at that point the possibility of further media-specific involvement ceases. As long as the publication process can still be halted and thus influence or control over the content can be exercised, the act is not complete. Only when the

statement is visible and perceptible to third parties is the publication considered complete.

The difficulties in applying the criterion of media-specific participation are particularly evident in the case of **social media**. The Federal Supreme Court most recently addressed this issue in a decision concerning Facebook, without explicitly setting out the typical chain of production and dissemination. 26

While **retweets** (Platform X, formerly Twitter) are still considered part of the media-typical dissemination due to their technical design, a **repost accompanied by one's own comment** on Facebook is regarded as an independent publication and thus no longer falls within the scope of Art. 28 of the SCC. In its reasoning, the Federal Supreme Court states that the original post is removed from the control of the original author by the shared and commented-on post. However, a repost accompanied by one's own comment may, in exceptional cases, be considered media-specific participation if its content—similar to a quotation—engages with the original post and the intent of the repost is not merely to disseminate the criminal statement but to facilitate a platform-specific discussion of the post. 27

Other forms of dissemination, such as **"liking,"** are not covered by the media-specific production and dissemination chain. The **setting of a hyperlink** is only part of the typical production and dissemination chain in exceptional cases, as the person setting the link is rarely directly involved in the publication process. As a rule, a link merely refers to content that has already been published. 28

C. Exhaustion in Publication

The criminal act must be exhausted in the publication. The scope of application is therefore limited to **media offenses**. This refers to offenses whose completion is exhausted **in the criminal publication**. This requirement is fulfilled in particular in the case of activity offenses based on a criminal expression of thought. Offenses whose completion requires a result going beyond publication are therefore excluded. 29

Offenses involving the expression of thoughts satisfy the requirement that the criminal conduct be realized exclusively through publication. 30

The classic examples are defamation offenses under Art. 173 et seq. SCC. Art. 162 SCC (breach of trade or business secrets), Art. 259 SCC (public incitement to commit a crime or to engage in violence), Art. 276 SCC (incitement and instigation to breach military duties), Art. 293 SCC (disclosure of officially confidential proceedings), Art. 320 et seq. SCC (breach of official and professional secrets), and Art. 3 in conjunction with Art. 23 UWG (unfair competition).

31 Offenses whose commission requires **active participation** or whose outcome depends on a psychological **effect on the victim** are excluded from the scope of application of Art. 28 SCC, because the offense is not committed merely by the publication of the content. Art. 28 SCC therefore **does not apply** to Art. 146 SCC (fraud), Art. 156 SCC (extortion), Art. 180 SCC (threats), Art. 181 SCC (coercion), and Art. 258 SCC (intimidation of the public). The applicability of Art. 28 SCC to the provisions of the URG (copyright infringements) is controversial.

32 The Federal Supreme Court has further ruled that **Art. 28 SCC applies only if** its application **does not contradict the purpose** pursued by the legislature in sanctioning the underlying principal offense. This restriction is justified on the grounds that a criminal provision specifically aimed at preventing the publication of certain statements or depictions—and thus illegal content—would be undermined in its legislative purpose by a judgment against the responsible parties under Art. 28 SCC. Based on this prerequisite, the application of Art. 28 SCC is specifically excluded in relation to Art. 135 SCC (depictions of violence), Art. 197(4) SCC (hardcore pornography), and Art. 261bis(4) SCC (discrimination and incitement to hatred).

33 This restriction of the scope of application introduced by the Federal Supreme Court contrary to the wording is **criticized** in **prevailing legal doctrine,** as it largely undermines media criminal law. To ensure legal certainty, it is demanded, among other things, that the legislature enshrine an exhaustive list of media offenses in law.

D. On the Criminal Liability of the Author

34 If the requirements of Art. 28(1) SCC are met, **only the author** is liable—subject to para. 2 through 4. This follows from the fact that both control over the content and the decision-making authority regarding publication rest with the

author, provided the publication did not occur without the author's consent (see Art. 28(3) SCC).

The exclusive criminal liability of the author grants immunity to all persons, with the exception of the author, who have **contributed to the media product in a media-specific capacity**. They are subject to cascading liability and —contrary to the general doctrine of perpetration and participation—remain exempt from punishment or can only be held liable on a subsidiary basis. 35

An author is defined as the person who **determines** the **content** of the media product and **gives it its external form**. This requirement is also deemed fulfilled if the content is incorporated into a new document or published online as part of a website. In this sense, bloggers and authors of letters to the editor or columns may also be classified as authors. The status of author is also fulfilled by anyone who has the content **written by a third party** or **presents themselves as the author** and assumes responsibility. 36

The translator is not considered an author, as they do not independently shape the intellectual content, provided they make no changes to the content and the translation contains no errors that alter the meaning. Nor is someone who reposts an agency report with a source citation considered an author. Nor is the operator of an Internet discussion forum considered an author, since they do not shape the content themselves and do not contribute to the intellectual content of the posts. 37

If a criminal offense has been committed jointly by several authors, all authors may be held criminally liable as perpetrators in accordance with the principles of joint criminal liability. 38

Unlike criminal law, **civil law** contains no provision limiting liability exclusively to the author. The injured party therefore has recourse to civil law under Art. 28 para. 1 of the CC, according to which action may be taken against any person who contributed to the violation of personality rights. 39

III. TWO-TIERED SUBSIDIARY LIABILITY (PARA. 2)

Art. 28(2) of the SCC **limits the circle of potentially liable parties** to a tiered series of subsidiarily liable persons. Under Art. 322(1) SCC, media companies are obligated to disclose the identity of the persons liable under Art. 28(2) or (3) SCC. Some legal scholars conclude from this that only those who 40 work within the media company in question can be considered subsidiarily liable. The Federal Supreme Court, however, extends this cascading liability to persons who do not belong to a media company.

41 Those with subsidiary liability are not punishable for the media offense itself, but—in accordance with the principle of fault—exclusively under Art. 322bis SCC for the genuine omission offense of **intentionally or negligently failing to prevent a punishable publication**. This procedure is initiated ex officio if the author cannot be identified or brought to trial in Switzerland.

42 The **failure to prevent a publication** is established if a publication was not stopped despite the existing possibility of doing so. However, there is no duty to intervene against publications that have already taken place, as the offense has already been completed at that point. Participation in the offense is therefore no longer possible, thereby also precluding the application of cascading liability under Art. 28 of the SCC.

43 If the **media offense committed by the author is a complaint-based offense**, subsidiary liability under Art. 322bis para. 3 SCC applies only if a criminal complaint was filed against the (un)known author within the prescribed time limit.

A. Level 1: Liability of the Responsible Editor

44 If the **author cannot be identified** or **cannot be brought to trial** in Switzerland, the responsible editor is subsidiarily liable in his or her place.

45 The responsible editor is the person who holds both **responsibility for the content** and **actual decision-making authority** over the content intended for publication. The publication must fall within their area of responsibility, whereby it is decisive that they have the actual ability to revise the content editorially. The subsidiary liability of the responsible editor extends exclusively to publications of the media company for which they work.

46 According to Art. 322 para. 2 of the SCC, newspapers and magazines must name a responsible editor in the **imprint**. However, this person need not necessarily be the same as the individual named in the imprint. Rather, what is decisive is who actually had the ability to modify the content relevant under criminal law or to refrain from publishing it.

B. Level 2: Liability of the Person Responsible for the Publication

1. Publication in General

If there is no responsible editor—which is particularly the case outside of media companies—the **person responsible** for the publication becomes liable under Art. 322bis of the SCC. 47

For a person to be considered responsible, they must have been involved in the decision to publish, either in terms of content or from a business perspective. This also includes anyone who has a media-specific **duty to monitor** and has the actual **ability** to **prevent publication**. 48

2. Publication on the Internet

In the case of publication on the Internet, **several actors** are typically involved who may be considered responsible persons. This multiple involvement complicates the attribution of criminal liability and raises the question of whether Internet providers within the meaning of Art. 28 para. 2 SCC can also be held subsidiarily liable. Previous Federal Supreme Court case law leaves this question unanswered. 49

Unlike media companies that produce their own content, **Internet providers** primarily provide technical infrastructure for publications. They can be broadly distinguished as follows: 50

- Content providers: offer their own content or information obtained from third parties.
- Access providers: ensure access to the web and other Internet services.
- Host providers: provide content providers with storage space and server infrastructure on their web servers on a contractual basis.

Whether these actors can be classified as persons responsible for publication is controversial and depends on their **influence** on the content as well as their **power to prevent publication**. Since providers are mostly legal entities, the further question arises as to which criteria should be used to identify the responsible natural person. 51

52 There is consensus regarding **content providers**. They create content and thus make editorial decisions. It makes no difference for liability whether a statement appears in traditional media or on a website. Content providers are therefore considered **persons with subsidiary liability**.

53 In contrast, complex questions arise regarding **access and host providers**. It is disputed whether these are or should be covered by cascading liability. If one assumes that Art. 322bis of the SCC links liability to affiliation with a media company, only persons who are active within such a company in a manner typical of the media are covered. This has the consequence that Internet providers generally do not fall within the scope of cascade liability, unless they simultaneously perform functions typical of the media. However, the legislative message and a report by the Federal Office of Justice have generally affirmed the classification of access and host providers as persons with subsidiary liability under para. 2 of Art. 28 of the SCC. Legal scholarship, on the other hand, largely rejects this and rightly considers access and host providers to be outside the scope of application.

54 **Access providers** provide only technical access to the Internet and enable users to access content that has already been published, without themselves exerting any influence over it.

55 The Federal Office of Justice justifies subsidiary liability on the grounds that access providers are an "indispensable link in the chain" for delivering content created by the author to the end user. At the same time, it limits liability: Access providers are only considered subsidiarily liable if they have acquired **concrete and reliable knowledge** of the existence of specific tortious content and have subsequently intentionally failed to remove it. However, this argument fails to recognize that, pursuant to Art. 322bis, para. 1 of the SCC, negligent omission is also punishable, which presupposes a breach of a duty of care. There is no obligation to conduct comprehensive (prior) monitoring or surveillance of content, and such an obligation should be rejected. In the absence of a specific legal basis, the Federal Office of Justice derives the required duty of care in a rather unconvincing manner from the **general principle of risk**, arguing that media pose a particular risk and that criminally relevant content would not reach users without the access provider. It is clear from the purported justification for limiting liability that access providers would, in nearly all cases, be deemed subsidiarily liable on the basis of negligent conduct. This must be rejected.

Subsidiary liability presupposes that realistic possibilities exist to **control content** and **prevent** its **publication.** However, this is precisely not the case with access providers. The provision of access serves the users alone and does not give rise to any liability for the published content. Access providers engage in **neither editorial activities** nor do they have active filtering mechanisms. Given the enormous volume of data, **the possibility of control is effectively ruled out**. They therefore lack the ability to monitor content or prevent its publication. Technically, they can only interrupt access. Furthermore, there is generally no direct or contractual relationship with the author. Access providers are therefore **not** to be classified as **persons with subsidiary liability**. 56

Host providers operate the technical infrastructure and regularly perform automated content uploads. In this process, data from the content provider is stored on the host provider's server. 57

In the opinion of the Federal Office of Justice, host providers are functionally **closest** to the **author** in the transmission chain between author and user. Due to their contractual relationship with the author, they could reserve supervisory rights over the content they transmit. Consequently, they would be in a position to take the necessary blocking measures if required. Under these circumstances, it appears appropriate to classify hosting providers as persons with subsidiary liability. 58

Hosting providers are **not involved in a supervisory capacity** in the publication process and do **not perform any editorial activities**. Although they have the technical means to prevent publication through blocking measures, there is no monitoring obligation, as there is no duty to prevent future infringements. The activities of hosting providers are limited to the provision of storage space and the automated publication of information. No liability for the content arises from this. Hosting providers are therefore **not** to be classified as **persons with subsidiary liability**. 59

Due to existing ambiguities regarding the scope of application of Art. 28 of the SCC and Art. 322^{bis} SCC, the Federal Council commissioned an expert commission in 2004, in response to a motion, to draft a revision bill. In the course of this work, a liability rule for providers was proposed that was clearly distinguished from the scope of application of Art. 28 SCC. However, Parliament **chose not** to **introduce such a provision**, as "appropriate solutions are pos- 60 sible on the basis of media criminal law (...) and the general principles regarding perpetration and participation (...)".

61 Specific liability issues also arise in the operation of **social media platforms**. Platform operators design the communication environment and determine the possibilities for communication and the dissemination of content. The Federal Supreme Court has, however, rejected a general, permanent monitoring obligation for online discussion forums. Nevertheless, it is conceivable that platform operators may be obligated under certain circumstances to monitor and prevent unlawful content. This is particularly likely when a legal violation is foreseeable given the circumstances, such as in the case of repeated violations by a user. Whether and under what conditions social media platform operators can be held liable on a subsidiary basis thus remains open and must be assessed on a case-by-case basis depending on the context.

IV. PUBLICATION WITHOUT THE AUTHOR'S CONSENT (PARA. 3)

62 If a publication occurs without the author's knowledge or against their will, the **responsible editor** and, on a subsidiary basis, the **person responsible for the publication** are liable to prosecution. The author, on the other hand, remains exempt from punishment, as he or she contributed to the commission of the offense without intent.

63 In contrast to Art. 28 para. 2 SCC, which derives criminal liability from an omission within the meaning of Art. 322bis SCC, the perpetrator is attributed **active participation** in the case of publication without the author's consent. The editor and, subsidiarily, the person responsible are therefore considered perpetrators of the media offense, thereby precluding the application of Art. 322bis SCC. This interpretation, based on the wording of Art. 28 para. 3 SCC, is viewed by the majority of legal scholars as a legislative oversight.

A. Publication without Knowledge

64 Publication without the author's knowledge occurs when the author **lacks any knowledge** of the publication in the relevant medium. Mere ignorance of individual details, however, is insufficient. The author's lack of knowledge may also pertain to **subsequent editorial interventions**, provided these

substantially alter the meaning of the content and do not merely involve abridgments or stylistic changes to the text.

B. Publication Against the Author's Will

Publication against the author's will is presumed to have occurred if the author has **expressly** or **impliedly** expressed his or her objection to the publication. Publication also occurs against the author's will in cases where there are misunderstandings regarding agreements that have been made. If a draft is published before the author has been able to carry out the agreed-upon review or revision, this is to be classified as **conduct contrary to the agreement** and thus as publication against the author's will or without the author's knowledge. 65

V. IMMUNITY FROM PROSECUTION FOR TRUTHFUL REPORTING (PARA. 4)

A. Basis for Immunity

The justification of truthful reporting on public proceedings and official communications underscores the effort to protect media freedom under Art. 17 of the FC. In the interest of **public opinion-forming** and to promote democratic discussion, the media must have the authority to report on the activities of public authorities. This exemption from criminal liability fulfills a **democratic protective function** by ensuring the openness of the public flow of information and free discourse, thereby safeguarding public oversight of state power. 66

B. Definition of Public Authority

Public authorities include all bodies legally vested with **official powers**. The authorities covered are not limited to legislative bodies but extend to all bodies that exercise state functions with sovereign authority. These include, in particular, the constitutional bodies of the Confederation and the cantons, courts, municipal councils, municipal assemblies, Landsgemeinden, and synods. Foreign authorities are also covered. 67

Due to the link to official powers, **private individuals acting in an official capacity** without their own decision-making authority—such as persons 68 bound by official secrecy or, at the federal level, all federal bodies subject to the Data Protection Act—are also to be classified as authorities. Examples include the SBB or the SUVA.

69 The application of non-punishable reporting to **judicial authorities** carries the risk that confidential information will become public. Since there is often no comprehensive duty of truth in the relevant proceedings and parties with different procedural roles are involved, there is a significant risk of false statements and the impairment of the rights of parties to the proceedings or third parties.

C. Truthful Reporting

70 Reporting is deemed to exist if it is **recognizable** to the public that the reproduced content either **was uttered in a public hearing** or **originates from an official communication**. Audio and video recordings also fall under the concept of reporting. However, immunity from criminal liability within the meaning of Art. 28 para. 4 SCC applies only if the recording is permissible under the law.

71 If the public hearing or official communication is not itself the subject of the media report, but is merely used as a **supplementary argument** in a report about a person or another matter, **no reporting** has taken place. This distinction forms the basis for the requirement of truthfulness.

72 A report is truthful provided that the statements contained therein are reproduced correctly either **verbally** or **in substance**. A substantive review of the accuracy of the content is not required.

73 **A complete reproduction is not required** for truthfulness. What is decisive is that the reporting conveys an accurate impression of the content to the reader. The omission of individual statements does not in itself constitute a violation of truthfulness. In particular, in reporting on public hearings, both abridged accounts and a focus on aspects other than the charges are common and do not in themselves constitute a lack of truthfulness. However, reporting on pending criminal proceedings must strictly take into account the presumption of innocence. It must be sufficiently clear that the facts presented have not yet been proven and must still be definitively established by the court. This can be expressed, for example, through phrases such as “according to the prosecution” or “as per the indictment.”

Truthful reporting also includes **commentary and criticism**. As an expression of opinion, criticism serves the purpose of social quality assurance and is therefore also covered by the privilege of immunity from prosecution. Since the truthfulness of commentary and value judgments cannot be proven, their admissibility is assessed based on whether they are grounded in a sufficient factual basis and appear reasonable in that context. 74

Only **biased distortions** that do not convey an overall picture corresponding to reality constitute unlawful reporting. The degree of care required for truthful reporting, as well as the scope of the journalistic presentation, depend on the specific characteristics of the respective medium and the expectations of the audience. Against this backdrop, even sensationalized presentations with eye-catching headlines and images may be permissible. It is impermissible, however, to present unspoken statements as alleged verbatim quotations using quotation marks. **Excessive value judgments** are **impermissible**, as they contradict the intent and purpose of Art. 28 para. 4 of the SCC, which aims to describe events that, in theory, any person in the courtroom could perceive with their "own eyes and ears" or read in official communications. 75

D. Public Proceedings

The immunity from prosecution regarding the reporting of a proceeding is based on its public nature. It is therefore granted only if a proceeding is accessible to a **potentially unlimited general public**. This also includes meetings of public authorities, even if they are accessible only to a limited portion of the public, provided they are not subject to a duty of confidentiality. A hearing is also considered public even if individual persons are excluded from it for specific reasons. A public meeting that is generally open to all therefore does not lose its public character merely because a single person is subsequently removed. 76

Even in the absence of a general public, the privilege of truthful reporting remains in force provided that **accredited media representatives** are admitted to the proceedings pursuant to para. 70(3) of the CrimPC and **no** statutory **reporting ban** exists. Conversely, this implies that reporting on secret proceedings is not covered by immunity from prosecution (see Art. 293 SCC). 77

E. Official Communications

78 Communications encompass all **oral** and **written forms** of official communication, including official statements, speeches, and reports, as well as those via social media. However, only communications that are official are covered by the exemption from criminal liability.

79 The official nature of a communication is determined by the authorities' consistent, non-arbitrary information practices when publishing official facts and by the definitions contained in information and public access laws. The central

characteristic is therefore that a communication serves the fulfillment of a **public duty** incumbent upon the community. In particular, information regarding the private lives of public officials is thus excluded.

80 Immunity from criminal liability applies exclusively when official communications are made accessible to a potentially unlimited general public, for example through the publication of reports, studies, or expert opinions ex officio. Oral statements at **press conferences** that are directed at an unlimited (media) audience and can be transmitted to the general public are also covered. The question of whether **oral statements** and **interviews** are covered is controversial in legal scholarship, as they are not necessarily addressed to the public.

81 Documents made available upon **individual request** are also considered official communications, provided that a legal obligation or the principle of equality before the law requires the authorities to grant access.

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COMMENTARY ON

Art. 179quater SCC

A commentary by Marvin Stark

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Breach of secrecy or privacy through the use of an image-carrying device

Art. 179quater

Any person who observes with a recording device or records with an image-carrying device information from the secret domain of another or information which is not automatically accessible from the private domain of another,

any person who makes use of information or makes information known to a third party, which he knows or must assume has been produced as a result of an offence under paragraph 1 above,

any person who stores or allows a third party access to a recording that he knows or must assume has been made as the result of an offence under paragraph 1 above, shall be liable on complaint to a custodial sentence not exceeding three years or to a monetary penalty.

CONTENT

I. RELEVANCE

1 Article 179^{quater} SCC was enacted at a time when it had no practical relevance: in the first 20 years of the penal provision's application (1969–1989), only eight convictions were recorded. A provision that makes mere photographing (and even observing) of others a criminal offense was a legislative novelty in its time and the Federal Council was not aware of any other country with such a provision. In recent decades, however, there has been a **significant increase** in reports and convictions, which may be due in no small part to technical developments and the ubiquity of smartphones. The phenomenon of *image-based sexual abuse* – i.e. the creation and/or distribution of intimate images without the consent of the person depicted – is also regularly treated under this criminal offense.

II. PROTECTED LEGAL INTEREST

2 Art. 179^{quater} SCC protects the **private and secret spheres** from abuse by optical recording devices. The legal interest is based on the protection of privacy under Art. 13 FC, which is particularly enshrined in the protection of personality under civil law. Behind the legal interest stands the “conviction that individuals can only develop into personalities if they are guaranteed a free space from the community and the state, as well as from other individuals”. The legislative authority also spoke of the right of each person to behave differently in a place where they believe they will not be seen by anyone than they would in public. These spaces of retreat, or the events that take place there, are to be protected in particular from being made available to third parties in the form of (moving) images. The protection is independent of the specific content of life; it can also involve completely mundane facts. Contrary to its marginal title (violation of the secret and private sphere by recording devices), the offense is an abstract endangerment offense.

III. GENESIS AND HISTORICAL TELOS

3 Article 179^{quater} SCC was introduced by the Federal Act on the Strengthening of the Protection of Personal Privacy under Criminal Law of December 20, 1968. The penal provision entered into force on May 1, 1969, together with five other articles (Art. 179^{bis} to Art. $179^{septies}$ SCC). The federal law is based on

a postulate from July 1, 1966, which called for the protection of the *intimate* sphere from *eavesdropping* devices under criminal law. The legislative authority was particularly concerned with mini-spies, i.e. small devices for eavesdropping on other people's conversations. Art. 179^{quater} SCC, which makes observation and imaging by means of image recording devices a criminal offense, was an exception. Nevertheless, Art. 179^{quater} SCC must always be understood in the **systematic context** of the other provisions of the partial revision, in particular Art. 179bis SCC, to which – in the words of the legislators – it forms the "counterpart" and which is "in principle structured in the same way". Art. 179bis SCC makes it a criminal offense to eavesdrop on and record third-party, non-public conversations. The legislative authority has always aimed to penalize only those acts that are as serious as eavesdropping with a listening device.

The legislative authority has concentrated primarily on the intrusions of the 4
tabloid press, especially the risk of images being captured, copied and distributed by members of the press. The punishment of voyeuristic or curious persons was not considered. The fact that the offense was nevertheless extended to mere observation with recording devices (N. 12) served to avoid evidentiary difficulties.

In particular, the **question of the protected areas of life** or the object of the 5
offense (N. 15 et seq.) led to numerous discussions in the councils. The current wording of the law ("a fact from the secret domain of another or a fact from the private domain of another that is not readily accessible to everyone") is a compromise solution between the Council of States, which only wanted to protect the secret domain, and the National Council, which also wanted to cover the entire private domain. The additional wording that now restricts the private sphere ("not readily accessible to anyone") is misleadingly formulated and can be interpreted in different ways. The historical telos of the clause can be deduced from the legislative materials (on the application of the interpretation, see notes 24 ff.):

1. "not [...] *accessible* fact": According to the German legal text, it could be concluded that "not accessible" means that there is no (local) access to the fact, in particular that it cannot be entered. However, a precise interpretation of the term requires a comparison with the French and Italian versions of the law. These versions speak of a fact that cannot be perceived or observed: "un fait ne pouvant être perçu" and "un fatto, non osservabile". A

systematic look at Art. 179^{bis} SCC, to which Art. 179^{quater} SCC is the legislative counterpart for optical recording devices (N. 3), leads to the same result: Art. 179^{bis} SCC requires a non-public, third-party conversation. A conversation is non-public if the participants conduct it in the justified expectation that it cannot be overheard by the general public without technical aids. This applies in principle regardless of where the conversation takes place. Taking into account the above definition, the wording of Art. 179^{quater} SCC has the following historical telos: a fact is "not accessible" if the person concerned can have a reasonable expectation that it is not *open to inspection* by the general public. The legislative materials suggest that the legislators also assumed such an understanding of the wording. They regularly based their decisions on the visibility of the facts and the possibility for the person concerned to protect themselves from public view.

2. "not *every person* [...] accessible fact": The fact must not be accessible to everyone, i.e. not to the general public. With regard to the equivalent of Art. 179^{bis} SCC (N. 3), facts are generally accessible if they "can be perceived by a larger group of people not defined by personal relationships".

3. "not [...] *readily* accessible fact": with this formulation, the legislative authority means that the person committing the act must take "special precautions" to overcome the lack of visibility of the facts, whether it be through the "misuse of certain devices and instruments" or "by other sophisticated means" . If, on the other hand, a fact is already generally accessible, it is not enough for the recording to overcome only a moral hurdle.

6 The question of protected areas of life is regularly associated with the **civil law theory of spheres**. The theory originates from the law of personality and is based on the idea that legal personality can be divided into spheres that require different degrees of legal protection depending on their degree of sensitivity. The theory of spheres may have inspired the legislative body when it integrated the terms secret and private sphere into Article 179^{quater} SCC in 1968. In view of the protected legal interest (N. 2), however, it was never the intention to use the sphere theory to define the protected areas. The legislators have repeatedly stated that they do not want to transfer to criminal law the civil law doctrine according to which there is also a private sphere in public, which is characterized by the privacy of the specific content of life. Consequently, they decided to restrict the private sphere conceptually by means of an additional formulation. The addition of "a fact not readily accessible to

the general public" means that – in contrast to civil law – the focus is exclusively on the visibility of the fact (N. 5), regardless of the content of the expression in question (N. 2). This means that only an actual visual private sphere is protected, which is fundamentally independent of the location in which the life event takes place. The only thing that matters is that the person concerned has somehow protected the facts in question (the content of which is irrelevant) from the gaze of the general public. The distinction between the private and secret spheres has also been almost completely eliminated, since the criterion of the visibility of the facts (N. 5, N. 24 f.) and the criterion of the unknown nature of the facts (N. 19) usually overlap (for an exception, see N. 19).

IV. OBSERVING AND RECORDING (PARA. 1)

A. Objective elements

1. Persons liable

It is disputed whether only the actual **intruder** can be the person liable, i.e. someone who enters the protected area from outside (extraneus), or also someone who is in the protected area with the consent of the person concerned but without consent to carry out an act (intraneus). Corboz considers only the extraneous person to be punishable. Donatsch argues that persons who share the same private sphere do not enjoy any protection from each other. According to Trachsler, the intraneous person can also be considered a perpetrator in the secret area, provided that he or she acts *secretly*. Others consider both the extraneus and the intraneus to be possible perpetrators in all constellations. Case law has so far only marginally addressed the question of who can be a perpetrator. The Federal Supreme Court has ruled that in areas of properties that may be used equally by the residents without exclusive domestic authority, the parties do not enjoy protection of their private sphere among themselves. However, anyone who is a guest in the area of another person's home can also be held criminally liable as an intraneus, even if the recording is made openly. In a recent decision, the Zurich Higher Regional Court took the view that the intraneus can be a perpetrator if he *secretly* records other persons present in their own private home with domestic authority. 7

8 The question of whether Art. 179^{quater} SCC only covers intruders (extranei) or also persons who are already within the protected area (intranei) as perpetrators can be determined by an **interpretation of** the norm. A historical-systematic interpretation of Art. 179^{quater} SCC could initially suggest that the penal provision only covers intruders: The article is designed as an analogy to Art. 179bis SCC (N. 3), which punishes only extranei for eavesdropping and recording conversations. Intranei, on the other hand, are covered by Art. 179ter SCC, which carries a lower penalty. This distinction is based on the fact that the legislature considered the wrongdoing of intruders to be less serious than that of outsiders. It could be concluded from this that Art. 179^{quater} SCC also only covers the more serious wrongdoing of intruders. However, a look at the protected legal interest and the historical purpose of the norm casts doubt on this interpretation: the aim of the legislators was to guarantee the protected persons an area for free development and to punish the dragging out of facts from this area into the public sphere (N. 2). However, this free development is not only endangered by intruders, but also by persons of trust (intranei) if they make recordings without consent. Those who constantly have to fear being recorded by persons with whom they share private information cannot develop freely. The protected legal interest is therefore endangered regardless of whether the person committing the offense is an intraneus or an extraneus. The wording of Art. 179^{quater} SCC also supports this interpretation: unlike Art. 179bis SCC, it does not explicitly exclude Intranei, but allows both groups to be covered without further ado. The systematic distinction between SCC 179bis and SCC 179ter, which provides for a distinction between extranei and intranei in the case of the spoken word, cannot be readily applied to SCC 179^{quater}, since this offence concerns image recording devices and not the listening in on conversations. In summary, the historical-teleological interpretation suggests that Art. 179^{quater} SCC covers both extranei and intranei as perpetrators.

2. Offense

9 According to Art. 179^{quater} para. 1 SCC, a person commits this offense if they observe (b.) or record (c.) an object (N. 15 ff.) with a recording device (a.).

a. Recording devices

10 The means used is an **image recording device**, which is defined by prevailing doctrine and case law as a device capable of capturing (moving) images for the purpose of transmission, storage or reproduction. This definition proves

to be insufficient: it would also include deepfake software as an image recording device, for example. Deepfake programs capture images for transmission, storage or playback. However, they use existing images and/or videos to create a new work, but do not record themselves, and therefore cannot be understood as an *image recording* device. The definition must read as follows: An image recording device is a device that visually captures and records a real event in real time. The natural visual function of the human eye is replaced by the recording device. Recording devices include, in particular, cameras that may be part of another device, namely smartphone cameras, webcams, camera drones or smart glasses. Furthermore, photocopiers or scanners are recording devices. Finally, programs can also be recording devices. The Federal Supreme Court ruled that taking a screenshot of an e-mail constitutes an act under Art. 179^{quater}, para. 1 SCC. Screenshots display and store what can be seen on the screen. The program thus creates a visualized snapshot of a real situation. Location devices or programs (location services, radio pills, tracking devices, thermal detectors, etc.), on the other hand, are not recording devices, since locating a person is not the reproduction of a real event, but a graphical representation of a person's whereabouts.

Purely **observation devices** (e.g. binoculars, telescopes, periscopes, night vision devices, torches, diving goggles, one-way mirrors, hand mirrors) are not recording devices and are therefore not considered to be instruments. This restriction is difficult to understand in view of the criminal act of observing with a recording device (N. 12 f.). Whether facts are spied out with an observation device or with a recording device is irrelevant for the endangering of the legal interest: the private sphere protected by Art. 179^{quater} SCC (N. 2) is also compromised by the use of observation devices, since the person concerned can no longer behave as if they were unobserved. The legal interest is even more at risk if facts obtained from the protected area are evaluated or disseminated – behavior that, according to para. 2, is only punishable if a recording device is used, but not if an observation device is used (see N. 29 ff., N. 37). 11

b. Observing

The use of a recording device to observe the target of the offense (without making recordings) is already considered an offense. It is considered observing when the person actively perceives the target of the offense visually. In 12 this case, the recording device acts as a means by which the person commits the offense observes the facts in question. For example, anyone who gains access to another person's webcam or smartphone camera by hacking (so-called camfecting) can intrude on that person's protected area by observing if the camera is merely activated but the events are not recorded.

13 The intraneus, who is in the protected area of the person concerned with their consent (see N. 7 f.), has already seen the facts and can only endanger the legal interest of the person concerned if he records the facts on an image carrier without consent. The act of observation is therefore to be reduced teleologically to actual **intruders** or extranei.

c. Recording

14 In the second case, the recording device is used to store the subject matter on an analog or digital image carrier. The recording must **depict the** object of assault, i.e. make it visually visible. A video on which only blackness can be seen and voices and sounds of pleasure can be heard is therefore not subject to Art. 179^{quater} SCC. Recording is also punishable if an already existing image from the protected area is copied or displayed. It does not matter whether the recording is made secretly or openly. It is also possible that the recording device is operating automatically in the absence of the person committing the offense.

3. Object of the offense

15 The object of the offense of the provision is facts (a.) from the secret area of another (b.) or from the private area of another that is not readily accessible to everyone (c.). Which area is affected usually differs purely due to the dogmatic reasoning based on the restrictive additional formulation in the case of the private area (see N. 6).

16 The jurisprudence of the Federal Court goes too far in also recognizing the protection of the secret or private sphere of **deceased persons** until at least their burial.

a. Facts

17 The concept of **facts** is to be understood broadly: it includes all present or past events or circumstances related to the protected area of the person under

surveillance that take on any visually perceptible form and are amenable to proof. The proviso 'evidentiary' implies that qualification as a fact does not depend on the veracity of the event or circumstance.

b. Secret

In order for a fact to be classified as secret, it must, according to prevailing doctrine and jurisprudence, be a **secret** in the criminal law sense, which is characterized by three cumulative criteria: it is a matter of a state of affairs that is relatively unknown, that the secret holder wants to keep secret and in which the secret holder has a justified interest in keeping secret. In view of the unambiguous wording in all language versions and the general structure of the law, the link with the concept of secrecy seems fundamentally reasonable. However, this only applies as long as it remains in line with the protected legal interest, which seeks to protect safe havens from interference regardless of their content (N. 2). Since the legitimate interest in confidentiality is a question of content, namely whether unlawful acts or circumstances are also to be granted protection as a secret, this criterion must not be taken into account when considering whether a person has knowledge of a secret belonging to another. Nor must the intimacy of the fact in question play a role. Therefore, only the unknown nature of the fact and the intention to keep it secret must be taken into account. 18

A relative **unfamiliarity with** the fact exists if its content is known only to a few precisely defined persons. This criterion means that the qualification of a fact as belonging to the secret area depends in most cases solely on its perceptibility: as soon as a fact – however intimate it may be – can be perceived by an indefinite number of persons for any reason, it becomes known and is no longer a secret in the criminal law sense. It follows that, in principle, the only thing that ultimately matters when it comes to secrets – and protected privacy – is whether the facts can be seen (see N. 5, N. 24 f.). Accordingly, the distinction between the two areas is often of no significance. However, there are situations in which the distinction between the protected secret area and the protected private area is relevant: a fact that the person concerned must assume to be accessible to the general public – that is, a larger group of people not defined by personal relationships – (N. 24 f.), but which in the specific case is only perceived by a small, precisely defined group of people, belongs only to the secret area, but not to the private area. 19

20 The **will to secrecy** means “the announcement of those efforts [...] that aim to withdraw a fact from the perception and knowledge of others”. It can be expressed explicitly or implied. Certain information carriers are “by their nature intended for a limited circle” – e.g. diaries or letters – and in certain places one expects to be able to pursue an activity in secret – e.g. in toilets or cloakrooms. The intention of secrecy is regularly expressed or reinforced when the information carriers or places are closed. A piece of clothing can also represent a desire for secrecy with regard to what is hidden underneath.

c. Private sphere not readily accessible to everyone

21 Because the concept of **private domain** is too broad for a criminal law provision under civil law, it was conceptually restricted in the legislative process by the additional wording “not readily accessible to everyone”, which has led to an actual erosion of the concept (N. 6). The interpretation of the additional wording is controversial:

22 The **Federal Supreme Court** interprets the additional wording “not readily accessible to the general public” very broadly: in line with prevailing doctrine, it generally limits the protected area to the so-called private sphere in the narrow sense, i.e. to all rooms and locations that are secured against outside viewing and where “the facts in dispute can in fact only be perceived by close relatives without further ado”. However, it does expand on this area: facts are not accessible *without further ado* if they can only be perceived by overcoming “physical [...] or legal-moral obstacles”. It defines the latter as “an imaginary, i.e. physically non-appearing, boundary [...] that, according to the generally accepted customs and practices in this country, is not crossed without the consent of those affected”. According to this understanding, anyone who enters or remains in a “private area protected in accordance with the offence of trespassing in Art. 186 SCC” in order to commit an offence is liable to prosecution. However, this local boundary of trespassing does not necessarily have to be physically crossed: Since overcoming a “legal and moral obstacle” is enough, people are protected even in the non-enclosed area in front of this space. The offender thus crosses the psychological boundary of a decent average person if they observe others *in front of* their house with a recording device or record them on a data storage medium – this applies even if the person can be seen from a place accessible to the general public.

The Federal Supreme Court's interpretation is open to **criticism**: the Federal Supreme Court extends the scope of application of Art. 179^{quater} SCC by criteria that neither arise from the wording of the law nor correspond to the will of the legislature (N. 5). What happens in the unenclosed area in front of a house is generally visible and thus does not constitute an area protected by the legal interest. The two problematic criteria that lead to this interpretation need to be examined more closely: 23

1. The link to *trespassing*: The fact that the area protected by Art. 179^{quater} para. 1 SCC basically coincides with that of Art. 186 SCC was adopted by the Federal Supreme Court from Noll, who was the only one to take this view at the time. A consideration of the German wording of Art. 179^{quater} para. 1 SCC alone suggests a connection to trespassing: the term "accessible" implies that the area can be entered (N. 5). However, when considering the French and Italian language versions, the protected legal interest and the historical telos (N. 2, N. 5), it is striking that the link with SCC 186 is without any justification. The crime of trespass protects a person's domestic authority, i.e. the authority to decide who may enter one's own premises. The places where domiciliary rights apply are listed in Art. 186 SCC. Art. 179^{quater} SCC, on the other hand, protects a completely different legal interest, namely the secrecy and privacy of the home against misuse by optical recording devices (N. 2). In contrast to Article 186 SCC, Article 179^{quater} para. 1 SCC does not contain any list of protected areas. The scope of protection of Article 179^{quater} SCC is not limited to persons who have domestic authority. Rather, in principle, all persons who are in a place protected from view are entitled to protection under the provision (N. 5, N. 24 f.). Finally, the legislators did not mention trespassing anywhere either, although the offense was already part of the SCC at the time. Therefore, no direct relationship between the two offenses can be established.
2. The term *"legal and moral obstacle"*: the Federal Court adopted this demarcation criterion from Riklin, but failed to recognize the fact that the author used this term in the context of general remarks on the theory of spheres (N. 6) and with reference to the literature on private law. In the narrower criminal private sphere, he himself took the view that there must be physical protection against prying eyes. This corresponds to the historical telos, according to which it is not sufficient for the recording to over-

come only a moral hurdle if a fact is already generally visible (N. 5). Consequently, Riklin has also criticized the Federal Court's expansive interpretation. It now depends almost entirely on the moral conceptions of the judge to give the offense sufficiently clear contours. This is already evident in the practice of the Federal Supreme Court: for example, a journalist photographing a man on his doorstep was found to be recording in a protected private area, while an insurance investigator observing a woman vacuuming on her balcony was not found to be committing a crime. In the latter case, the court ruled that the images were “accessible without overcoming a physical or psychological barrier”. The obvious unequal treatment of the two rulings is taken even further *ad absurdum* by the reasoning that “no particularly personal scenes, but rather voluntarily performed everyday actions” were involved. In accordance with the protected legal interest (N. 2), the Federal Court otherwise correctly states: “It is not necessary for the observed or depicted behavior to be of a particularly personal nature [...]”.

24 The **true meaning** of the additional wording can be determined by a historical-systematic and at the same time teleological interpretation (see N. 5). Accordingly, a fact is deemed to be “not readily accessible to the general public” if the data subject can demonstrate *a well-founded expectation* that the fact in question is not accessible to the general public (N. 25 f.), without special efforts being required (N. 27). The term “general public” refers here to a larger group of people, not defined by personal relationships. Even when interpreted in line with the true meaning of the provision, there remains a gray area that must be filled by the moral judgment of the judge. However, this area is much smaller than it would be if the Federal Court's criteria were used to define it.

25 The reasonable expectation that a particular fact is not readily accessible to the general public arises when the person concerned has taken precautions to protect themselves from the gaze of a larger group of people not defined by personal relationships. Such a private space is usually created by a **physical barrier** between the fact in question and the general public, such as a hedge, a wall, window shutters, doors, curtains, drawers, a tent, an envelope or an item of clothing. By contrast, anyone who fails to protect themselves sufficiently from public view loses the legitimate expectation of not being seen by the general public. Facts that are generally accessible without restriction enjoy no protection. By contrast, what remains protected is what is only visible to a

group of people defined by personal relationships, such as from the neighboring house. Accordingly, something that can be seen from the public street, even through a leaky hedge or a window, is “readily accessible to everyone”. If there is an effective privacy screen in principle, but it has a gap (e.g. a keyhole) or is temporarily removed against the will of the person concerned, the justified expectation of not being seen by the general public remains.

Factors that impede visibility such as great distance, darkness or water do not in themselves provide effective visual protection that gives the person concerned a reasonable expectation of not being readily seen by the general public. Although these obstacles can be overcome by means of vision-enhancing functions in recording devices, widely available observation devices with the same functions exist and their use is not punishable (N. 11). Consequently, the person concerned cannot legitimately assume that the facts are not visible to the general public. They must expect that other people will use observation devices to make the facts visible. Therefore, in principle, additional physical privacy protection (N. 25) is required, which the person concerned must overcome (N. 27). However, there are exceptions in which the person concerned can legitimately assume that they will not be seen even without physical visual protection. An exception arises when the legitimate expectation in a specific case is particularly strong due to the circumstances – for example, the specific location and/or time of day. In such cases, it must be assessed whether an average person in the same situation would have had to expect to be seen by the general public. 26

The formulation “not readily” refers, in view of the history of the criminal provision, to **overcoming the lack of visibility** (N. 5). If the person committing the act is an extraneous person (N. 7 f.), they overcome the physical visual protection between the act in question and the general public (N. 25) through technical and/or physical efforts. In this case, a recording device (N. 10) is either hidden in the area protected from view, activated by hacking in the area protected from view (camfecting), positioned above or below the screen, or used after the screen has been forcibly removed or removed. If the affected person, despite the lack of physical visual cover due to visual obstructions, can legitimately assume that they will not be seen by the general public, the extraneus overcomes these obstacles by using the visual-enhancing functions of recording devices (N. 26). If the person committing the offense is an intraneus (N. 7 f.), it must first be determined whether he or she is in the protected 27 area of the person concerned with that person's consent, whereby this area is separated from the general public either by a physical screen or by qualified sight-obstructing factors. If this is the case, it is sufficient for the person to record the event (openly or secretly) (N. 14). Because the wrong in this case lies in the breach of trust (N. 8), no further technical and/or physical efforts are required.

B. Subjective element

28 The subjective element requires **(conditional) intent**. The person committing the offense must at least consider it possible and accept that the fact that he or she is observing or recording with a recording device is secret or not readily accessible to the general public.

V. SUBSEQUENT ACTS (PARAS. 2 AND 3)

29 Paras. 2 and 3 penalize follow-up actions that lead to the facts (para. 2) or recordings (para. 3) from the protected areas being used or reaching further persons. This creates a greater danger for the protected legal interest (N. 2) than in para. 1.

A. Objective elements

1. Circle of offenders

30 The subsequent acts mentioned in paragraphs 2 and 3 are **general offenses**. They can therefore be committed both by the persons who have obtained the facts or image recordings through an act according to paragraph 1 and by any other person. This interpretation may correspond to the intention of the legislative authority, but it leads to excessive results, since anyone who exploits or distributes publicly disseminated facts or image recordings that are based on a criminal offense according to para. 1 can be held criminally liable without restriction. Some scholars are of the opinion that criminal liability ceases as soon as a fact has become common knowledge, “since there is then no longer any need for punishment”. Others would like to base it on *praeter legem* whether the person concerned still has an interest worthy of protection in keeping the facts secret at the moment of exploitation.

2. Offense

The follow-up actions include various acts that affect different objects (see N. 36 f.). The exploitation and disclosure to a third party (para. 2) relate to facts, while the storage and making available to a third party (para. 3) relate to recordings. 31

a. Exploitation of facts (para. 2)

As the French legal text ("tire profit") makes clearer, "exploiting" means that the person uses the facts to his or her **own advantage**. The advantage does not have to be monetary. In order to fulfill the offense of exploiting according to para. 2, it would thus be sufficient if someone amuses themselves with the acquired fact or if it triggers some other positive feeling. Consequently, in the vast majority of cases of taking note of the fact, there would already be an evaluation. For the observing or recording person, the mere act of taking note usually coincides with the act of committing the offense according to para. 1 and constitutes a non-punishable post-facto offense. If the person committing the offense is different from the person who fulfilled para. 1, the term must be interpreted very restrictively. Simply being aware of the fact is not enough either. 32

b. Disclosure of facts to a third party (para. 2)

The second offense under Para. 2 is when the fact is passed on to a person who is neither the person nor the affected person, namely by telling them or sending them a text message. The offense is committed as soon as the third party has the opportunity to take note of the information passed on, for example from the moment they receive the letter, e-mail or message. 33

c. Storing recordings (para. 3)

Storing refers to image or video recordings that depict the protected areas. In this case, the recordings are on some physical object. The aim of this offense is to prevent the possibility of a person's secret or private area being endangered again. According to Legler, a certain duration of possession of the recordings is required for it to be considered storage. 34

d. Making recordings accessible to a third party (para. 3)

35 The recording is made accessible to a third party if it is shown, played or handed over or sent to that person in the original or as a copy.

3. Object

36 The object of the offense is facts (para. 2, for a definition see N. 17) or recordings (para. 3, for a definition see N. 10, N. 14) that can be traced back to a punishable act in accordance with para. 1. The offense must have been committed intentionally and without justification, but the person committing the offense does not have to have acted culpably. The recordings (para. 3) may be either digital or physical, and may also be copies.

37 The object of the offence has two **loopholes in the law** that are difficult to understand in view of the protected legal interest (N. 2): firstly, facts obtained by means of observation devices may be evaluated or disclosed to third parties without criminal consequences (N. 11). On the other hand, according to Art. 179^{quater}, para. 2 or 3 SCC, anyone who distributes images or facts from the secret or private sphere of another person without their consent is not liable to prosecution, provided that these were obtained with their consent. The gaps in the law can be explained by the history of the norm, which shows that the legislators were primarily concerned with interference by the tabloid press (N. 4). Today, however, these restrictions appear outdated, as interference by the press has become less significant, while law enforcement agencies are increasingly confronted with perpetrators who act out of voyeuristic or other harmful intentions and distribute their recordings online. In particular, the distribution of such content on the internet has fundamentally changed the threat situation – a development that could not have been foreseen by the legislative authorities. In response to the newly emerged problem, one of the gaps has at least been partially closed: since the introduction of Art. 197a SCC on July 1, 2024, the distribution of sexual content that was originally recorded with the consent of the person concerned is punishable.

B. Mental element

38 The mental element requires **(conditional) intent**. The phrase 'know or assume' means that the standard of proof required for intent is lower than usual. It is sufficient that the offender was aware of grounds for suspicion that should

have led them to believe that the facts or recordings were unlawful. It is difficult to say when such circumstances are present, especially in the area of (soft) pornography, where there are a large number of recordings whose secret creation is merely simulated. Furthermore, it must be taken into account that a person is often no longer able to recognize that a fact or recording has been obtained in a punishable manner if it has reached them via several intermediate carriers. In the follow-up actions according to para. 2, it is often not possible to recognize whether the facts were obtained illegally, since observation with observation devices is not a criminal offense, while observation with recording devices is punishable (N. 11 f.).

VI. JUSTIFICATIONS

The penal provision can be justified with the usual justifications. Consent is explicitly mentioned in the elements constituting the offense. It can be left open whether this is consent excluding the elements constituting the offense or a justification, since it is irrelevant for practical application. In addition, the justification of protecting legitimate interests is of practical importance. 39

The differentiation between extranei and intranei (see N. 7 f.) is of decisive importance for the assessment of whether or not **consent has been given**. In the case of extranei, there is generally no consent from the person concerned from the outset. However, the latter usually does not even notice the act, since the behavior is hidden or secret. An act according to para. 1 is often only noticed after a subsequent act according to para. 2 has already taken place. This also applies to hidden recordings of intranei. In the case of overt recordings of intranei, there will be justification in the form of (implied) consent in a large number of cases. However, this does not apply in all cases: especially in areas of life that are subject to a great deal of shame, those affected often react passively or even with tonic immobility to unexpected intrusions. In this case, they are not able to give consent. In addition, it is important to note what the consent refers to: consent that another person may see a fact does not also include consent that they may be photographed. Similarly, consent that a fact may be photographed does not also include consent that it may be video recorded. 40

The justification of **safeguarding legitimate interests** can serve as justification in cases of Art. 179quater SCC, since recordings from protected areas are regularly suitable for enforcing legitimate interests, in particular if they reveal 41 that someone is engaging in unlawful behavior. According to the case law of the Federal Supreme Court, the justification does not apply if a competent authority could have been contacted.

VII. COMPLAINT AND SANCTION

42 Art. 179^{quater} SCC is a complaint-dependent offence because "the injured party does not always have an interest in having files or dossiers created about his personal matters, or in them becoming even better known through [the] proceedings" . All persons whose protected secret or private sphere is affected are entitled to file a complaint. If the protected area affects several persons, each individual is entitled to file a criminal complaint. According to the case law of the Federal Supreme Court, the relatives of a deceased person whose secret or private sphere has been invaded are also entitled to file a complaint.

43 The law provides for a penalty of a misdemeanor (Art. 10 para. 2 SCC) of up to three years' imprisonment or a fine. The judge may also order the confiscation or deletion of the illegal recordings (Art. 69 SCC). The recording device must also be confiscated or destroyed if the conditions of Art. 179^{sexies} SCC are met. If a financial gain has been made as a result of the acts of exploitation under Art. 179^{quater} para. 2 SCC, this must be confiscated in accordance with Art. 70 SCC.

VIII. CONCURRENT OFFENSES

44 Anyone who observes and records facts from the protected area only fulfills Art. 179^{quater} para. 1 SCC once. In the event of multiple subsequent acts in accordance with para. 2 or 3, the offense is fulfilled anew each time. Real concurrence also exists between the acts punishable under Art. 179^{quater} para. 1 SCC and the subsequent offenses under para. 2 as well as the making available to third parties under para. 3. If the act of exploitation consists exclusively of taking note, it constitutes a co-punished subsequent offense in relation to para. 1 (see N. 32). Even the mere storage of data in accordance with para. 3 is, in relation to para. 1 and to the other elements of Art. 179^{quater} SCC, a subsequent offense that is punishable.

45 If, when a picture is taken in accordance with Art. 179^{quater} para. 1 SCC, a **non-public conversation** is also recorded in sound in accordance with Art. 179bis para. 1 SCC (**listening to and recording third-party conversations**)

or Art. 179ter para. 1 SCC (unauthorized recording of conversations) are recorded, the two offenses are in genuine competition with each other, since SCC Art. 179bis et seq. protect a different part of the secret and private sphere than SCC Art. 179quater, namely the impartiality of oral statements and the confidentiality of the conversation. The subsequent acts under para. 2 and 3 of Art. 179bis f. SCC are also in genuine competition with the subsequent offenses under Art. 179quater para. 2 and 3 SCC, in accordance with the above rules (N. 44).

Anyone who records facts from the protected area without the consent of the person concerned and passes these recordings on to third parties may also be guilty of the offence under Art. 197a SCC (**forwarding sexual content**), provided the recordings are of a sexual nature. In this case, there are three offences, all of which are in genuine competition with each other: Art. 179quater para. 1 SCC (recording), Art. 179quater para. 3 (making available to a third party), Art. 197a SCC. In the case of the latter article, depending on the extent of distribution, either para. 1 (forwarding to a third party) or para. 2 (making public) is fulfilled. 46

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COMMENTARY ON

Art. 197a SCC

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5. Unauthorised passing on of private sexual content

Art. 197*a*

[1] Any person who passes on private sexual content, in particular documents, sound or visual recordings, depictions or other items or performances, without the consent of the person recognisable therein, shall on complaint be liable to a custodial sentence not exceeding one year or to a monetary penalty.

[2] If the offender has published the content, a custodial sentence not exceeding three years or a monetary penalty shall be imposed.

CONTENT

I. BACKGROUND

A. Image-Based Sexual Abuse

1. Definition

According to the legislative materials, Article 197a of the SCC was created with the phenomenon of so-called "revenge porn" in mind. Originally, this term referred to a specific situation that occurs after the breakdown of a relationship: one person disseminates, without the other's consent, nude, sexting, or sex recordings that were consensually created during the relationship in order to expose the other person to ridicule and thus take revenge on them for implied misconduct. Over time, however, the term has developed into a kind of collective term that is also used to describe other, similar situations, such as when sexually explicit images are obtained through hacking, used for blackmail, or secretly recorded and distributed for voyeuristic purposes. It has also been adopted in numerous languages and is used internationally. The term is mainly used in media and political discourse; in academic debate, it is largely rejected due to its inaccuracy and problematic connotations. Both components of the term are critically questioned: the expression "revenge" is too narrow, as perpetrators often pursue other motives in practice, such as exercising power, enhancing their own social status, or financial interests. In addition, this term implies a reaction to the wrongdoing of the person concerned and thus shifts the focus to the perspective of the perpetrator rather than the harmful consequences for the victim. The term "pornography" is also inaccurate: it incorrectly describes the content disseminated in the context of this phenomenon as "pornographic," even though this is generally not the case in the legal sense of the term. Often, the images are simply nude photographs, but their publication can also cause considerable embarrassment. Furthermore, the term pornography has moral connotations and is potentially stigmatizing. Researchers therefore propose the term "image-based sexual abuse" to describe the phenomenon. This term is broader and describes the non-consensual production, recording, or distribution of sexualized (N. 4) images or videos, including altered or artificially generated media, as well as the threat of distributing such material. If the threat is linked to a specific demand – such as the release of further recordings, the performance of sexual acts, or the payment of money – this is referred to as *sextortion*. 1

2 Although the term "revenge pornography" was questioned critically in some quarters during the legislative process, it was accepted uncritically by most of those involved or conflated with the collective term "cyberbullying," i.e., "the systematic exposure of a person using electronic means of communication." The use of *cybermobbing* or *cyberbullying* in cases of *image-based sexual abuse* is rightly criticized, as terms such as *bullying* or *mobbing* are often associated with juvenile misconduct, which carries the risk of downplaying the seriousness of the behavior. This is problematic because the misuse of sexual content affects people of all ages and can have serious consequences, including suicide among those affected (N. 7). Another criticism is that the term conflates several complex issues and, in particular, assumes a mere context of exposure or defamation, thereby pushing the sexual dimension of such assaults into the background (see N. 4). This was also evident in the political debate, in which the specifically sexualized nature of such assaults was sometimes misunderstood and they were treated as mere defamation offenses (see N. 8, 10). Although image-based sexual abuse may be part of a cyberbullying constellation in individual cases, the phenomenon is neither limited to this nor can it be conceptually qualified as a mere subcategory of it, especially since it regularly occurs outside of adolescent bullying situations and represents a specific form of sexualized assault. In addition, the term *cyberbullying* excludes any actions that take place without digital tools (see N. 6).

2. Phenomenon

3 International study results suggest that the phenomenon of *image-based sexual abuse* is **gender-specific**: it appears that women and LGBTQI+ individuals are particularly affected and suffer more severely from the effects. In contrast, the perpetrators are predominantly male. The fact that female victims are particularly affected is explained as a reflection of social structures in which women are stigmatized for living their sexuality openly. They are also particularly often affected by victim blaming—a reversal of perpetrator and victim in which it is not the person who distributed the recording without consent who is criticized, but the woman herself. She is then accused of being responsible for the distribution because she created a sexualized image of herself in the first place – even if this image was created without her knowledge, stolen or hacked (N. 5) and distributed without her consent. For the reasons mentioned above, such attacks are an effective means of intimidation, punishment, or

control—and are therefore not only individual attacks, but also an expression of structural inequality.

Central to the phenomenon of *image-based sexual abuse* is that it involves **sexual transgressions**. It is therefore essential to limit the definition to sexual – or more precisely, sexualized – content, in particular depictions of nudity (especially of the genitals and female breasts) and sexual acts (for the regulation in Art. 197a SCC, see N. 16 ff.). In contrast, recordings that depict private or vulnerable moments – such as crying faces, hospital stays, or private conversations – but do not have a comparable sexualizing potential do not fall under this phenomenon. This limitation in terms of content is crucial for several reasons: On the one hand, sexualized recordings achieve a particularly wide reach on the internet, are disseminated more frequently, and are part of a commercial exploitation market. Secondly, such images have particularly serious consequences for the individuals concerned, as their publication deeply invades their privacy and *at the same time* violates their sexual self-determination (see N. 11). The dissemination of non-sexualized, sensitive content can also cause considerable distress, but in terms of reach and intensity of intrusion, it lags significantly behind the dissemination of sexualized images. Research therefore increasingly emphasizes that the non-consensual distribution of sexualized images should be considered a form of sexual offense whose effects are structurally comparable to those of other sexual transgressions. This assessment is supported by current studies: the effects of the dissemination of sexualized images – in contrast to the dissemination of non-sexualized content – have been extensively researched (cf. N. 7) and show clear parallels to the consequences of classic sexual assaults. The victims themselves also often perceive these acts as sexual assaults. 4

The **origin of the content** distributed in the context of image-based sexual abuse is diverse: some of it consists of recordings that were produced consensually in the context of a romantic relationship or sexting – either by the person concerned themselves or by their partner. Recordings that were intended exclusively for a paying audience (e.g., content shared on OnlyFans) can also be distributed without authorization (so-called content leakage; see N. 19, 21 for information on criminal liability). In addition, there are cases in which the content was obtained through hacking. According to current study findings, the most common scenario is that the distributed recordings originate from situations in which they were already created without consent and thus them- 5 selves constitute the result of an image-based sexual assault. The range of possible contexts in which this occurs is wide: victims are secretly or openly recorded without consent during consensual or non-consensual sexual acts (cf. criminal liability N. 16 f., 19 ff.). Naked people are also regularly recorded in private or public spaces with hidden or hacked cameras (spy cams or camfecting) (see N. 18, 20 on criminal liability). However, even clothed persons—especially women—can be depicted in a sexualized manner in public spaces, for example through so-called *creepshots*, in which the genital region, buttocks, or breasts are deliberately photographed or filmed, through *downblousing*, i.e., filming down a neckline, or through *upskirting*, i.e., photographing or filming under skirts (see N. 18, 20). In addition, artificially produced images are created and distributed, in particular so-called *deepfake* pornography (videos or images generated by artificial intelligence in which the faces of real people are montaged into pornographic scenes), *deep nudes* (images in which the clothing of the persons depicted is digitally removed using artificial intelligence) or simple photomontages in which real persons are subsequently inserted into sexualized or pornographic contexts (cf. criminal liability N. 22, 30). The examples mentioned illustrate a typical feature of the phenomenon: Everyday situations are transferred into a sexualized context, often completely detached from their original context. Even activities such as personal hygiene, going to the toilet, or sunbathing can thus become the starting point for image-based sexual abuse.

6 The **distribution of sexualized images** takes place in various ways, with the severity of the violation of legal interests increasing as the number of recipients increases. For example, relevant images can initially be shown to others without consent, for example via the screen of one's own device (for criminal liability, see N. 34). In addition, relevant images are distributed physically, for example by post, or digitally via chat messages, emails, or livestreams (for criminal liability, see N. 33 f.), in some cases specifically targeting the victim's personal environment. Particularly serious is publication in which the content is made accessible to a large and unmanageable audience (for criminal liability, see N. 35), for example on social media or on special online platforms. In some cases, the recordings are published in the victim's name – for example, via fake profiles – to give the impression that the victim shared the content themselves. The distribution is often accompanied by *doxing*—the disclosure of personal data—as well as offensive and accusatory comments.

Image-based sexual assaults can have serious and long-lasting **effects** on those affected. When introducing Article 197a of the SCC, the legislature also referred to these consequences and made statements that can be confirmed by scientific studies: Particular emphasis was placed on the fact that once disseminated, recordings can be rapidly and uncontrollably reproduced on the internet. In most cases, they cannot be (completely) deleted (using civil law tools) and thus become a permanent part of the digital identity of the person concerned – especially if additional personal data has been disclosed (*doxing*, see N. 6). Victims lose control over their own image and their (self-)representation to the outside world. This form of assault is not tied to a specific place or time, but has a permanent, global, and omnipresent effect. As a result of victimization, victims are often exposed to further harassment by others, which also takes place outside the online sphere (e.g., in the form of stalking, sexual harassment, or threats). The acts often also affect the social and working lives of the victims: some lose their jobs or leave them voluntarily, while others report considerable difficulties in finding new employment. *Image-based sexual abuse* therefore also has a behavior-controlling component: victims regularly feel compelled to take drastic measures, such as changing their name or appearance or withdrawing completely from social media. Accordingly, many victims report a turning point that they perceive as "life-destroying" with far-reaching effects on their self-image, their relationships, and their everyday lives. Almost all victims report intense negative feelings such as anger, helplessness, humiliation, shock, fear, guilt, and shame. They develop anxiety disorders, depression, post-traumatic stress disorder, and a profound loss of self-esteem. In severe cases, this can lead to self-harming behavior or suicidal tendencies. The acts also have an isolating effect, as many victims develop trust issues and feel unsafe both online and in public, causing them to avoid certain websites and places, change their behavior, and consciously restrict their freedom of movement. Victims of pornographic deepfakes report similar psychological and social effects. A particularly serious form of non-consensual distribution of sexualized recordings occurs when the images or videos depict actual sexual violence. The distribution of these recordings permanently repeats the events, perpetuates their humiliating and hurtful nature, and invites a wider audience to participate in the violation. This can take the form of comments that condone the act or contain additional insults. This causes the trauma of these sexual assaults to be relived and intensified over and over again. 7

B. History

8 As early as 2010 and 2016, parliamentary motions were submitted to the National Council requesting the Federal Council to examine the need for legislative action with regard to the distribution of intimate or pornographic recordings without consent. In both cases, the Federal Council referred to existing defamation offenses and civil law protection of privacy and expressly denied the need for a revision of the law. During the consultation process on the revision of sexual criminal law, which came into force on July 1, 2024, five participants explicitly called for the criminalization of the phenomenon of "revenge porn" (for a critique of the term and phenomenology, see N. 1 ff.). The Legal Affairs Committee of the Council of States took up this concern and added a new Article 197a to the draft, which would make the unauthorized distribution of non-public sexual content an offense under the SCC. Both chambers agreed in principle that new legislation was needed to address the unlawful distribution of certain non-public, intimate content. However, the specific content of the regulation was controversial: there was disagreement regarding the material scope, the systematic location in the law, and the wording of the new provision. The majority of the Council of States argued in favor of limiting the criminal provision to sexual content and systematically anchoring it in sexual criminal law. In contrast, the majority of the National Council advocated an alternative solution: it wanted to delete Art. 197a of the SCC and insert an Article 179$^{\text{undecies}}$ in Title III ("Offenses against honor and privacy"). This would make it a criminal offense to disseminate any content that could seriously damage a person's reputation – including compromising or embarrassing recordings that are not specifically sexual in nature. The Council of States firmly upheld Art. 197a SCC and called for the deletion of the newly proposed Art. 179$^{\text{undecies}}$. Ultimately, the minority position in the National Council succeeded in winning a majority. This meant that the view prevailed that the criminal provision should be limited to sexual content and systematically assigned to **sexual criminal law**. Accordingly, the legislative body also decided *against* a provision protecting the "secret and private sphere." In view of the legal interest of sexual self-determination (N. 11) and the particular severity of the violation, as evidenced by scientific studies (N. 7), which is essentially characterized by the sexualized dimension of the phenomenon (cf. N. 4), this legislative decision proves to be appropriate and coherent – one whose *ratio legis* must now be consistently implemented by case law.

It should be noted that Art. 197a SCC exclusively criminalizes the **unauthorized distribution of sexual content** without the consent of the person depicted or named. This means that a gap in protection remains, which should not be underestimated, particularly with regard to the non-consensual *creation of* such content. In cases of unauthorized creation of sexualized recordings, Art. 179quater SCC is also regularly applied, but this is undoubtedly not tailored to the injustice typical of *image-based sexual abuse*. Since the revision of sexual criminal law, Art. 198 para. 1 Var. 2 SCC also covers image-based sexual harassment and thus certain aspects of the phenomenon. Finally, Art. 179decies SCC makes it a criminal offense to use another person's identity with the intention of causing harm or gaining an advantage—which may be particularly relevant in the distribution of *deepfake* pornography or *deepnudes*. 9

II. PROTECTED LEGAL INTEREST

Although the protected legal interest was never explicitly named or dogmatically defined in the **legislative process** for Art. 197a SCC, the political debate actually revolved around precisely this issue: The central issue of contention was whether the new offense should be located in Title III ("Offenses against honor and privacy") or Title V ("Offenses against sexual integrity") (N. 8). Ultimately, the debate centered on which legal interest should take precedence: Is it a matter of defamation or violation of honor or privacy – i.e., legal interests covered by Title III – or is it a matter of sexual assault? The legislature's decision to assign the provision to Title V leaves no doubt: it is not honor or privacy that is to be protected, but sexual integrity – and with it the sexual self-determination of the person concerned (see N. 11). The terms "intimacy" and "(sexual) sense of shame" used in political debates do not change this. Although these terms may be helpful in describing the subjectively perceived dimension of injustice, they are not suitable as criminal law interests: 10

1. The term "intimate sphere" originates from civil law personality rights and is often mistakenly equated in the criminal law context with the recognized legal interest of privacy. Although this may well be affected in the circumstances covered by Art. 197a SCC, it merely describes a more general dimension of personal injury, but not the specific interference with sexual self-determination that Art. 197a SCC covers through its systematic position in Title V. And even if one were to understand "privacy" as a new, in-

dependent legal interest under criminal law, its classification in Title V would argue against it being protected by Art. 197a SCC. This is because not everything that is 'intimate' is necessarily also "sexual."

2. "(Sexual) modesty" is neither a recognized legal interest nor an interest worthy of protection under criminal law, but merely a regularly observable emotional reaction to the loss of control over one's own sexuality or to a violation of sexual self-determination.

11 Article 197a of the SCC protects the **sexual self-determination** of the person depicted or named. This legal interest is traditionally physical in nature and encompasses, on the one hand, the positive freedom to engage in sexual acts according to one's own wishes and, on the other hand, the negative freedom not to be involved in sexual interactions against one's will. However, recent developments in criminal law increasingly recognize that non-physical forms of sexualization—such as those that occur in particular in image-based sexual abuse—can also constitute interference with sexual self-determination and therefore deserve protection under criminal law. This is nothing new in the Swiss understanding of legal interests: several sexual offenses already protect sexual self-determination from non-physical interference. Within the scope of application of Art. 197a SCC, the legal interest is specified in the protection of the right to dispose of sexualized representations. The person concerned should be able to decide for themselves whether, in what form, and to whom they disclose sexual content about themselves. Sexual self-determination thus also includes the right to decide on the distribution or public disclosure of sexual content. This includes, in particular, details of one's own sex life, recordings thereof, and images of intimate body parts (genitals, buttocks, female breasts). The legislative decision to base Art. 197a SCC on a consent solution underscores the central importance of the legal interest: In contrast to physical sexual offenses (Articles 189 and 190 of the SCC), where the absence of objection is sufficient (objection solution), Article 197a of the SCC requires express, informed consent (see N. 36 f.).

III. OBJECTIVE ELEMENTS OF THE OFFENSE

12 The objective elements of the offense are fulfilled by anyone who (N. 13 f.) forwards or publishes (N. 33 ff.) an object of the offense (N. 15 ff.) without the consent of the person depicted (N. 36 f.).

A. Group of persons

Art. 197a SCC is a **general offense**. In principle, it is irrelevant how the perpetrator came into possession of the content. Even if they received it in a harassing manner from another person – for example, a so-called "dick pic" – they may be liable to prosecution if they distribute the content to third parties without the consent of the person depicted or named (see N. 36). 13

In the case of unauthorized forwarding of an object of the offense under para. 1 (N. 33 f.), a **chain of distribution** may form, or the content may be repeatedly published without authorization by different persons under para. 2 (N. 35). This raises the question of who else can be considered a perpetrator and where criminal responsibility ends. Legal scholars rightly argue that any person who forwards an object of the offense without the consent of the person concerned and acts intentionally (see N. 38) should be classified as an independent perpetrator. This also applies in principle within the scope of the qualifying elements under para. 2. The elements of the offense therefore remain in place even if content that was not originally public (N. 19) has already been published once. This view is essential in order to maintain the protective effect of the norm: otherwise, content that has already been published could be disseminated without restriction. However, it must be required that the retransmission or republication reaches a potentially *new* target group and that the perpetrator is aware of this. Anyone who forwards an object of the offense within a circle of friends in which it is already circulating, or publishes it on a website where it has already been accessed frequently, does not qualify as a perpetrator. However, if the content is forwarded to people who are not yet familiar with it, or if it is published in a way that reaches a larger new group of people – for example, by uploading it to another website – the person redistributing the content may be considered an independent perpetrator. 14

B. Object of the offense

The object of the offense is sexual content (N. 16 ff.) that is not public (N. 19 ff.), is placed on a specific medium (N. 26 ff.), and on which the person concerned is recognizable (N. 23 ff.). 15

1. Sexual content

16 The element of sexual content is a central difficulty of Art. 197a SCC and was also the element that raised the most concerns during the legislative process. It was generally agreed that the term should be understood more broadly than that of pornography and should encompass all content that has a **sexual reference** or *caractère sexuel*. In legal scholarship, the criteria for the definition of pornography under Art. 197 SCC are sometimes used to define the term. However, such an approach—for example, focusing on the sexually provocative effect on viewers—misses the purpose of the norm, which is to protect the sexual self-determination of the person depicted, and must therefore be rejected. The provocative effect of the content on others is irrelevant to the victim whose sexual content is being distributed without authorization. Although every pornographic depiction is sexual content according to Art. 197a of the SCC, not all sexual content is pornography within the meaning of Art. 197 of the SCC. Sexual content requires a separate definition based on the *ratio legis*. The materials cite two examples of sexual content: sexual acts (N. 17) and (partial) nudity (N. 18).

17 The fact that depictions of **sexual acts** are covered by the offense is evident from the legislative materials and is also unanimously accepted in legal doctrine. Whenever a sexual act is present, its depiction or description is sufficient to assume sexual content – no special emphasis on the genital area is required. According to the legislative intent, the interpretation of the term "sexual act" should be based on previous Federal Supreme Court case law. Accordingly, a sexual act is deemed to have taken place if a behavior has a clearly recognizable sexual reference based on its outward appearance and is considered significant in terms of the protected legal interest – in this context, with regard to sexual self-determination in relation to the sexual representation of one's own body (N. 11). The criterion of significance ensures that more serious sexual offenses, which are classified as crimes or misdemeanors, are clearly distinguished from less serious offenses – in this case, verbal or image-based sexual harassment under Art. 198 para. 1 Var. 2 SCC. The requirement of an outwardly unambiguous sexual reference is particularly problematic. By basing the definition of "sexual" on a sexual reference, the definition remains circular in terms of content; there is no narrower conceptual clarification. This is understandable insofar as sexuality is a complex, individually diverse, and culturally influenced phenomenon. The assumption of a supposedly "ob-

jective" clarity fails to recognize that such assessments are ultimately subject to social and time-bound values – and are therefore always influenced by the individual ideas of the person making the judgment. The Federal Supreme Court attempts to counter this with case-based concretizations. Sexual intercourse, anal intercourse, and oral intercourse are considered clearly sexual. Other behaviors involving touching primary or secondary sexual characteristics or inserting objects into body orifices, on the other hand, require careful differentiation, as they can also occur in a nursing or medical context. However, the case law developed in this regard is only of limited relevance within the scope of application of Art. 197a SCC for two reasons: First, depictions of sexual acts only cover the upper end of the spectrum of offenses; visual content showing (partial) nudity is often sufficient (N. 18). Secondly, the focus of the assessment is not on a violation of sexual integrity by the act itself, but on the endangerment of the freedom of choice of the person concerned with regard to their sexual self-expression.

According to the legislative intent, depictions of **(partial) nudity** are also generally considered sexual content. However, mere descriptions are unlikely to suffice in this context; a visual representation is probably required. In the opinion of the Federal Council, in the case of (partial) nudity, it is even necessary that "a sexual reference is additionally established, for example through body posture or presentation." In legal doctrine, it remains largely unclear whether this requirement should apply. It is merely stated that (partially) exposed primary and secondary sexual characteristics – more specifically: genitals, buttocks, and female breasts – are covered, provided that a sexual reference can be established. However, it is not specified when this applies. A differentiation according to the degree of exposure seems appropriate: 18

1. In the case of *partial* exposure – the example given in the legislative materials is an "image showing a woman with an oversized, accentuated neckline" – the Federal Council's criterion can be used as a distinguishing feature. The decisive factor is the composition of the image: only when the camera angle, posture, or sexually suggestive clothing clearly draws attention to the genitals, buttocks, or female breasts does the photograph take on a sexual character. It is irrelevant whether this focus – for example, in the context of a self-portrait – was chosen by the person depicted or determined against their will by a third party, as is the case with *creepshots*, *downblousing*, or *upskirting* (see N. 5). The Federal Council's requirement

to contextualize nudity appears appropriate here and compatible with the protective purpose of Art. 197a of the SCC.

2. In the case of *complete* exposure of genitals, anus, or female nipples, there is much to suggest that even a seemingly neutral depiction is sufficient to qualify as sexual content – even without a particular focus on the relevant body parts. These are areas of the body to which society attributes sexual significance, so that their unauthorized depiction in a state of exposure appears, regardless of the specific context, to be an act of sexualization and potentially a violation of sexual self-determination (see N. 4). If the other elements of the offense are also fulfilled—in particular the requirement of non-publicity (see N. 19 f.)—the unwanted exposure of these body parts, regardless of the specific manner of depiction, may already constitute a violation of legal rights. This is exemplified by voyeuristic recordings in changing rooms, solariums, or saunas, where the nudity of the persons concerned is exploited for sexual consumption by third parties. A restrictive interpretation, which would additionally require a specific focus on the exposed body parts, would mean that such recordings without focusing elements would not be covered – despite their clearly intrusive nature and their obvious potential to violate sexual self-determination if distributed without authorization. Such a view would appear neither appropriate nor compatible with the protective purpose of Art. 197a SCC.

2. Not public

19 According to Art. 197a SCC, the sexual content must be "not public," which, according to the legislative intent, applies in particular if the content "was created for purely private use according to the will of the person recognizable in it." From this, it could be inferred that the victim must at least have consented to the creation of the material or been aware of it. This cannot be the intention, especially since the materials recognize that the punishable phenomenon also covers the dissemination of content created *without consent*. Scheidegger's proposed interpretation therefore seems more convincing, according to which the decisive factor is whether the person concerned did not attribute **any public purpose** to the sexual content, i.e., did not want to make it "accessible to a potentially indeterminable group of recipients." According to this view, in case of doubt, it should be assumed that sexual content is "not public."

In the case of **non-consensual content**, such as a filmed rape or voyeuristic recordings, there is by definition always a lack of public purpose on the part of the person depicted. In view of the purpose of the norm, it should in principle be irrelevant whether the relevant facts took place in public or not. During the legislative process, it was explicitly pointed out that Art. 197a SCC could go beyond the scope of Art. 179^{quater} SCC, which in principle does not offer any protection in public. Since Art. 197a SCC protects sexual self-determination rather than privacy or the private sphere, it must be assessed according to different criteria than Art. 179^{quater} SCC. Anyone who appears (partially) naked in a (semi-)public place—such as in a changing room, on a beach, or in a toilet—should be able to expect that no recordings of this will be distributed, despite the local circumstances, in view of the protective purpose of Art. 197a of the SCC. The protection of sexual self-determination does not end at the threshold of the public sphere, as long as there has been no conscious or implied disclosure to an indeterminable audience. This can only be assumed in exceptional cases, for example, when "flashing" during a public soccer game or deliberately exposing one's breasts in front of the camera during a public concert. 20

The assessment is more difficult in the case of **consensually created (and distributed) content**. In our opinion, such cases require a context-dependent overall assessment that takes into account, for example, the size and anonymity of the target audience and existing barriers to access between the content and the general public. Technical barriers such as paywalls, password protection, or anti-screenshot functions can serve as indications of private use. The requirements should not be too high; even poor protection against the redistribution of one's own content is an indication of private intent. The use of platforms such as *OnlyFans* (N. 5) therefore does not constitute unrestricted consent to further distribution, but should be understood as targeted disclosure to a limited group of users. The actual public sphere only begins beyond this sphere protected by access barriers and terms of use—for example, by sending images to a large group of random people or sharing content on a public social network. 21

There is debate as to whether **artificially produced sexual content** – in particular pornographic *deepfakes* or *deepnudes* (N. 5) – also falls under the category of "non-public" content within the meaning of Art. 197a SCC if it was generated from recordings that were originally publicly accessible. A formula- 22 tion in the legislative materials, according to which the victim is "depicted," "named," or "targeted" by the sexual content, suggests that artificially manipulated representations should also be covered. In addition, the wording of the law, which explicitly mentions "images" in addition to "recordings," suggests a deliberate inclusion of artificially generated content. It is true that the source images for *deepfake pornography* regularly come from publicly accessible sources, such as social networks or professional websites. However, in view of the protective purpose, it is not the public nature of the original image material that should be decisive, but rather the lack of public purpose of the final product with sexual content generated from it. Such artificial products are independent, usually non-consensual creations whose sexual content clearly contradicts the recognizable will of the person concerned. The person concerned had no reason to assume that the image showing them would be transferred to a sexualized context and misused accordingly. For this reason, it seems appropriate to classify *deepfake* pornography and *deepnudes* as "non-public" within the meaning of Art. 197a SCC.

3. Recognizability

23 According to the wording of the law, the injured party must be "recognizable" in the object of the offense (Art. 197a para. 1 SCC). In the literature, this term is often equated with "identifiable," from which it is concluded that criminal liability only exists if third parties can identify the specific victim on the basis of the sexual content. Pixelated or otherwise anonymized representations are therefore not considered to constitute an offense. However, this equation of 'recognizable' and "identifiable" must be critically questioned. "Recognizable" and "identifiable" are not synonyms: while identifiability requires that the person concerned can be determined by third parties, recognizability only requires that the person is perceptible as such in the object of the offense – for example, through a visible body or voice – even if no conclusions can be drawn about their specific identity. There are indications that the legislators had a narrower definition of identifiability in mind: the French version uses the term "identifiable," and statements by the Federal Council also point to a more restrictive understanding of the term. In contrast, the Italian version uses 'riconoscibile' – a term that corresponds more closely to the German "erkennbar" (recognizable). However, the systematic and teleological interpretation is decisive: in most of the cases mentioned in Art. 197a para. 1 SCC, it is not usually possible to clearly identify the person concerned, but it is pos-

sible to perceive them as a representation of a real, not merely fictional, person. A large proportion of punishable cases would be excluded if criminal liability were made dependent on the victim being identifiable by third parties on the basis of the content. In the case of images (N. 28), for example, identifiability is generally excluded if only the body is visible and not the face or other individualizing features. Examples include sexting images of individual body parts (e.g., breasts, penis), recordings of sexual acts in which only the body but not the face or other individual characteristics are visible, upskirting recordings, or spycam videos from toilet bowls. A strict identifiability criterion would exclude such essential case groups and would run counter to the legislative intention. Recognizability therefore does not require identifiability, but only the **perceptibility of a real person**. The extent to which a plausible attribution to the person concerned is required beyond this is determined by the respective variants of the offense (for forwarding according to para. 1, see N. 24, for publication according to para. 2, see N. 25).

Forwarding (N. 33 f.) pursuant to Art. 197a para. 1 SCC is an offense subject 24
to private prosecution (N. 39) . Criminal law protection therefore only applies if the person concerned recognizes themselves in the object of the offense and files a criminal complaint. In this case, it is sufficient if the attribution of the sexual content to the specific person concerned appears plausible based on the overall circumstances of the distribution—whether through the visible face of the victim, an accompanying text that names the victim, or through references from the social environment. This also applies in principle if the person concerned is falsely associated with sexual content that actually relates to another person – a scenario that has been expressly mentioned by the legislative authority. Examples include deepfake pornography or images that have been labeled with the name of another person. However, this is conditional on the false attribution appearing credible to outsiders. This is because the effect on the victim can be equally distressing regardless of the actual identity of the person depicted, as long as third parties assume that it is the person concerned (see N. 30). The identity of the person depicted therefore does not have to be established with certainty – especially since this is often not possible in practice. If, on the other hand, the attribution is obviously incorrect—for example, because the person depicted is clearly someone else or it is clearly recognizable as a fake—criminal liability under Art. 198 para. 1 var. 2 SCC (verbal or image-based sexual harassment) should be examined instead.

25 **Publishing** (N. 35) pursuant to Art. 197a para. 2 SCC is an offense prosecuted ex officio (N. 40). Accordingly, it should also be sufficient for authorities to be made aware of the publication by third parties. If it can be proven or is obvious that the content was published without the consent of the person depicted or named, the elements of the offense may also be fulfilled even if the person concerned never finds out about it. However, in any case, a plausible attribution to a real person who is not necessarily identifiable is still required, even if their identity is not known. The publication of clearly recognizable forgeries, on the other hand, does not constitute an offense within the meaning of Art. 197a SCC.

4. Media

26 The possible media for sexual content mentioned in Art. 197a SCC are based on the list in Art. 197 SCC (pornography) and include, in particular, writings, sound or image recordings, illustrations, objects, and performances. Insofar as there is no deviating protection with regard to the legal interest, the case law and literature developed in relation to Art. 197 SCC can generally be relied upon. Although the list is not exhaustive, it should cover most of the media relevant in practice. It should be noted that sexual content can also be embodied in several types of media at the same time – for example, in an image recording (N. 28) of a written chat (N. 27). Both physical and digital objects of the offense are covered. The decisive factor is always that the sexual content can plausibly be attributed to a real person (cf. N. 24 f.): While forwarding under para. 1 requires credible attribution to the specific person concerned, publication under para. 2 requires only plausible attribution to a real person who is not necessarily identifiable. In the latter case, it must also be clear from the circumstances that the person targeted did not consent to the publication (cf. N. 25).

27 The law first mentions non-public **writings** of a sexual nature. This category clearly departs from the *image*-based context and, in my opinion, should be interpreted restrictively. A broad interpretation could lead to rumors about a person's sex life that have already been communicated in writing – for example, in a chat – being considered criminal offenses. However, such an extension is not in line with the legislative intention. Therefore, only written content that was either written by the victim themselves or that credibly appears to have been written by the victim themselves can be considered as objects of

the offense (see N. 24 f.). Milder forms of written references to a person's sexuality may be subsumed under Art. 198 para. 1 var. 2 SCC (verbal sexual harassment). A typical example of the application of Art. 197a SCC is the dissemination of genuine or fake sexting chat logs between the victim and a third party.

The core of the provision is **image recordings of the victim**. This refers to 28
visual recordings of real events in real time, in particular photos and videos, which are produced and stored using an image recording device. The latter regularly also include an audio track, which is why they can also be considered sound recordings (N. 29). For criminal liability under para. 1, it is not necessary for the person concerned to be identifiable to third parties. It is sufficient if they recognize themselves and appear credible as the addressee of the sexual content depicted. Recognizability can result either from the image itself—for example, through the visible depiction of the person concerned—or from the manner of dissemination, in particular if accompanying information establishes a credible link to the person concerned (see N. 24). In the case of publications pursuant to para. 2, on the other hand, it is sufficient if the circumstances indicate that the images were obviously published without the consent of the person depicted (see N. 25). This is evident, for example, in the publication of voyeuristic recordings from a changing room or toilet in a well-known publicly accessible place or in the publication of *OnlyFans* recordings originally intended only for a closed user group.

Audio recordings are also covered as possible carriers of sexual content. 29
These include, in particular, acoustic recordings of sexual noises (e.g., moaning) or conversations with sexual content (e.g., phone sex) between the victim and a third party. This only covers auditory representations of sexual acts and audio recordings of their verbal description. The recognizability of the victim (N. 23 ff.) results here in particular from a voice that is acoustically similar to that of the victim or from an otherwise credible attribution to the person concerned, for example by mentioning their name or the circumstances of the distribution.

The form of representation referred to in Art. 197a SCC as "**images**" makes it 30
clear that artificially generated content can also be covered by the offense. This applies in particular to pornographic *deepfakes* or *deepnudes* that depict fictional events. Some legal literature argues that a systematic interpretation argues against the inclusion of such representations, since Article 197a SCC—

unlike Article 197 SCC—does not distinguish between the reproduction of "actual" and "non-actual" acts. However, this argument is not convincing. This is because the two provisions pursue different protective objectives: the prohibition of hard pornography in para. 197(4) and (5) SCC serves, in the case of *real* depictions, in particular to protect the minors depicted, who may be specifically endangered by the production of the content, to prevent market structures from developing, and to provide general protection against the "corrupting" effect of the content. The latter is based on the assumption that hardcore pornography increases the viewer's willingness to imitate the events depicted. In the case of *fictional* depictions – such as drawings or animations – the protection of the person depicted does not apply due to the absence of real participants; the protection of persons actually involved is not pursued. Art. 197a of the SCC, on the other hand, takes a completely different approach: it protects the sexual self-determination of the person depicted, i.e., the specific person whose image is used in a sexual context without their consent. In view of the effects of the unauthorized distribution of deepfake pornography, which are comparable to those of real recordings (see N. 7), and the empirically proven difficulty of the Swiss population in reliably distinguishing deepfakes from real recordings, it would not be objectively justifiable to limit the protective effect to real images. The term "images" was probably created specifically for such artificially generated content (see N. 22). Any interpretation to the contrary would contradict both the wording and the purpose of the provision. In order for the recognizability criterion (N. 23 ff.) to be met, an objectively plausible and outwardly credible attribution to a real person is sufficient; identifiability is not required. For forwarding pursuant to para. 1, it is decisive that the person concerned recognizes themselves and appears credible as the addressee of the sexual content (N. 24). In the case of publication under para. 2, on the other hand, it is sufficient if the circumstances indicate that the depiction was obviously published without the consent of the real person depicted, who does not necessarily have to be specifically identifiable (N. 25). For the attribution to be credible, the forgery must be very realistic. This is particularly conceivable in the case of pornographic *deepfakes* or *deepnudes*, but can also be the case with very realistic sexualized photomontages. If, on the other hand, there is no credible attribution to the outside world—for example, in the case of obviously fake or recognizably manipulated images—Art. 198 SCC must be examined instead (cf. N. 24).

Less relevant in practice, but expressly mentioned in the law, are **objects** that depict sexual content. This refers in particular to objects with sexual connotations that can be associated with the victim – such as a collection of sex toys or fetish objects. In this context, too, a credible attribution to the victim is required (cf. N. 23 ff.). 31

The category of **performances** includes live performances of sexual acts or (partial) nudity. Classic examples are striptease or live sex shows. Livestreams in which sexual content is transmitted in real time are particularly relevant to the scope of application of Art. 197a SCC. In the absence of storage, these are not image recordings in the strict sense, but they do fulfill the concept of "presentation." With regard to the recognizability of the victim, the same requirements apply in principle as for image recordings (see N. 28); however, perception and thus plausible attribution (N. 24 f.) take place in real time in this case. 32

C. Criminal act

1. Forwarding (para. 1)

An offense under Art. 197a para. 1 SCC is committed by anyone who forwards an object of the offense to at least one third party without the consent of the recognizable person (N. 23 ff.). However, the act does not constitute an offense under Art. 197a SCC if the content is sent exclusively to the person depicted or described. The term "forward" as used in the German text of the law is linguistically unfortunate. It could give the incorrect impression that only content that the perpetrator has previously received from another person (e.g., directly from the victim) is covered. However, such a restriction does not correspond to the legislative intention. Content created by the perpetrator themselves in which the recognizable victim is depicted or described should also be covered. The French and Italian language versions ("transmet" and "trasmette") are also not ideal, but they more accurately reflect the legislative intent: This refers to any form of **visual or acoustic disclosure** of sexual content to third parties, regardless of whether this is done physically (e.g., through printouts or data carriers) or digitally (e.g., via messenger services, social networks, livestreams, or cloud storage). Forwarding is completed when the act of transmission is finished. This also applies if the addressee was already in possession of the content in question (see N. 34). It is not necessary 33 for the third party to actually receive or take note of the content. Repeated forwarding as part of a chain distribution may also constitute an offense (see N. 14).

34 There is controversy in the literature as to whether the **mere display** of sexual content – without transfer of control – also constitutes "forwarding." This refers, for example, to livestreams, self-deleting messages, or allowing someone to view a recording on one's own device. As Scheidegger correctly points out, this question must be answered in the affirmative in view of the wording and systematics of the norm. Art. 197a SCC expressly also covers presentations (N. 32) in which it is conceptually impossible for a change of ownership or control of the image or audio material shown to take place. It follows logically that even the mere display of content constitutes a possible criminal act within the meaning of Art. 197a para. 1 SCC.

2. Publication (para. 2)

35 Art. 197a para. 2 SCC provides for a qualification if the criminal act consists in publishing the object of the offense, i.e., in particular, if it is "made accessible to an indefinite number of persons, for example via the Internet." Difficulties in defining the boundaries arise in particular where content is made accessible to a larger, but still not unlimited, group of people, as "new technologies have given rise to a multitude of 'semi-public spheres'." The boundaries between non-public and public disclosure have become blurred, making it difficult to formulate a conclusive definition of the term "publish." Some legal scholars argue that sharing in a group chat with 30 people could already be considered publication within the meaning of the provision. Others, however, suggest focusing more on the protective purpose of the norm. According to this view, the criminal classification should depend on how large and arbitrary the group of recipients is – because the larger, more anonymous, and more uncontrollable this group is, the more serious the violation of legal rights is for the person concerned (see also N. 6). Systematically, it also seems appropriate to use the criteria that are also used to define the element of "not public" in the case of content created and distributed by mutual agreement (see N. 19, 21). According to this, the perpetrator must pursue a **public purpose** when distributing the (originally non-public) content. Decisive factors include, in particular, the number of recipients, their degree of familiarity or anonymity to the perpetrator, and the presence or absence of (technical) access barriers.

Returning to the example of a group chat with 30 participants, its assessment is therefore highly context-dependent: If it is a closed *WhatsApp* group with people who are personally known to each other, publication is generally unlikely to be considered public. The case is different if it is a *Telegram* chat that anyone can join without access restrictions – in this case, it can be assumed to be a potentially public space. A mere abstract risk that content that was not originally public will be disseminated in an uncontrolled manner – for example, because someone could take a screenshot of the content – is *not* sufficient for qualification. However, the qualified act is already complete when the perpetrator creates the concrete possibility that the content can be accessed publicly – regardless of whether it was actually accessed. Multiple publication of the same object of the offense, for example through a second publication on another platform, may also constitute an offense (see N. 14).

D. Lack of consent

The central element of Art. 197a SCC is the lack of consent to the specific act of dissemination. Unlike physical offenses against sexual self-determination under Art. 189 f. SCC, it is not a matter of whether the person concerned has expressed a contrary will (objection solution), but whether express or at least implied consent to the disclosure of the content has been given (**consent solution**). Consent must always relate to the specific act of distribution. The fact that a person has consented to a recording or voluntarily transmitted it to a specific person or group of persons is not sufficient to infer consent to further distribution. This applies even if the initial transmission was intrusive or harassing, such as in the case of unsolicited dick pics. Consent must always be given in context. Persons who receive sexual content by mutual agreement and mistakenly assume that this also “allows” them to forward it to third parties are not subject to a factual error, but to a mistake of law under Art. 21 SCC. 36

In accordance with part of the doctrine, “consent” within the meaning of Art. 197a SCC is to be understood as **consent** that requires capacity of judgment, voluntariness, and a minimum level of information. Consent obtained under duress, through deception, or by exploiting a relationship of dependency is therefore invalid. Subsequent consent cannot remedy the wrongfulness of the distribution that has already taken place. Conversely, the revocation of previously given consent must be taken into account if it was known to the person 37 distributing the material at the time of distribution. If several persons are depicted or named in non-public sexual content, forwarding or publishing is only lawful if all recognizable persons have effectively consented to the specific distribution.

IV. SUBJECTIVE ELEMENTS

38 Intent is required to fulfill the subjective elements of Art. 197a SCC, whereby conditional intent is sufficient. The intent must relate in particular to the fact that the victim has not consented to the specific act of distribution. In the case of the qualifying element of publication (para. 2), the perpetrator must at least accept that the content will be accessible to an indefinite or at least significant number of persons, or "consciously relinquish control over the sphere of influence of the content." A specific motive such as revenge, enrichment, or defamation is not required, but may be taken into account when determining the sentence.

V. COMPLAINT (PARA. 1) AND SANCTION

39 The basic offense of forwarding under Art. 197a para. 1 SCC is a **complaint offense**. The time limit for filing a complaint begins on the day on which the person entitled to file a complaint becomes aware of the perpetrator (Art. 31 SCC). This is a misdemeanor (Art. 10 para. 2 SCC) punishable by imprisonment for up to one year or a fine.

40 The qualifying offense of publication under Art. 197a para. 2 SCC, on the other hand, constitutes an **offense prosecuted ex officio**. This is also a misdemeanor under Art. 10 para. 2 SCC, but with an increased penalty of imprisonment for up to *three* years or a fine.

VI. CONCURRENCE

41 In its report, the **Legal Affairs Committee of the Council of States** did refer to possible conflicts, but only in a brief and imprecise manner and without reference to the legal interests protected in each case. After listing various offenses that could also apply in relevant circumstances, it summarily stated: "In such cases, the more specific offenses take precedence and consume the wrongfulness of the act. They also usually provide for a higher penalty." This

statement must be viewed critically for several reasons: First, offenses under other titles do not constitute *lex specialis* in relation to Art. 197a SCC, as they protect other legal interests: While Art. 197a SCC aims to protect the sexual self-determination of the person depicted (N. 11), offenses against honor or property, for example, cover other dimensions of wrongdoing. Offenses with different protective purposes are fundamentally in genuine competition with each other, provided that none of them comprehensively covers the entire wrongdoing. Sexual self-determination in the sense of the right to dispose of one's own sexual content is not already covered by the legal interests of other titles. Secondly, a higher penalty alone does not constitute grounds for assuming genuine competition or consumption. As long as different legal interests are affected, no conclusion can be drawn from the severity of the penalty about the extent of the wrongdoing or its complete coverage. Against the background of the legislative history of Art. 197a SCC, which aims to independently sanction a specific wrongdoing – namely the violation of sexual self-determination through the dissemination of sexual content – the blanket statement by the Legal Commission proves to be untenable. A differentiated analysis of the conceivable competitive relationships paints a different picture:

If recordings are obtained prior to their distribution through **offenses against property** (in particular Art. 139 SCC and Art. 143 SCC) or if sexual content is used to extort money (Art. 156 SCC) and this is then distributed, genuine competition with Art. 197a SCC can be assumed due to the different legal interests protected. 42

In addition to Art. 197a SCC, there will regularly – although not necessarily – be **offenses against honor and privacy**, i.e., defamation offenses (Art. 173 ff. SCC), unauthorized interception or recording offenses (Art. 179^{bis} ff. SCC) or identity theft (Art. 179^{decies} SCC). Since these norms protect different legal interests, Art. 197a SCC is in genuine competition with all offenses under this title. The violation of sexual self-determination constitutes a separate wrong that is not covered by the aforementioned provisions. 43

Even **offenses against freedom**, such as those typically committed in connection with *sextortion* (N. 1) – in particular threats (Art. 180 SCC) or coercion (Art. 181 SCC) – are not punishable predicate offenses in relation to Art. 197a SCC if they occur before the images are distributed. If the image material is published after such a threat or if certain actions are demanded in exchange 44 for its deletion, this constitutes a separate violation of sexual self-determination. In these cases, Art. 197a SCC is in genuine competition with the offenses against freedom. The freedom-restricting component intensifies the overall injustice, but does not absorb it.

45 If the distributed content constitutes **pornography** within the meaning of Art. 197 SCC, there is a conflict between Art. 197a and Art. 197 SCC. Since all variants of Art. 197 SCC pursue a different direction of protection (cf. N. 30), the two offenses are in genuine competition with each other. If young people share their own pornographic content among themselves, the consent or lack thereof of those young people who are capable of judgment within the meaning of Art. 197a SCC may be taken into account. Even if adolescents capable of judgment consent to the distribution and thus criminal liability under Art. 197a SCC does not apply, criminal liability under Art. 197 para. 4 SCC may still exist.

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COMMENTARY ON

Art. 305ter SCC

A commentary by André Tanner / Madeleine von Rotz

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Insufficient diligence in financial transactions and right to report

Art. 305ter

[1] Any person who as part of his profession accepts, holds on deposit, or assists in investing or transferring outside assets and fails to ascertain the identity of the beneficial owner of the assets with the care that is required in the circumstances shall be liable to a custodial sentence not exceeding one year or to a monetary penalty.

[2] The persons included in paragraph 1 above are entitled to report to the Money Laundering Reporting Office in the Federal Office of Police any observations that indicate that assets originate from a felony or an aggravated tax misdemeanour in terms of Article 305bis number 1bis.

CONTENT

I. PARA. 1 - LACK OF DUE DILIGENCE IN FINANCIAL TRANSACTIONS

A. Introduction

1. Purpose

In order to prevent the fight against money laundering from coming to nothing from the outset, a standard is required that imposes enforceable identification, documentation and record-keeping obligations on persons working in the financial sector. Since 1990, **Art. 305ter para. 1 SCC** has provided criminal law protection for a **central obligation** in the fight against money laundering - that of establishing the identity of the beneficial owner. When the Anti-Money Laundering Act came into force in 1998, further obligations were standardized by law under threat of criminal sanctions. 1

The introduction of the money laundering offense (Art. 305bis SCC) took place in the same year as Art. 305ter para. 1 SCC and led to a potential dilemma for financial intermediaries. If accounts were blocked and criminal charges filed due to a suspicion of money laundering, the financial intermediary risked a **breach of the duty of confidentiality**. As a result, a justification for this was created in 1994 with the reporting right standardized in **Art. 305ter para. 2 SCC**. This opened up the possibility for persons working in the financial sector to file criminal charges without hesitation if, for example, a suspicion of money laundering arises in connection with investigations under Art. 305ter para. 1 SCC. 2

Historically, Art. 305ter SCC was not included in the Criminal Code for the purpose of combating money laundering. Although Art. 305ter SCC was introduced as part of the money laundering legislation, it was intended to serve the enforcement of a central financial regulatory concern (*Know Your Customer, KYC*). The nexus to the fight against money laundering was only later established by the FATF by qualifying the identification obligation as a global minimum standard for combating money laundering. 3

2. Type of offense

4 Art. 305ter para. 1 SCC is an **abstract endangering offense** that serves to enforce the identification obligation and thus to protect the *paper trail*. Accordingly, the nature of Art. 305ter para. 1 SCC is not a money laundering offense in the narrower sense. Whether the assets associated with the duty to identify are of a legal or illegal nature is irrelevant with regard to criminal liability under Art. 305ter para. 1 SCC.

5 According to prevailing doctrine and case law, **the administration of justice** is the legal interest to be protected by Art. 305ter para. 1 SCC, as a failure to identify the beneficial owner jeopardizes the state's claim to confiscation. Pieth denies this and rightly qualifies the offense as an "atypical administrative criminal law norm inserted into the SCC to enforce transparency in the customer relationship".

3. Practical significance

6 The topics of tax law and combating money laundering have become increasingly explosive in the recent past, not least due to various revelations by the international consortium of investigative journalists. The question of the actual beneficial owners of assets, which is closely linked to these two topics, has also come to the fore. The **identification of the beneficial owner** is considered the most important instrument in combating the abuse of offshore financial centers. Against this background, the importance of a criminal provision to enforce this identification obligation should not be underestimated from a crime prevention perspective.

7 However, in view of the due diligence obligations set out in the AMLA with regard to identification and detection, it is clear that the obligation standardized in Art. 305ter para. 1 SCC could also have been enforced exclusively by means of financial supervisory law and administrative criminal law. Art. 305ter para. 1 SCC criminalizes anyone who fails to comply with the obligation to identify the beneficial owner set out in Art. 4 AMLA. The fact that the criminal liability of failing to identify the beneficial owner has nevertheless been standardized in the SCC since 1990 has to do with the lack of general financial supervision law at the time and the solution proposed by the Federal Council to enforce the duty to identify independently under criminal law instead of criminalizing negligent money laundering, as demanded by some scholars. Ac-

cordingly, Art. 305ter para. 1 SCC is a "**stopgap provision**". According to the first report of the interdepartmental coordination group on the national assessment of money laundering and terrorist financing risks in Switzerland from 2015, convictions under Art. 305ter para. 1 SCC have stabilized at a very low level compared to those under Art. 305bis no. 1 SCC.

B. Objective elements of the offense

1. Subject of the offense

According to Art. 305ter para. 1 SCC, anyone who "professionally accepts, holds, invests or helps to transfer assets belonging to others", i.e. anyone who acts as a financial intermediary, is liable to prosecution. Accordingly, this is a **genuine special offense** that should oblige the entire financial sector to maintain the same level of identification. According to the legislator and case law, Art. 305ter SCC is not intended to cover just any business people who, for example, accept third-party assets as part of their professional activities. The scope of application is typically limited to sectors that are susceptible to abuse, including transactions with liquid or very easily liquidated assets. The decisive factor is whether the professional activity is attributable to the financial sector, which is also evident from the marginal phrase in Art. 305ter SCC - "lack of due diligence in financial transactions". 8

According to prevailing doctrine, Art. 2 AMLA can be used to clarify the question of which activity is specifically considered financial intermediation, although the non-exhaustive list in Art. 2 para. 3 AMLA does not provide the necessary clarity. Furthermore, the dispatch on the revision of the SCC published in 1989 with regard to the introduction of Art. 305ter para. 1 SCC states that in addition to banks, trustees, investment advisors, financial managers, money changers, precious metal dealers and business lawyers are also included in the group of offenders. The Federal Council also added that case law must circumscribe the fringes of the field of offenders. The **vagueness of the definition of perpetrators** is criticized by scholars. For example, the distinction between a business lawyer and a traditional lawyer's activity already presents difficulties. According to Pieth and Schultze, jewelers with regard to their sales activities, real estate dealers, antique dealers, coin dealers and gallery owners are not covered by Art. 305ter para. 1 SCC. 9

10 According to Stratenwerth and Bommer, the definition of the criminal conduct of "accepting", "storing", "investing" or "transferring", which are typical actions of a financial intermediary, does not further restrict the group of offenders. In contrast, the criterion of "**professional**" represents such a limitation. The 1989 dispatch on the SCC revision states that the activity must be a full-time or part-time occupation, whereby the resulting regular income must not merely constitute insignificant ancillary income. In Art. 7 AMLO, the Federal Council has defined the term "professional activity" in concrete terms. A financial intermediary is deemed to be carrying out such an activity if one of the four conditions set out in Art. 7 para. 1 AMLO is met. An activity is classified as professional if gross proceeds of more than CHF 50,000 are generated per calendar year or if there is unlimited power of disposal over third-party assets that exceed CHF 5 million at any given time. Furthermore, an activity qualifies as professional if a financial intermediary enters into business relationships with more than 20 contracting parties per calendar year that are not limited to a one-off activity, or maintains at least 20 such relationships per calendar year. Finally, a financial intermediary is deemed to be acting in a professional capacity if transactions are carried out with a total volume exceeding CHF 2 million per calendar year.

2. Offense

11 There is disagreement among scholars as to whether Art. 305ter para. 1 SCC should be qualified as a genuine offense of omission or a simple offense of activity, although according to Pieth and Arzt this problem hardly plays a role in practice. According to various doctrinal opinions, it is rather the specification of the requirements of the offence that is important, as it lacks the necessary clarity. For example, ambiguities arise in connection with the term "**beneficial owner**", which is taken from the CDB. The decisive factor in the allocation of assets is an economic approach. According to Zulauf, the focus is on who has "an identifiable and lasting interest" in the assets in question. According to the dispatch, the "**beneficial owner**" in Art. 305ter para. 1 SCC is to be understood in a broader sense, i.e. going beyond the wording of the provision, there is an obligation to identify the contractual partner and - if not identical - the effective beneficiary of the assets represented by him. Following this approach, Pieth argues that the AMLA and the CDB presuppose the identification of the contractual partner as a matter of course and that it can therefore be assumed that the identification of the contractual partner is covered by Art.

305ter SCC in accordance with the *ratio legis*. According to the opinion expressed here, in the light of legal certainty and taking into account the economic perspective, the decisive criterion is to follow Zulauf's explanations.

The duty of care is based "on**the circumstances**". This serves to enforce the principle of proportionality and thus regulates the limit of reasonable investigations. The applicable minimum standard for the identification of clients is regulated by administrative and private money laundering law - primarily the AMLA, AMLO, AMLO-FINMA and CDB 20 - which is binding for criminal courts. As already mentioned, the purpose of Art. 305ter para. 1 SCC is to determine the beneficial owner. According to previous Federal Supreme Court case law, a financial intermediary who **correctly** identifies the beneficial owner but does not exercise sufficient diligence is not subject to Art. 305ter SCC. The duty of identification under Art. 305ter para. 1 SCC is limited to the basic elements (surname, first name, date of birth, nationality). The basic elements must be checked for plausibility. Sufficient diligence is not exercised by those who, despite inconsistencies, are satisfied with the declarations of the contractual partner and do not carry out any further clarifications. 12

As part of the most recent revision of the AMLA, the question of whether there is an obligation to **verify identity** in connection with Art. 305ter para. 1 SCC that goes beyond the mere obligation to establish **identity** should have been clarified. According to the revised Art. 4 para. 1 AMLA, in addition to establishing identity, the financial intermediary must now also verify it "in order to ascertain who the beneficial owner is." With regard to the recently codified verification obligation, the dispatch states the following: "The aforementioned obligation is not fulfilled by merely requesting a copy of the identity card of the beneficial owner for the files". 13

Thus, the declarations received from the contracting partner must now not only be checked for plausibility in the event of inconsistencies, but must always be verified (materially and risk-based). According to the Federal Supreme Court, the CDB forms have increased credibility. They constitute **documents** within the meaning of Art. 110 no. 4. Accordingly, the contracting party may be guilty of forgery of documents under Art. 251 SCC if it makes false statements to the financial intermediary regarding the origin of the funds. Nevertheless, the financial intermediary may not rely on the fact that the information received from the contracting partner is correct. It should be noted, however, that he cannot be expected to carry out the same depth of 14 investigation as the criminal prosecution authorities, especially as the responsible employees of a financial intermediary have a different set of tasks than the public prosecutor's office.

C. Subjective offense

15 Only those who act **intentionally** are liable to prosecution. The perpetrator must deliberately violate the duty of disclosure, whereby contingent intent is sufficient. According to the case law of the Federal Supreme Court, a lack of professional diligence is sufficient to infer intent. Anyone who fails to take the measures to clarify the identity that diligent bank employees would have taken on the basis of specific circumstances is acting with intent. It should be noted that intent must relate to all objective elements of the offense. The perpetrator must therefore be aware of his function as a person subject to a duty of identification and recognize that he must comply with this duty due to the specific situation. In addition, the perpetrator must intentionally violate the duty to ascertain despite recognizing the possibility of action.

D. Penalty and statute of limitations

16 The law provides for a custodial sentence of up to one year or a fine (**misdemeanor**). In the event of a conviction, the offender is recorded in the criminal register.

17 According to the case law of the Federal Supreme Court, Art. 305ter para. 1 SCC is a **continuing offense**. The limitation period begins to run as soon as the criminal conduct ends. This is the case on the day on which the business relationship is terminated or on which the financial intermediary has put an end to the unlawful situation by establishing the identity of the beneficial owner of the assets.

E. Competition

18 In principle, Art. 305ter SCC takes precedence, although the FCC has assumed genuine competition in one case. Although both offenses protect the same legal interest, Art. 305ter SCC is aimed at a narrower group of persons and sanctions the violation of certain duties of care regardless of whether the assets are of legal or illegal origin. Accordingly, this lack of due diligence should be punished as such and not be regarded as a kind of non-punishable preparato-

ry act for money laundering. Taking into account the legislative history of the norm, the court's decision appears logical. There is also genuine competition with Art. 160 SCC and Art. 305 SCC.

II. PARA. 2 - REPORTING LAW

A. Introduction

1. Purpose

As mentioned in the introduction, the right to report codified in Art. 305ter para. 2 SCC constitutes a criminal law **justification** for the violation of professional secrecy obligations, under which information giving rise to suspicion can be forwarded to MROS. 19

The right to report thus complements the duty to report. According to this, the financial intermediary must report to MROS immediately if it knows or has reasonable grounds to suspect that the assets involved in the business relationship are connected with a criminal offense under Art. 305ter SCC (Art. 9 para. 1 AMLA). In the case of circumstances that have not (yet) reached the threshold of reasonable suspicion, the person entitled to report would find themselves in a **dilemma** without the right to report, because if they did not report, they could be guilty of money laundering (by omission) if the circumstances were subsequently assessed as reportable. The threshold for negligent or even intentional failure to report (Art. 37 para. 1 and 2 AMLA) would be reached more quickly due to the broad interpretation of the term "reasonable suspicion". However, if the person authorized to report were to report a suspicion that does not actually meet the threshold of reasonable suspicion, they could breach their professional duty of confidentiality (bank client confidentiality pursuant to Art. 47 BankG, professional secrecy pursuant to Art. 321 SCC, business secrecy pursuant to Art. 162 SCC or postal secrecy pursuant to Art. 321ter SCC). Reporting law solves this dilemma. 20

2. Practical significance

The practical significance of the right to report is not only due to the justification of money laundering reporting. In legal reality, the right to report becomes a reporting obligation for the financial intermediary, as it is not only a matter of being accused of possibly intentionally receiving criminally obtained 21 funds, but also of protection against possible **administrative criminal law consequences** with regard to Art. 37 AMLA, which may result from the absence of a report, a late report or an incomplete report to MROS.

22 **Absence of a report**: If the right to report were abolished, as was discussed during the deliberations on the most recent revision of the AMLA, then the person authorized to report would more easily fall under the criminal provisions of Art. 37 AMLA. The threshold for negligent failure to report under Art. 37 para. 2 SCC would then be reached more quickly due to the broad interpretation of the term "reasonable suspicion".

23 **Delayed reporting**: In contrast to the reporting obligation, a report under the reporting law does not have to be made immediately according to the wording of the provision. However, if the financial intermediary mistakenly fails to submit a report immediately under the right to report, even though he should have submitted the report under the duty to report, he may be accused of a breach of the duty to report within the meaning of Art. 37 AMLA. It is therefore advisable to submit a report in accordance with Art. 305ter para. 2 SCC as soon as possible.

24 **Incomplete report**: An incomplete money laundering report may also constitute a breach of the reporting obligation within the meaning of Art. 37 AMLA. The information and documents to be submitted to MROS are governed by Art. 3 AMLO.

25 The right to report is only independent of the duty to report if the respective suspicion thresholds can be clearly distinguished. However, the distinction between the right to report and the obligation to report is blurred.

26 The practical significance of the right to report is given. However, it would be welcome to move the right to report from the Criminal Code to the Anti-Money Laundering Act. This proposal was not implemented as part of the most recent revision of the AMLA, but some gaps between the right to report and the obligation to report were closed.

B. Persons entitled to report

27 The group of persons entitled to report under Art. 305ter para. 2 SCC is identical to the **group of offenders under para. 1**. In practice, these are compli-

ance officers of banks and other financial intermediaries, trustees, investment advisors, financial administrators, money changers or precious metal dealers.

Lawyers who also act as financial intermediaries are at risk of falling into a criminal liability trap in practice. This is because if a suspicion of money laundering arises from a lawyer's activity, which is therefore protected by professional secrecy under Art. 321 SCC, they have neither a duty to report under Art. 9 para. 2 AMLA nor a right to report under Art. 305ter para. 2 SCC. A money laundering report may only be made if the acceptance of the potentially incriminated assets took place in an activity that is not subject to professional secrecy. Such a non-professional activity is, for example, asset management and investment. 28

Traders pursuant to Art. 2 para. 1 lit. b AMLA do not have a right to report, but only a duty to report pursuant to Art. 9 para. 1bis AMLA, as they explicitly do not belong to the group of financial intermediaries. 29

C. A suspicion justifying the report

1. Subject of the suspicion

According to the wording of the law, the suspicion (only) relates to the origin of the assets from a crime (Art. 10 para. 2 SCC) or from a qualified tax offense pursuant to Art. 305bis no. 1bis SCC. The reporting obligation pursuant to Art. 9 para. 1 AMLA includes other suspicious circumstances (criminal offence pursuant to Art. ^{260ter} SCC or Art. 305ter SCC; power of disposal of a criminal or terrorist organization; terrorist financing pursuant to Art. 260^{quinquies} para. 1 SCC). 30

Tax fraud within the meaning of Art. 186 DBG (direct federal tax) and Art. 59 StHG (direct tax of the cantons and municipalities) is considered a **qualified tax offense**. This consists of tax evasion by means of a documentary offense. The amount of tax evaded must also be at least CHF 300,000 per tax period. The financial intermediary must therefore also check the assets deposited with him for tax purposes. 31

If the predicate offense was committed **abroad**, it must be punishable there and constitute a crime or a qualified tax offense in Switzerland in order to qualify as a predicate offense to money laundering. 32

2. Lower threshold and "simple suspicion"

33 According to the wording of the law, "**perceptions**" may be reported. But what does this mean? According to the dispatch, insinuations or vague impressions are not sufficient. Rather, it is a matter of clues, concerns or inconsistencies, simply circumstantial evidence that points to a criminal origin of the assets and is capable of being corroborated by the prosecution authorities.

34 The right to report should not be stretched and interpreted arbitrarily. With regard to the assets in question, there must at least be the **appearance** that they could be of criminal origin.

35 The right to report may be invoked even if there is only one **indication** of money laundering. It is not necessary for several such indications to result in a "reasonable suspicion" or even certainty. A "simple suspicion" is also sufficient according to MROS practice.

3. Upper threshold and "reasonable suspicion"

a. Federal Supreme Court on "simple doute"

36 With its decision of November 27, 2008, the Federal Supreme Court caused ongoing confusion and criticism. It held that a simple suspicion or doubt ("**simple doute**") is sufficient for a reporting obligation pursuant to Art. 9 para. 1 AMLA: "*De l'avis de la doctrine, un soupçon est fondé s'il repose sur des circonstances insolites qui ont été recueillies avec soin par l'intermédiaire financier. If this person has a simple suspicion that, for example, the patrimonial assets originate from a criminal act, he must also make a communication to the MROS*".

37 It would be more accurate to use the French term "**soupçon**" rather than "doute" for the German word "Verdacht", if the wording of the French version of Art. 9 AMLA is taken as a guide. The **sources** on which the Federal Supreme Court relies have also not been carefully interpreted, as the argumentation chosen by the Federal Supreme Court is not applied in the same way by De Capitani and Thelesklaf. As Kuster points out, according to Thelesklaf, a suspicion is only justified if it is based on careful investigations in accordance with Art. 6 para. 2 AMLA. Luchsinger points out that the recommendation of the authors cited by the Federal Supreme Court that, in case of

doubt, a report under Art. 9 AMLA should be submitted, does not imply a lowering of the threshold for the reporting obligation.

In its ruling of March 18, 2015, the Federal Criminal Court clarified the triggering of the reporting obligation to the effect that a suspicion is always justified if the special investigations pursuant to Art. 6 AMLA cannot rebut the presumption that the assets are connected to a criminal offence. This is because, once the investigations have been carried out, it is clear that either the transaction that appears suspicious has been checked for plausibility and is in order, or the financial intermediary's suspicion is well-founded and must be reported to MROS in accordance with the reporting obligation. In its ruling of 21 March 2018, the Federal Supreme Court relied on this clarification of the Federal Criminal Court: "*If the suspicion cannot be dispelled in the course of background investigations pursuant to Art. 6 para. 2 AMLA ... it is deemed to be justified without further ado*". This **recent case law clarifies the misunderstanding** that arose from the ruling of November 27, 2008. In its ruling of January 11, 2021, the Federal Supreme Court held that the concept of "reasonable suspicion" is certainly open to discussion and interpretation and that it cannot be disputed that the case law had interpreted the wording of Art. 9 AMLA progressively. However, the Federal Supreme Court recalled the original concept and also pointed out that the idea was already expressed in the 1996 dispatch on the AMLA that suspicions that cannot be dispelled after the conclusion of the investigation procedure must be reported. This approach corresponds to the logic of the AMLA, in particular with regard to Art. 6 AMLA, as well as the purpose of the law to enable the detection and confiscation of the assets concerned. 38

The most recent case law of the Federal Supreme Court is (now) also in line with **FINMA's interpretation** according to its 2017 annual report: "*Reasonable suspicion exists if the results of these special investigations [pursuant to Art. 6 para. 2 AMLA] cannot rebut the presumption that the assets originate from a crime. The financial intermediary must report such business relationships to the Money Laundering Reporting Office (reporting obligation under Art. 9 AMLA; see decisions of the Federal Criminal Court SK 2017.54 of December 19, 2017 and SK.2014.14 of March 18, 2015, E. 4.5.1.1). If the requirements for a reporting obligation are unclear, the financial intermediary may nevertheless submit a report (right to report under Art. 305ter para. 2 SCC).*" 39

b. Parliamentary consultation on the inclusion of a definition

40 In the federal parliamentary consultation, it was pointed out that willful disregard of the reporting obligation can lead to a fine of up to CHF 500,000 (Art. 37 para. 1 AMLA) or a ban from the profession (Art. 33 FINMASA) for the financial intermediary concerned. This is precisely why reasonable suspicion must be defined by the legislator. In cases of doubt, the financial intermediary decided to report money laundering to MROS, which overburdened MROS.

41 Various strict **variants** were discussed with regard to the specific definition. In the end, the current practice of the Federal Supreme Court was followed. The financial intermediary must submit a report if there are concrete indications that he cannot dispel his justified suspicions by means of additional clarifications. This would involve disproving the indication or concrete evidence of money laundering.

42 It was emphasized that the financial intermediary must carry out appropriate investigations within the framework of the **means and resources** available to him, as he would have no police or investigative powers. This is to be agreed with. He must pass on relevant observations. Nevertheless, it cannot be expected to carry out the same depth of investigation as the criminal prosecution authorities. The financial intermediary or the compliance officer working for him is not a public prosecutor.

c. Definition pursuant to Art. 9 para. 1^{quater} revAmLA

43 In the run-up to the most recent revision of the AMLA, scholars agreed that the blurred distinction between the right to report and the duty to report as well as the various levels of suspicion require clarification. Various approaches were presented regarding the implementation of this clarification. Thelesklaf called for the term "justified" codified in Art. 9 AMLA to be deleted. According to Luchsinger, a new, clear definition of the requirements for the duty to report and, if necessary, the right to report is essential. Zulauf and Hutzler were in favor of abolishing the right to report and splitting the reporting obligation into primary and secondary reporting.

44 In the end, the right to report was retained and the following new para. ^{1quater} was **codified**:

In the cases referred to in paragraph 1, a reasonable suspicion exists if the financial intermediary has a concrete indication or several indications that paragraph 1 letter a may be fulfilled for the assets involved in the business relationship and this suspicion cannot be dispelled on the basis of additional clarifications in accordance with Article 6.

d. Assessment of the legal certainty of the new definition

The latest revision of the AMLA now **codifies** that a suspicion based on a concrete indication or several indications leads to a reporting obligation if the suspicion cannot be dispelled by means of additional investigations. 45

In fact, a sufficient legal basis leads to more **legal certainty** for the financial intermediary, which is why a definition based on Art. 20 para. 1 AMLO is to be welcomed. 46

On the other hand, the financial intermediary is still **entitled** to make a report in accordance with Art. ^{305ter} para. 2 SCC if the conditions for a reporting obligation are unclear and a certain degree of unease remains in this sense. With the new definition and the most recent case law of the Federal Supreme Court, the importance of the right to report has decreased. 47

D. Prohibition of information

The most recent revision of the AMLA also affected the prohibition of information pursuant to **Art. 10a AMLA**. The revised paragraph 3 reads as follows: 48

The financial intermediary may also inform another financial intermediary subject to this Act that he has madea report under Article 9 of this Act or under Article 305ter paragraph 2 SCC, insofar as this is necessary to comply with the obligations under this Act and provided that both financial intermediaries:

a. provide joint services for a client in connection with the client's asset management on the basis of a contractually agreed cooperation; or

b. belong to the same group.

The notification pursuant to Art. 305ter para. 2 SCC is now also explicitly mentioned. The financial intermediary may therefore, under certain circumstances, provide information on reports based on both the duty to report and the **right to report**. 49

50 The addition to the reporting law closes a gap that is relevant from a practical point of view. There was always uncertainty among financial intermediaries within the **same group** as to whether, how and what information they may share in the event of a report under Art. 305ter para. 2 SCC.

E. Reporting on termination of the business relationship

51 From a practical point of view, the question often arises as to what **leeway** the financial intermediary has to separate from his contractual partner without violating the reporting obligation or the reporting law.

52 As a result of the most recent revision of the AMLA, the AMLO and AMLO-FINMA were also revised accordingly with regard to obligations in the event of suspected money laundering. The provisions on the termination of the business relationship pursuant to Art. 32 AMLO-FINMA were set out by the Federal Council **at AMLO level**.

53 Once a report has been made, the financial intermediary may not break off the business relationship on its own initiative (Art. 12a para. 1 AMLO, Art. 32 para. 3 AMLO-FINMA) and must continue to execute client orders (Art. 9a para. 1 AMLA). Only if MROS does not inform the financial intermediary within 40 working days that it will forward the reported information to a prosecution authority may the business relationship be terminated (Art. 9b para. 1 AMLA in conjunction with Art. 12a para. 1 AMLO). The MROS must be informed immediately of the termination of the business relationship and the date of termination (Art. 9b para. 3 AMLA). The **withdrawal of significant assets** must then only be permitted in a form that allows the prosecution authorities to trace them (Art. 9b para. 2 AMLA). This obligation also applies in the event of non-reporting in accordance with reporting law (Art. 12b para. 2 AMLO).

54 The financial intermediary is also prohibited from terminating a dubious business relationship (for which he decides not to make use of the right to report even though the requirements are met) and from allowing the withdrawal of significant assets if there are concrete indications that **official freezing measures** are imminent (Art. 12a para. 2 AMLO; Art. 32 para. 2 aMLO-FINMA).

55 The preparation of a so-called **no-AML report** is now regulated in Art. 22a para. 2 AMLO-FINMA (Art. 31 AMLO-FINMA): If the financial intermediary does not submit a suspicious activity report based on the right to report (Art.

305ter para. 2 SCC) because he was able to dispel the suspicion on the basis of additional investigations in accordance with Art. 6 AMLA, he must document the investigations carried out and his conclusions in an appropriate manner (Art. 7 AMLA). In doing so, he must record why he has dispelled the suspicion and waived his right to report. Such a no-AML report must now be drawn up for all dubious business relationships, not just those with significant assets.

Once the business relationship has been terminated, the question arises as to whether the obligation to report and the right to report continue and, if so, for how long. 56

The obligation to report in accordance with Art. 9 para. 1 AMLA also **ends** with the business relationship. In this regard, Ivell rightly refers to the wording of the standard and "the assets involved in the business relationship". Accordingly, a reporting obligation after termination of the business relationship would require an explicit legal basis. In addition, according to Reinle, a different result would lead to an unreasonable burden for the financial intermediary in view of Art. 37 para. 2 AMLA (negligent breach of the duty to report) and thus to a disruptive result. 57

The right to report under Art. 305ter para. 2 SCC, **on the other hand**, continues to exist even after the termination of the business relationship (for an unlimited period of time). Here too, the wording of the provision must first be taken into account. The assets do not have to be involved in a business relationship. Ivell also points out that time limits would not be compatible with the concept of voluntary reporting. 58

F. Addressee and form of the notification

The addressee of the report is **MROS** at the Federal Office of Police (fedpol), which receives reports from the various financial market players, carries out investigations into the reported transactions and decides whether and which of the reported information is to be forwarded to the prosecution authorities (Art. 23 AMLA; Art. 1 para. 2 AMLO). 59

On January 1, 2020, MROS introduced the online portal "**goAML**" for communication with the Reporting Office (e.g. submitting money laundering reports). Anyone who does not submit reports via this information system must use the form provided and submit the report securely (Art. 3a para. 3 AMLO). Reporting forms by post are therefore still possible, but goAML must be used 60 for subsequent reporting of information (Art. 11a AMLA). In the explanatory notes to the partial revision of the AMLO, the financial intermediary is recommended to use goAML to submit the initial report as well.

61 As part of the **next revision of the AM** LA, the Federal Council is proposing a new Art. 23 para. 7 AMLA with the following wording: *"Communication with the Reporting Office shall take place via the data processing system in accordance with para. 3. The Federal Office of Police (fedpol) shall determine the data standard of the information transmitted via the data processing system".* In order to further improve data quality, only goAML should be used and MROS should be allowed to determine the data standard.

G. Deadline for analyzing the reports

62 The **old law** provided for different deadlines for the analysis of reports by MROS. This led to uncertainties for financial intermediaries when (further) dealing with business relationships for which they had made use of the right to report.

63 Art. 23 para. 5 AMLA stipulated that MROS must inform the financial intermediary within **20 working days** whether or not it will forward the report to a prosecution authority in accordance with Art. 9 para. 1 lit. a AMLA. However, according to Art. 23 para. 6 aMLA, MROS had no deadline for analyzing a report under Art. ^{305ter} para. 2 SCC.

64 MROS was also **not satisfied with** the regulation at the time. The response time of MROS was 27 working days on average, not including the time for preparation and evaluation. It should also be noted that MROS may have to obtain additional information in accordance with Art. 11a AMLA, possibly even from counterparties abroad.

65 In order to take better account of reality and to give MROS the necessary leeway to prioritize serious suspicious activity reports, the deadline has been extended to **40 working days**, also in view of the increasing number of reports per year. At the same time, the uncertainties of financial intermediaries with regard to the reporting law have been eliminated in that MROS now also has a deadline of 40 working days to analyze a report in accordance with Art. 305^{ter} para. 2 SCC (Art. 9b para. 1 AMLA in conjunction with Art. 23 para. 5 AMLA).

This commentary merely reflects the interpretations and views of the authors. No conclusions can be drawn about the practice of the authors' employers.

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COMMENTARY ON

Art. 322ter SCC

A commentary by Loris Baumgartner / Marco Hurni

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Title Nineteen: Bribery

1. Bribery of Swiss public officials

Bribery

Art. 322ter

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 undue advantage, or offers, promises or gives such an advantage to a third party in order to cause the public official to carry out or to fail to carry out an act in connection with his official activity which is contrary to his duty or dependent on his discretion,

shall be liable to a custodial sentence not exceeding five years or to a monetary penalty.

CONTENT

I. PROTECTED LEGAL INTEREST

1 The criminal offenses of bribery of public officials protect the **public's trust** in the objectivity and objectivity of official activities.

2 Some doctrine and case law hold the view that the criminal offense of bribery of public officials protects other legal interests. For example, the Federal Criminal Court also cited the protection of human rights as part of the protected legal interest of bribery of public officials. The protection of competition is also sometimes counted as a (co-)protected legal interest. Pieth, for example, states in connection with the state procurement system that it is undisputed that fair competition must also be protected in accordance with the increased requirements and increased competitive pressure in the state procurement system with the corruption offenses.

3 Although these opinions may often be correct in practice, they miss the mark according to the view expressed here: for example, the protection of human rights is in fact inextricably linked to the objective and factual exercise of state action. In other words, a violation of human rights should always go hand in hand with an illegal or discriminatory activity. If this is also accompanied by a bribe (see n. 21 et seq.), the area of the protected legal right is also affected by a narrow definition. The same applies to fair competition: if an official activity is carried out objectively and factually, competition cannot be impaired by state power. Any further impairment of free and fair competition must then be protected by competition law and not bribery law.

4 Against this background, the present opinion is that the criminal offenses of (domestic) bribery of public officials **exclusively** protect the public's trust in the objectivity and practicality of official acts.

II. PERSONS INVOLVED

5 The persons involved in the bribery of public officials are divided into the bribing person and the bribed person or public official. In the context of active bribery of public officials pursuant to Art. 322^{ter} SCC, only the bribing person is a suitable offender.

A. Bribing person (perpetrator)

1. Natural person

The perpetrator of active bribery of public officials is the bribing person who, by offering or granting an undue advantage, intends to cause the bribed person to breach their (official) duties. **Anyone**, i.e. any natural person, can be the bribing party and thus the perpetrator of active bribery offenses. 6

2. Legal person

The situation regarding legal persons must be viewed in a more differentiated manner. Pursuant to Art. 102 para. 2 SCC, legal persons may in principle be liable to prosecution within the framework of so-called concurrent corporate criminal liability (see on subsidiary corporate criminal liability, OK-Baumgartner/Hurni, Art. 322quater SCC N. 4 f.). *Concurrent* corporate criminal liability under Art. 102 para. 2 SCC exists if the company is accused of not having taken all necessary and reasonable organizational measures to prevent the commission of a catalog offence. Since active bribery of public officials under Art. 322ter SCC is such a catalog offence, the possibility of concurrent punishment of the company is possible **regardless** of the criminal liability of a natural person. 7

It should be noted at this point only that the concurrent corporate criminal liability under Art. 102 para. 2 SCC is not an independent offense, but an attribution norm. This means that if the constituent elements of Art. 102 para. 2 SCC are present, the company is nevertheless not qualified as the "bribe-giver". The briber is always the natural person. The accusation against the company based on Art. 102 para. 2 SCC is therefore not that the company as the bribing party fulfils the offence of bribery of public officials, but rather that it did not take all reasonable measures to prevent a natural person within the company organization from committing an act of bribery in the course of business. 8

B. Person bribed (object of the offense)

Bribery of a public official can only be punishable if the bribery communication (cf. n. 39 ff., according to which, in the opinion expressed here, a bribery offense is a communication offense) is made **to a public official**. Public offi- 9 cials within the meaning of Art. 110 para. 3 SCC as well as the other functionaries listed in Art. 322ter SCC are considered public officials. This is an exhaustive list.

1. Member of a judicial or other authority

10 A person is deemed to be a member of a judicial or other authority if he or she is a member of a legislative, executive or judicial body of the state. It is irrelevant whether this body is a collegial body or not. According to the view expressed here, this means that the terminology of "member" is to be understood non-technically and that membership of a judicial authority refers to membership of the entire court and not to an individual panel. This ensures that, for example, a single judge can also be qualified as a member of a judicial authority and can therefore be bribed. This term therefore includes, for example, judges, members of parliament, magistrates and members of church, school and other councils.

11 Often, this type of public official is also likely to fulfill the definition of a public official pursuant to Art. 110 para. 3 SCC.

2. Definition of public official

12 Art. 110 para. 3 SCC defines public officials as employees of a public administration and the administration of justice as well as persons who provisionally hold an office or are provisionally employed by a public administration or the administration of justice or who temporarily exercise official functions. For the assumption of a civil servant status, it is therefore essential that the transferred function is of an official nature. Such an official function always exists if the function has been transferred to fulfill a public task incumbent on the community. In the Pierre Maudet case, the Federal Supreme Court then stated that a "candidate public official" cannot be equated with a public official in office. If a person has a dual status and acts as a public official as well as standing in a future election, a distinction must be made as to whether the benefit is linked to the status as a public official or the status as a candidate in a future election.

13 Private individuals who perform public duties are treated in the same way as public officials (see Art. 322^{decies} para. 2 SCC). This equality already results from the interpretation of the concept of public official under Art. 110 para. 3

SCC, according to which the Swiss Criminal Code assumes an **institutional and a functional concept of public official**.

All bodies that perform public duties with sovereign powers under the relevant law are to be regarded as **institutional public officials**. This includes, in particular, all bodies of the community that represent the state and administrative organization to the outside world. 14

Functional public officials, on the other hand, are all persons who are entrusted with the performance of a public task, regardless of the legal form of the contractual or binding relationship with the state. In most cases, these are persons who are employed by a state-affiliated company that is entrusted with the performance of a public task. Indications for the assumption of functional public office are therefore, for example, a state majority of shares in the group, control over the majority of votes and state influence over the nomination of the management bodies of this company. In the so-called "Gazprom decision", the Federal Criminal Court also determined that the law of foreign states must also be taken into account when assessing whether a company performs public functions. The criminal law coverage of public officials is therefore relatively broad. 15

Private judges appointed outside the state **by agreement of the parties** to arbitrate or decide (private law) disputes are also deemed to be public officials. The explicit mention of arbitrators in the wording of Art. 322ter SCC is necessary as the arbitrators are not acting in a sovereign capacity even in the case of an enforceable arbitral award. The "impartial officials" at sports competitions do not count as referees within the meaning of Art. 322ter SCC; however, the granting of undue advantages to impartial officials may constitute an offense of private bribery pursuant to Art. 322^{octies} f. SCC. 16

3. Officially appointed experts

Officially appointed experts are **experts** who, due to their special knowledge in a particular field, assist the judicial authorities in establishing legally relevant facts. 17

4. Officially appointed translators and interpreters

18 Officially appointed translators and interpreters are those auxiliary persons of the authorities and courts who translate statements and documents in foreign languages. The cantonal and federal procedural law determines the details.

5. Members of the armed forces

19 All persons who perform **military service** on the basis of compulsory or voluntary military service are considered to be members of the armed forces. This includes all officers, non-commissioned officers, privates and soldiers in the armed forces, the military women's service and the Red Cross service.

20 Members of the armed forces are only mentioned in the case of active bribery offenses, as the criminal liability of passive bribery by members of the armed forces is governed exclusively by Art. 142 et seq. MStG.

III. IMPROPER ADVANTAGE

A. Advantage

21 The **instrumentality** of bribery offenses is the undue advantage granted by the bribing person to the bribed person. This includes advantages in favor of the bribed person himself as well as in favor of a third party.

22 All gratuitous benefits, both **material and immaterial**, are deemed to be undue advantages.

1. Material advantage

23 The benefit is material if it results in an objectively measurable, economic or legal **improvement**. This primarily includes cash benefits, benefits in kind or benefits with a certain market value, as well as a waiver of claims. Legal advantages include the avoidance of a penalty or the extension of a deadline. In practice, attempts are often made to disguise the gratuitousness of the benefit by concluding fictitious transactions. Fictitious consultancy agreements, inflated invoices or the granting of loans that are not in line with the market are common. Such transactions qualify as a benefit if performance and consideration do not correspond economically. The standard market conditions should then be used as a benchmark.

2. Intangible advantage

An advantage is immaterial if it is a social or professional advantage, electoral support, advantageous marriage, a promotion and honors or sexual favors. This is **criticized** in the doctrine **as being too broad**, as in fact everything can be subsumed as an immaterial advantage. Moreover, most intangible benefits are at least indirectly measurable in material terms. 24

Consent to a joint barbecue or an evening out are not considered intangible benefits. 25

According to the view expressed here, it is not decisive for the affirmation of the existence of an advantage whether this advantage can necessarily be qualified as a tangible or intangible advantage. Rather, the decisive factor is that the recipient of the benefit feels an objectively measurable legal, economic or personal improvement as a result of the granting of this benefit. 26

3. Further comments

The mere **compensation of expenses** incurred by the recipient as a result of carrying out an action that is contrary to duty or discretionary does not constitute an advantage, as there is neither a legal nor a factual improvement. Therefore, the (subsequent) reimbursement of expenses actually incurred and to be borne by the recipient himself is not a benefit under the facts, not even on the occasion of an official act in breach of duty. However, if the donor's contribution exceeds the recipient's expenses even minimally, this must be regarded as a benefit. It should also be noted that the subsequent granting of an advantage for a prior breach of duty does not constitute bribery. 27

This is due to the so-called **future requirement**. This means that the granting of the undue advantage must be aimed at a future act or omission by the public official in breach of duty. The question of whether bribery of public officials requires a future requirement is controversial among scholars; while some scholars reject a future requirement, this view is strongly criticized by other voices in doctrine and case law. 28

Art. 135 para. 1 aStGB still expressly stipulated that the official act in breach of duty must be a future official act. Although this explicit provision was repealed with the revision of the criminal law on corruption, the view expressed here is that the future requirement must still **be adhered to**. A subsequent reward for 29 an act or omission by a public official in breach of duty is not capable of affecting the legal interest protected in this case, as the public's trust in the objectivity of official activities is not affected by an act of bribery.

30 If the future requirement were to be abandoned, it would also be questionable whether an **equivalence relationship** can exist at all (cf. n. 49 et seq.; under certain circumstances, criminal liability based on the granting of an advantage pursuant to Art. 322quinquies SCC is conceivable, cf. OK-Baumgartner-Hurni, Art. 322quinquies n. 6 et seq.).

31 The future requirement is satisfied if an activity in breach of duty takes place without the granting of an undue advantage, but such an advantage has already been **agreed**. This case constellation fulfills the offence of promising an undue advantage (see N. 37).

B. Impropriety

32 In order for the granting of an advantage to be punishable in the context of bribery of public officials, it must be an undue advantage.

33 An advantage is improper if the recipient of the advantage is **not entitled** to accept it. “Improper” and ‘unlawful’ can therefore be used as synonyms.

34 However, it is not absolutely necessary for the acceptance of a lawful benefit that the public official has a direct legal right to accept the benefit. In particular, benefits that are granted on the basis of a contract are also due as long as the law or the administrative rules of the authorities (so-called Code of Conduct) leave room for this. Furthermore, Art. 322decies para. 1 SCC contains special provisions on advantages approved by a third party or minor and socially customary advantages that are never improper (see OC-Baumgartner/Hurni, Art. 322decies N. 2 et seq.).

IV. OFFENSE

35 Finally, the offense in the narrower sense consists of the offering, promising or granting of the undue advantage by the bribing party to the public official for his benefit or for the benefit of a third party. The offense can be committed explicitly or implicitly.

A. Offering, promising or granting

The action variant of **offering** is understood to be the request to conclude a bribery agreement. It is therefore a unilateral declaration of intent on the part of the bribe-giver with the declaration content that the recipient will be granted an undue advantage for an act or omission by the public official in breach of duty. The offer of an undue advantage is a declaration of intent that must be received; by agreeing to the offer, the bribe-giver is obliged to provide the advantage. Whether the contractually agreed performance of an undue advantage can be (compulsorily) enforced under civil law by the public official's consent to the offer is not decisive. 36

The alternative offense of the **promise** represents the contractual (negotiation) stage in which the undue advantage was *offered* and also *accepted* by the potential recipient of the advantage. The parties have therefore agreed the corruptive obligation. The advanced bribery stage of the offense of offering the undue advantage has no influence on the abstract penalty range. At most, the advanced stage of the offense is taken into account in the context of the objective seriousness of the element of the offense. 37

Finally, the offense variant of **granting** an undue advantage is considered to have been committed if, after the stage of *promising* an undue advantage, this very advantage is also handed over. The briber therefore fulfills the performance agreed and owed under the bribery contract with the public official for the benefit of the public official or a third party. The dispatch on the revision of the criminal law on corruption already lists undue advantages to close relatives of a public official as a suitable offense. There are particular difficulties in drawing the line where the undue advantage is offered, promised or granted to a social or non-material organization with which the public official is not closely associated. According to the view expressed here, the term "third party" must be interpreted broadly. Public confidence in the objectivity of official activities is also violated if the public official makes a discretionary decision based on unobjective incentives in favour of an idealistic organization with which the public official is closely associated without objective reasons. An example of this would be an agreement whereby the public official, as a big fan of a football club, carries out a discretionary act in favor of a bribing person who in return gives this football club a sum of money. This is an undue advantage in favour of a social organization that is not close to the public official for objective reasons. 38

B. Attempt

39 It has not been fully clarified how an attempt to bribe a public official must be conceived, or the intensity or precision with which the public official must have received the offer of a bribe. The offense variants of offering and promising both represent the promise of an advantage without the advantage having (already) been conveyed. The acceptance of the offer by the public official is not necessary to complete the offense; it is sufficient if the offer has actually reached the public official. The offense is **completed** with the offer and the arrival of the offer. However, it is disputed whether the public official must actually have taken note of the offer. According to the view expressed here, there are no convincing arguments as to why it should be necessary for the public official to take note of the offer in order to complete the alternative offense of offering. Rather, it must be sufficient for the offer of a bribe to reach the public official in order for the alternative offence of offering to be completed; in this case, the briber has done everything necessary on his part to commit the offence. The offense of bribery is therefore a **communication offense**.

40 This means that, according to the authors, an attempt to actively bribe a public official can only be possible if the offer made **does not reach** the public official, for whatever reason, or could not penetrate the public official's area of access. As soon as the bribe offer has reached the public official's area of access, the bribe-giver's act is complete and he must be punished for active bribery of public officials. In the case of the alternative acts of promising and giving, the public official has necessarily taken note of the bribe-giver's offer and even agreed to it, which is why the question discussed above concerning these alternative acts does not arise. If these alternative actions are affirmed, there is always a completed (and finished) offense.

41 As long as the communication of the undue advantage from the bribe-giver to the public official has not yet begun, there is only a **non-punishable preparatory act**. An example of this is a case in which the bribe-giver has written and signed a letter offering an undue advantage to the public official, but has not yet sent it. In this case, there is a non-punishable preparatory act. As soon as the person offering the bribe has sent the letter, but the post office loses it, this constitutes attempted active bribery of a public official. If Swiss Post delivers the letter and the public official receives it, this constitutes a

completed active bribery of a public official punishable by law; this also applies if the public official places the letter unopened in the waste paper.

V. CONSIDERATION

The promise, offer or granting of the undue advantage must be made in connection with a consideration by the public official which arises from his official activity. 42

A. Connection with the official activity

The consideration of the public official must be related to his official duties, 43 otherwise there can be no bribery of public officials. In such a case, private bribery would have to be examined if the public official is in an additional, private-law relationship with a principal.

The prevailing doctrine pursues a broad definition of official acts. Conse- 44 quently, a connection with the official activity does not always only exist if the public official acts **within the scope of his actual area of responsibility**, but can already exist if the action of the public official is also possible merely due to his position within the office. Consequently, it is sufficient to assume a connection to the official activity if the actions take place outside the official's area of responsibility, provided that it is possible to attribute them to “his” authority. An actual decision-making authority of the office holder in a specific matter is not required.

B. Consideration in the narrower sense

The act or omission carried out or demanded by the public official must ei- 45 ther **be in breach of duty or at the discretion** of the public official.

1. Decisions or omissions contrary to duty

An act or omission by a public official is in breach of duty if it violates a (pub- 46 lic law) **norm** that defines the public official's duty of conduct. A breach of an official directive or an administrative order may also constitute a breach of duty. Purely off-duty activities do not constitute a breach of duty.

A special case exists with regard to **arbitrators**, as their conduct in accor- 47 dance with their duties arises exclusively from private law standards or contractual provisions. In this case, the private law norms and the contractual provisions are to be regarded as official duties and a breach of them constitutes a breach of duty by the arbitrator that is relevant under bribery law.

2. Discretionary decisions

48 Bribery of public officials also covers actions or omissions that are at the **discretion of the public official**. Discretionary decisions are always covered by bribery of public officials, even if the discretionary decision is not objectively objectionable; it is not necessary for the discretion to have been exceeded, undercut or abused or for it to be inappropriate. The discretionary decision is therefore always deemed to be relevant under criminal law relating to corruption as soon as it is based on irrelevant motives or a flawed procedure.

C. Equivalence relationship

49 Finally, corruption in the sense of criminal law can only exist if there is an equivalence relationship between the undue advantage granted by the bribe-giver to the recipient of the advantage and the consideration paid by the public official. The public official is supposed to provide his or her consideration, i.e. his or her official activity, precisely because of the bribe-giver's performance. There must therefore be **an actual agreement between** the bribe-giver and the public official **to commit wrongdoing**.

50 A relationship of equivalence exists if the undue advantage is offered precisely for the act or omission of the public official in breach of duty. In other words, the benefit must be offered **in exchange** for a sufficiently specific or determinable breach of duty or discretionary decision. However, this act in breach of duty does not necessarily have to be concretely determined in detail.

51 In order to prove a relationship of equivalence, it is not necessary for the wrongful agreement to be specifically determined for each benefit and each act in breach of duty. It is sufficient if the **nature of** the public official's action is determined by the agreement on wrongdoing. This view is also supported by the prevailing doctrine, which requires determinability, a sufficiently specific consideration or a consideration whose material content is at least roughly known.

Friendly relations between the bribing person and the public official do not preclude bribery as a result of the granting of an undue advantage. An equivalent relationship may also exist in such a constellation. 52

VI. SUBJECTIVE ELEMENTS OF THE OFFENSE

Active bribery of public officials is an intentional offense, although contingent intent is also sufficient. The briber's knowledge and intent must relate to the fulfillment of all objective elements of the offence, including in particular the relationship of equivalence. 53

VII. CONCURRENCE

Art. 322ter SCC takes precedence over Art. 168 SCC (bribery during execution). 54

Art. 322ter SCC excludes Art. 322^{quniquies} SCC as a catch-all offense. 55

Art. 322ter SCC and Art. 322^{quater} SCC are mirror images of each other, which is why no participation or complicity in the counter-offense can be established. If the bribed person commits a punishable act as a result of the bribe, the bribe is in genuine ideal competition with incitement to commit a punishable act. Conceivable punishable acts include Art. 293 SCC (publication of official secret negotiations), Art. 305 SCC (favoritism), Art. 307 SCC (false testimony), Art. 312 SCC (abuse of office), Art. 314 SCC (misconduct in office), Art. 317 SCC (falsification of documents in office), Art. 319 SCC (escape of prisoners) and Art. 320 SCC (violation of official secrecy). 56

The relationship between Art. 322t^{er} SCC and the bribery of foreign public officials or the bribery of private individuals is controversial among scholars. Pieth, for example, assumes genuine competition due to the different legal interests involved. According to Hilti, on the other hand, there is no competition, as the offenses are mutually exclusive. This view is to be followed. This means that there is either bribery of a domestic or a foreign public official. If the person involved in the bribery cannot be subsumed under the definition of a public official, then the bribery of a private individual is present. 57

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Acceptance of bribes

Art. 322quater

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 undue advantage for that person or for a third party in order that he carries out or fails to carry out an act in connection with his official activity which is contrary to his duty or dependent on his discretion,

shall be liable to a custodial sentence not exceeding five years or to a monetary penalty.

CONTENT

I. PRELIMINARY REMARKS

Passive bribery of public officials is the **mirror image** of active bribery of public officials and is punishable by law if a public official demands, allows himself to be promised or accepts an undue advantage in return for an official act that is contrary to his duties or is discretionary. 1

II. PROTECTED LEGAL INTEREST

The protected legal interest is **identical** to that of active bribery of public officials (see OK-Baumgartner/Hurni, Art. 322ter N. 1 ff.) . 2

III. PERPETRATION

The perpetrator of passive bribery of public officials is the public official (see the list in OK-Baumgartner/Hurni, Art. 322ter N. 10 et seq.). Only a person who holds an office can be liable to prosecution for passive bribery of public officials. Art. 322quater SCC is therefore a **special offense**. 3

In the context of subsidiary **corporate criminal liability**, it is theoretically conceivable that a company may also be liable to prosecution for passive bribery of public officials within the meaning of Art. 102 para. 1 SCC, particularly if it is a state-owned or mixed-economy company. In order to qualify as a state-owned or mixed-economy company, it is crucial that the public sector exercises control over the company and that the company performs a public function. Examples include public-law institutions such as SUVA or special-law companies such as Swiss Federal Railways SBB, Swiss Post AG, Swisscom AG or public limited companies under the law of obligations in which the public sector controls the company, such as Flughafen Zürich AG. According to current case law of the Federal Supreme Court, however, the cantonal banks should not be considered state-owned companies, despite the special legal basis. 4

Of course, in such a case, the (strict) requirements of subsidiary corporate criminal liability pursuant to Art. 102 para. 1 SCC must be examined. These requirements are met if a natural person commits an offence while carrying out business activities within the scope of the corporate purpose for the state-owned enterprise and it is not possible to attribute this offence or the act or 5 omission to a specific natural person due to a **lack of organization**. The application of subsidiary corporate criminal liability is therefore theoretically also conceivable for passive bribery of public officials pursuant to Art. 322quater SCC. In practice, however, subsidiary corporate criminal liability is unlikely to ever be applied, as the requirements for proving the commission of the offense by an (unknown) natural person as an objective condition for criminal liability are de facto impossible for the prosecuting authorities to prove.

IV. UNDUE ADVANTAGE

6 The concept of undue advantage corresponds to that of active bribery of public officials (see OC-Baumgartner/Hurni, Art. 322ter N. 21 et seq.).

V. OFFENSE

7 The offense consists of demanding, being promised or accepting the undue advantage by the public official.

8 **Demanding** is a unilateral declaration of intent by the public official, according to which the public official requests the bribe-giver to provide an undue advantage. The communication of such a request may be express or implied. The offense is completed as soon as the demand has reached the recipient. Consequently, an attempt can only exist if the public official has sent the demand to the recipient but, for whatever reason, it does not reach the recipient or does not reach the recipient (see OK-Baumgartner/Hurni, Art. 322ter N. 39 et seq.).

9 The offense of **accepting a promise** is understood to be the express or implied acceptance of an offer of a bribe. The undue advantage is paid at a later date.

10 The offense of **accepting** an undue advantage is committed when the public official has accepted the undue advantage. It is conceivable that the public official only realizes that it is an undue advantage after accepting it. In such a situation, the doctrine takes the view that the element of acceptance of an undue advantage is fulfilled if the public official benefits from it. According to the opinion expressed here, all bribery offenses are communication offenses (see OK-Baumgartner/Hurni, Art. 322ter SCC N. 39). The offense is completed

with the acceptance of an undue advantage. Accordingly, according to the view expressed here, it must be sufficient that the bribed person subjectively wants to benefit from the undue advantage or that the bribed person subjectively assumes that he can benefit from the undue advantage, even if this is objectively not possible. This is therefore the case if the public official recognizes the nature of the benefit as an undue advantage and then neither returns it nor hands it over to the head of the office, but intends to subsequently carry out an official act in breach of duty. However, if the public official continues to be convinced of the admissibility of accepting the benefit, such a situation must be examined in accordance with the rules of mistake of fact pursuant to Art. 13 SCC.

VI. CONSIDERATION

The elements of the offense of acting in breach of duty in connection with the official activity, or the equivalent relationship, correspond to those of active bribery of public officials (see OC-Baumgartner/Hurni, Art. 322ter N. 42 et seq.). 11

VII. SUBJECTIVE ELEMENTS OF THE OFFENSE

In subjective terms, intent is required, whereby contingent intent is sufficient. 12
Contingent intent is conceivable, for example, in those cases in which the public official only casually expresses the offer of a bribe or the willingness to bribe the bribing person in a conversation, but the public official accepts that the bribing person is aware of these statements. Whether the public official has the intention of actually allowing himself to be influenced by the undue advantage is irrelevant, as the actual performance of the act in breach of duty is not necessary to fulfill the elements of the offence (see N. 6 et seq.).

VIII. CONCURRENCE

Cf. OC-Baumgartner/Hurni, Art. 322ter N. 56 on the relationship with Art. 13
322quater.

Art. 322sexies is superseded as a catch-all provision by Art. 322quater. 14

15 With regard to criminal acts against official and professional duty, there is genuine competition due to the different legal interests protected (see OC-Baumgartner/Hurni, Art. 322ter N. 56).

16 The relationship between Art. 168 para. 3 and Art. 322quater is controversial, although it can generally be assumed that Art. 322quater takes precedence due to the higher threat of punishment.

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Granting an advantage

Art. 322quinquies

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 undue advantage for that person or for a third party in order that the person carries out his official duties shall be liable to a custodial sentence not exceeding three years or to a monetary penalty.

CONTENT

I. PRELIMINARY REMARKS

The criminal offenses of granting and accepting advantages pursuant to Art. 322^{quinquies} f. SCC regulate the so-called **"feeding"** through unspecific "gifts" and "goodwill payments" that are not directly related to an official act, but are merely granted with a view to such an act. 1

II. PROTECTED LEGAL INTEREST

The protected legal interest is **identical** to that of active bribery of public officials (see OK-Baumgartner/Hurni, Art. 322ter N. 1 et seq.). 2

III. PERSONS INVOLVED

Anyone can be the perpetrator of the granting of an advantage (see the list in OK-Baumgartner/Hurni, Art. 322ter N. 6 et seq.). In turn, public officials are eligible beneficiaries (see OK-Baumgartner/Hurni, Art. 322ter N. 10 et seq.). 3

IV. UNDUE ADVANTAGE

The concept of undue advantage corresponds to that of active bribery of public officials (see OK-Baumgartner/Hurni, Art. 322ter N. 24 et seq.). 4

V. OFFENSE

The offense consists of an offer, promise or grant of an undue advantage (see OK-Baumgartner/Hurni, Art. 322ter N. 38 et seq.) . 5

VI. WITH REGARD TO THE PERFORMANCE OF OFFICIAL DUTIES

Within the scope of the offense of granting an advantage, a modified relationship of equivalence is required: The granting of an advantage does not have to be related to a specific official act (see OC-Baumgartner/Hurni, Art. 322ter N. 52 et seq.), but it is sufficient if the undue advantage is granted **with regard to the performance of official duties**. An undue advantage is granted with re- 6 gard to the official act if the granting of this advantage is likely to influence the future conduct of the office holder.

7 In other words, the purpose of the offence of granting an undue advantage is to make it a punishable offence to **cultivate a** relationship with a public official. This is the case if the advantage granted has the aim of making the public official generally favorable to the party granting the advantage. Against this background, the granting of an advantage serves as a catch-all offense for active bribery of public officials pursuant to Art. ^{322ter} SCC. This is particularly relevant in practice if proof of an unlawful agreement fails (see OK-Baumgartner/Hurni, Art. 322^{ter} N. 54).

8 The advantage granted must be capable of influencing the future conduct of the office. Against this background, customary social gifts cannot be used as grounds for criminal liability (see OK-Baumgartner/Hurni, Art. 322^{decies} N. 7 et seq.).

VII. SUBJECTIVE ELEMENTS OF THE OFFENSE

9 In subjective terms, **intent** is required, whereby contingent intent is sufficient.

VIII. CONCURRENCE

10 Art. $322^{quinqiues}$ and Art. 322^{sexies} are mirror images of each other, so participation or complicity in the counter-offense is not possible.

11 Cf. OC-Baumgartner/Hurni, Art. 322^{ter} N. 58 regarding the relationship to Art. $_{322quinquies}$.

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Acceptance of an advantage

Art. 322$^{\textbf{sexies}}$

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 undue advantage for himself or for a third party in order that he carries out his official duties shall be liable to a custodial sentence not exceeding three years or to a monetary penalty.

CONTENT

I. PRELIMINARY REMARKS

The criminal offenses of granting and accepting advantages pursuant to Art. 322quinquies f. SCC regulate the so-called " **feeding**" through unspecific "gifts" and "goodwill payments" that are not directly related to an official act, but are merely granted with a view to such an act. 1

II. PROTECTED LEGAL INTEREST

The protected legal interest is **identical** to that of active bribery of public officials (see OK-Baumgartner/Hurni, Art. 322ter N. 1 et seq.). 2

III. PERSONS INVOLVED

Anyone can be the perpetrator of the granting of an advantage (see the list in OK-Baumgartner/Hurni, Art. 322ter N. 6 et seq.). In turn, public officials are eligible beneficiaries (see OK-Baumgartner/Hurni, Art. 322ter N. 10 et seq.). 3

IV. UNDUE ADVANTAGE

The concept of undue advantage corresponds to that of active bribery of public officials (see OK-Baumgartner/Hurni, Art. 322ter N. 24 et seq.). 4

V. OFFENSE

The offense consists of an offer, promise or grant of an undue advantage (see OK-Baumgartner/Hurni, Art. 322ter N. 38 et seq.). 5

VI. WITH REGARD TO THE PERFORMANCE OF OFFICIAL DUTIES

Within the scope of the offense of granting an advantage, a modified relationship of equivalence is required: The granting of an advantage does not have to be related to a specific official act (see OK-Baumgartner/Hurni, Art. 322ter N. 52 et seq.), but it is sufficient if the undue advantage is granted **with regard to the performance of official duties**. An undue advantage is granted with re- 6 gard to the official act if the granting of this advantage is likely to influence the future conduct of the office holder.

7 In other words, the purpose of the offence of granting an undue advantage is to make it a punishable offence to **cultivate a** relationship with a public official. This is the case if the advantage granted has the aim of making the public official generally favorable to the party granting the advantage. Against this background, the granting of an advantage serves as a catch-all offense for active bribery of public officials pursuant to Art. 322^{ter} SCC. This is particularly relevant in practice if proof of an unlawful agreement fails (see OK-Baumgartner/Hurni, Art. 322^{ter} N. 54).

8 The advantage granted must be capable of influencing the future conduct of the office. Against this background, customary social gifts cannot be used as grounds for criminal liability (see OK-Baumgartner/Hurni, Art. 322^{decies} N. 7 et seq.).

VII. SUBJECTIVE ELEMENTS OF THE OFFENSE

9 In subjective terms, **intent** is required, whereby contingent intent is sufficient.

VIII. CONCURRENCE

10 Art. $322^{quinqiues}$ and Art. 322^{sexies} are mirror images of each other, so participation or complicity in the counter-offense is not possible.

11 Cf. OC-Baumgartner/Hurni, Art. 322^{ter} N. 58 regarding the relationship to Art. $322^{quinquies}$.

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COMMENTARY ON

Art. 322septies SCC

A commentary by Loris Baumgartner / Marco Hurni

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2. Bribery of foreign public officials

Art. 322septies

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 who is acting for a foreign state or international organisation an undue advantage, or gives such an advantage to a third party, in order that the person carries out or fails to carry out an act in connection with his official activities which is contrary to his duties or dependent on his discretion,

any person who as 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 of a foreign state or of an international organisation demands, secures the promise of, or accepts an undue advantage for himself or for a third party in order that he carries out or fails to carry out an act in connection with his official activity which is contrary to his duty or dependent on his discretion

shall be liable to a custodial sentence not exceeding five years or to a monetary penalty.

CONTENT

I. PRELIMINARY REMARKS

1 Art. 322^septies^ SCC protects the **identical legal interests** as domestic bribery of public officials (see OK-Baumgartner/Hurni, Art. 322^ter^ N. 1 et seq.). However, the scope of application is extended to foreign states and international organizations.

2 With the exception of the extension of the person to be bribed to persons working for a foreign state or an international organization, Art. 322^septies^ para. 1 SCC corresponds to the wording of Art. 322^ter^ SCC. Para. 2 of Art. 322^septies^ SCC corresponds to Art. 322^quater^ SCC. Accordingly, subject to the following explanations, reference is made to the commentary on these articles (see OK-Baumgartner/Hurni, Art. 322^ter^ and 322^quater^ SCC).

A. Active bribery of foreign public officials

3 Any natural person is a suitable perpetrator of active bribery of foreign public officials.

4 In addition to natural persons, legal entities are also suitable subjects of sanctions in the context of corporate criminal liability under Art. 102 para. 2 SCC and are the focus of the criminal prosecution authorities, namely the Office of the Attorney General of Switzerland. The starting point was the investigation by the Office of the Attorney General of Switzerland against ALSTOM SA and ALSTOM Network (Schweiz) AG in 2009. The proceedings against the Swiss subsidiary, ALSTOM Network (Schweiz) AG, were concluded in November 2011 by means of a summary penalty order, with the offence in question being bribery of foreign public officials in accordance with Art. 322^septies^ SCC. Corporate criminal liability comes into question if the company does not take all necessary and required organizational precautions to prevent bribery offences and the offence in question becomes possible precisely because of this lack of precautions. The higher the risk of bribery in the respective industry and the foreign country in which the company conducts its activities, the stricter the requirements for the necessary and essential organizational precautions. Over the years, the Office of the Attorney General of Switzerland has conducted various other criminal proceedings against legal entities based on Art. 322^septies^ SCC. It can be assumed that the number of these proceedings will also increase in the future.

The offense must be committed against a foreign public official. Bribery of foreign public **officials** is based on the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The OECD regularly reviews compliance with this convention by means of "*monitoring mechanisms*". This is a set of instruments in which states can review each other and make suggestions for improvement. This creates a kind of political peer pressure to ensure that states comply with the Convention. According to Art. 1 no. 4 lit. a of the OECD Convention, a foreign public official is (i) a person who holds a legislative, administrative or judicial office in another state by appointment or election, (ii) a person who performs public functions for another state, including an authority or a public enterprise, or (iii) a public official or agent of an international organization. The dispatch already states that a literal adoption of the Convention text does not make sense and that the interpretation of the term "public official" should be based on the facts of domestic bribery of public officials. Accordingly, according to unanimous doctrine and case law, the term "foreign public official" is interpreted autonomously and in line with the term "public official" under Swiss law. Accordingly, the term "public official" includes both institutional and functional officials and members of judicial or other authorities. An interpretation of the term "foreign public official" under Swiss law means that persons who would not qualify as public officials under national law in their own country are also classified as public officials. According to the case law of the Federal Criminal Court, the term "public official" also includes members of parliament of a foreign state, irrespective of whether or not the bribery of a public official is a punishable offence in the foreign country. 5

International organizations are intergovernmental organizations and organizations created by other public bodies. According to the current legal situation, a sports governing body is not considered an international organization. Accordingly, acts of bribery towards officials of international sports governing bodies based in Switzerland cannot be subsumed under the offense of bribery of public officials. However, the elements of the offense of private bribery pursuant to Art. 322$^{\text{octies}}$ f. SCC may be fulfilled. 6

The **offense and the means of committing the offense** under Art. 322$^{\text{septies}}$ SCC correspond to those under Art. 322$^{\text{ter}}$ SCC. With regard to the undue advantage, certain necessary payments provided for by foreign law are excluded from this concept. On the other hand, local customs that do not take the form 7 of statutory or customary law are not sufficient to constitute a justification for the granting of an advantage. This leads to delimitation difficulties in particular where a person grants so-called *facilitation payments* in order to promote the performance of an official act to which they are entitled. The terms "breach of official duty" and "discretionary act" are broadly defined. This means that, although a facilitation payment is made with regard to an official act to which it is entitled, this official act is at the discretion of the official carrying it out. Accordingly, such facilitation payments also fall under Art. 322^{septies} SCC, unless they are explicitly permitted under foreign law.

8 The offense in the narrower sense includes the offer, promise and granting of an undue advantage (OK-Baumgartner/Hurni, Art. 322ter N. 21 et seq.). In addition, there must be an equivalent relationship between the undue advantage offered, promised or granted and the expected consideration (OK-Baumgartner/Hurni, Art. 322ter N. 49 et seq.). A **cross-border granting** or acceptance of an advantage that does not relate to a specific official act is not covered by Art. 322^{septies} and therefore remains unpunishable.

9 For the subjective elements of the offense, please refer to the comments on Art. 322ter SCC (OK-Baumgartner/Hurni, Art. 322ter N. 53).

B. Passive bribery of foreign public officials

10 The offense of passive bribery of foreign public officials is structured in the same way as the active offense. Accordingly, the identical concept of public official also applies to the passive offense. This results in the problem that a person can be considered a foreign public official by applying the autonomous concept of a public official, even though they are not considered a public official in their own country and according to its legal system.

II. CONFLICTS

11 Art. 322^{septies} para. 1 and para. 2 SCC are mirror images of each other. Therefore, no complicity or participation in the counter-offense can be established in each case.

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4. General provisions

Art. 322^{decies}

[1] The following are not undue advantages:

a. advantages permitted under public employment law or contractually approved by a third party;

b. negligible advantages that are common social practice.

[2] Private individuals who fulfil official duties are subject to the same provisions as public officials.

CONTENT

I. DELIMITATION OF NON-CRIMINAL CONDUCT

Art. 322^{decies} SCC was created during the last revision of the criminal law on corruption in 2016. The aim of this **revision** was to close gaps in criminal law on corruption that still existed in Switzerland as the home country of various major international sports associations and as a globalized business location. With the introduction of the offense of granting or accepting an advantage, there was a growing need to exempt certain acts from criminal liability in all cases. This need was met by the common provisions pursuant to Art. 322^{decies} SCC. 1

A. Benefits permitted under employment law

With Art. 322^{decies} para. 1 lit. a SCC, the legislator has created an exception that exempts **benefits permitted under employment law** from criminal liability. An advantage is covered by lit. a if its acceptance is permitted on the basis of a general-abstract norm of public service law. In the course of the revision of the criminal law on corruption, the dispatch pointed out that such general-abstract norms must already have entered into force prior to the offense. This includes, for example, administrative standards relating to the reporting, approval or delivery of gifts or other benefits, such as those provided for in Art. 21 para. 3 of the Federal Personnel Act and Art. 93 and 93a of the Federal Personnel Ordinance. 2

If there is a suspicion of **bribery of foreign public officials**, the circumstances in the country concerned are decisive in assessing the general abstract standard. For example, payments to foreign public officials that are permitted or even required under the relevant local written law or established case or customary law do not constitute an undue advantage. 3

B. Contractually authorized advantages

With the regulation of bribery in the private sector in the SCC, Art. 322^{decies} para. 1 lit. a SCC created the counterpart to the advantages permitted under employment law. Accordingly, benefits **that have been contractually approved by a third party** do not constitute undue advantages. A third party is deemed to be the trust giver who has a contractual relationship with the trust taker. 4

5 The question of whether consent must be given **before or after the offense** is disputed among scholars. If one follows the message, it must already be clear before the act in question which advantages are authorized. In contrast, there are doctrinal opinions that follow the wording of Art. 322^{decies} para. 1 lit. a, 2nd part of the sentence and see the possibility of subsequent authorization of this benefit. According to the opinion expressed here, this issue must be viewed in a differentiated manner. A criminal act is already completed when the offer reaches the public official or private individual. Although approval can be granted at a later point in time, the (criminal) act is therefore already complete. Subsequent approval of an advantage can therefore only have the effect of excluding prosecution in the sense of a declaration of disinterest. However, since the fulfillment of the elements of the offense had already been completed, the approval cannot constitute consent that excludes prosecution.

6 In the case of private bribery pursuant to Art. 322^{octies} SCC, the question also arises as to whether the provision of an advantage to a third party, and therefore not to the person in a position of trust, can be authorized by the principal. It should be noted that the principal generally does not have a contractual relationship with this third party and accordingly there are no duties of loyalty between the third party and the principal. In the case of private bribery, however, the focus is always on a **breach of the duty of loyalty** between the person receiving the bribe and the person placing the trust. Whether the bribing person provides a benefit to a third party or to the relying party is irrelevant from the perspective of the relying party, as the relying party also breaches its duty of loyalty if the bribing person provides a benefit to a third party on the instructions of the relying party. Therefore, it seems objectionable if approval can only be granted if the relying party retains the benefit himself, but not if the benefit is directed to a third party.

7 To simplify matters, here is an example: An employee who works as a purchasing manager for his employer has a friendly relationship with a potential supplier of the employer. The employee may be liable to prosecution for private bribery if he allows himself to be bribed by the supplier granting a benefit to the employee's preferred sports club so that the employee allocates future supplements to this supplier. Since the employer can approve the awarding of the contract to the supplier as a result of the direct granting of a gift from the supplier to the employee, it seems only logical that the employer can also ap-

prove the awarding of the contract to the supplier as a result of the benefit to the sports club.

C. Minor, socially customary benefits

According to Art. 322^{decies} para. 1 lit. b SCC, minor, socially customary advantages are exempt from criminal liability, whereby the requirements must be met cumulatively. Whether an advantage falls within the range of insignificance and social custom must be assessed on the basis of an **overall assessment**. 8

Benefits are considered to be **socially customary** if they are based on social conventions and are not considered improper by society as a whole. Criminal liability is not assumed if the benefits in question cannot cause any bias on the part of the recipient and therefore cannot be influenced by the sender. The embassy refers here to cases in the absolutely trivial area, such as a coffee during a meeting or the gift of a pocket calendar. A distinction must be made between such absolutely trivial cases and cases in which a minor benefit is given, but this is done in direct connection with or with the aim of carrying out an act of bribery. If the benefit is provided with a view to an act of bribery, there is no social custom. Minority and social custom are therefore cumulative requirements in order to exclude criminal liability. 9

Due to the lack of a statutory maximum limit, it is not possible to precisely define when a benefit is no longer **de minimis**. The limit of insignificance must be set at the threshold above which influencing becomes possible. This threshold is controversial among scholars and has not yet been assessed by the Federal Supreme Court. Hilti, for example, analyzes the different doctrinal opinions and focuses on possible influence. In his opinion, the threshold of insignificance must be set low in order to prevent influence. Other doctrinal voices apply the case law on Art. 172ter SCC analogously to the threshold of insignificance, according to which insignificance would be set at a maximum value of CHF 300.00. According to the opinion expressed here, this value is to be approved in accordance with the case law on Art. 172ter SCC in the sense of an absolute maximum limit. However, whether a maximum amount of CHF 300.00 is still a suitable guideline value for the upper value limit pursuant to Art. 172ter SCC is disputed among scholars. Furthermore, it should be noted that even lower amounts can no longer be considered minor. This is the case if the criterion of social custom is weighted more heavily. Accordingly, 10 the answer to the question of what constitutes a minor and socially customary disadvantage always results from an overall consideration of the two cumulative requirements to be fulfilled. The frequency of the advantage granted must also be taken into account, whereby the multiple granting of an advantage that appears to be socially customary and insignificant when considered individually can make it suitable as a means of committing an offense.

II. EQUALITY OF PRIVATE INDIVIDUALS WITH PUBLIC OFFICIALS

11 According to para. 2, private individuals who perform public duties are treated in the same way as public officials. This equality already results from the **interpretation of the term "public official"** according to Art. 110 para. 3 SCC, according to which the Swiss Criminal Code assumes both an institutional and a functional concept of public official (see OK-Baumgartner/Hurni, Art. 322ter SCC N. 14 et seq.).

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COMMENTARY ON

Art. 329 SCC

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Breach of military secrecy

Art. 329

1. Any person who unlawfully

enters buildings or any other places, the access to which is prohibited by the military authorities,

makes drawings, diagrams or plans or takes photographs or makes films of military establishments or objects serving the national defence, or copies or publishes such drawings, diagrams, plans, photographs or films,

shall be liable to a fine.

2. Attempts and complicity are also offences.

CONTENT

I. GENERAL

Art. 329 SCC protects the legal interest of national defense and, according to the margin, military secrets in particular. Despite the identical marginal note, however, the offense cannot be equated with Art. 106 MStG, because the latter only protects material secrets. In contrast, Art. 329 SCC already criminalizes the impairment of formal secrets, i.e. documents, etc., which, regardless of their actual secrecy, are classified as confidential or secret according to the special provisions of administrative law, and thus the apron of military secrets. It is thus an abstract endangerment offense. The Federal Supreme Court confirmed the prevailing doctrine and stated that Art. 329 SCC was already fulfilled if no military secrets to be preserved in the interest of national defense were affected by the proscribed conduct. 1

At the same time, paragraph 1 protects the domestic right of the military authorities as an official offense. 2

In accordance with Art. 23 para. 1 letter k CrimPC, Art. 329 SCC is subject to federal jurisdiction. 3

II. OBJECTIVE ELEMENTS OF THE OFFENCE

A. Offenses

1. Intrusion

The offence is committed by anyone who unlawfully enters an institution. Paragraph 1 mentions institutions and other localities. It thus protects enclosed facilities, such as barracks, but also open training grounds or car parks (so-called "barracks trespass"). 4

2. Imaging, copying or publishing

The offense is committed by anyone who creates an image or performs a (downstream) action such as copying or publishing. This includes publications in magazines, posts in social media or the creation of printscreens or copies. It is not necessary that the illustration has already been disclosed to third parties. 5

6 The content of the image may be military establishments or items classified as confidential or secret, such as documents, plans, radios, parts of weapon systems, etc.

B. Unlawfulness

7 The elements of the offense require that the act be done unlawfully, i.e., generally without right or without specific authorization. The unlawfulness must therefore be positively affirmed.

1. Basis of restrictions and prohibitions (classification)

8 In the case of installations under the Federal Law on the Protection of Military Installations, any unauthorized entry, depiction, etc. is prohibited (Art. 4 Federal Law on the Protection of Military Installations, SR 510.518). This is subject to authorization in accordance with the provisions of the Ordinance on the Protection of Military Installations. This generally permits the depiction of the exterior of a facility that can be perceived without special aids or special precautions. However, publication must not allow any conclusions to be drawn about the location or purpose of the installation (Art. 4 para. 5 Installation Protection Ordinance, SR 510.518.1). Under these conditions, aerial photographs of military installations are also permitted (Art. 80 Ordinance on Aviation, SR 748.01).

9 Further restrictions and prohibitions can be found in the Federal Information Security Act (E-ISG), which regulates the processing of documents classified as "confidential" or "secret," etc. The classification must be recognizable to the perpetrator, e.g., by an appropriate imprint or stamp.

10 A ban on entering a military installation can also be based on the general domiciliary right of the military authorities, as can be derived from the wording of the law. In question are (house) bans by the military authorities of the Confederation (the Defense Group, the Federal Office of Armaments and the Chief Audit Office) including the army, the military authorities of the cantons and third parties entrusted with military tasks. Such a prohibition must be recognizable to the perpetrators, e.g. by appropriate signage.

2. Timeliness of restrictions and prohibitions (classification)

Since Art. 329 SCC already protects formal secrets, it is irrelevant, according to the view expressed here, whether the special legal requirements (e.g. according to E-ISG) for classification were (still) fulfilled at the time of the offense. Likewise, a declassification is irrelevant if it was not yet known at the time of the offense. As long as a classification was recognizable to the perpetrator, Art. 329 SCC applies. Excluded from this are invalid classifications or those which obviously cannot (any longer) pursue a purpose of secrecy, e.g. a site plan of the barracks in Bern. The same must apply if the perpetrator knew with certainty that the classification had been removed at the time of the crime. A subsequent declassification does not exonerate the perpetrator from his criminal responsibility. 11

III. SUBJECTIVE ELEMENTS OF THE CRIME

The elements of the offense require intent, although contingent intent is sufficient. The subjective element requires, in particular, that the perpetrator was aware of the unlawfulness. According to the Federal Supreme Court, the visible classification "confidential" or "secret" is a significant indication of a material secret. This must apply a fortiori to formal secrets. Knowledge of unlawfulness may also be deemed to exist otherwise, for example on the basis of special knowledge of the perpetrator or on the basis of the overall circumstances. 12

Treasonable intent is not required. 13

IV. ATTEMPT AND AIDING AND ABETTING

Attempt and aiding and abetting are punishable under no. 2, e.g., offering classified documents to media representatives for publication. The offering of classified documents to the media with the aim of inducing the military authorities to do, tolerate or refrain from doing something is also an unlawful means of coercion. 14

V. CONCURRENCES

Art. 329 SCC is subsidiary to Art. 267 SCC (diplomatic treason), Art. 274 SCC (military intelligence), Art. 86 SCC (espionage and treasonable violation of 15 military secrets), Art. 106 SCC (violation of military secrets) and Art. 7 Federal Law on the Protection of Military Installations. In each case, it is a predicate offense that is also punishable.

16 In general, it should be noted that Art. 86 and 106 MStG are also applicable to civilians (Art. 3 para. 1 no. 7 MStG). The same applies to offences against the Federal Law on the Protection of Military Installations (Art. 9 Federal Law on the Protection of Military Installations).

17 For acts committed by members of the armed forces in military service that do not yet reach the threshold of Art. 86 and 106 SCC, the provisions of the SCC take precedence over Art. 329 SCC (Art. 9 para. 1 SCC). One might think of Art. 61 MStG (insubordination) or Art. 72 MStG (failure to comply with service regulations) in conjunction with the prohibition of publication of pictures, film and video sequences or the rules on access, recording and entrainment permits for military installations (no. 309 ff. Organization of Training Services, ODA).

18 Whether Art. 329 para. 1 SCC also protects the right of domicile within the meaning of Art. 186 SCC is disputed. According to the view expressed here, this is true because both the holder of the domestic right and the holder of a formal secret have a comparable interest in disposing of access to private or non-public or semi-public space. Consequently, there is alternativeity between the two offenses. The misdemeanor offense of Art. 186 SCC takes precedence over the misdemeanor offense of Art. 329 SCC if a corresponding criminal complaint is filed.

19 Due to the numerous, competing penal norms that in principle take precedence over Art. 329 SCC, the practical scope of application of this provision is small, which is why its deletion was considered. However, its existence is justified in particular by the criminal law protection of formal secrets.

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COMMENTARY ON

Art. 331 SCC

A commentary by Jan Imhof

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Unauthorised wearing of the military uniform

Art. 331

Any person who wears the uniform of the Swiss armed forces without authority shall be liable to a fine.

CONTENT

I. GENERAL

Art. 331 SCC protects the legal interest of national defense. On the one hand, the uniform has a representative function: "The uniform is an expression of belonging to the army. [...]" (Art. 58 para. 1 Service Regulations of the Armed Forces). The idea of state representation is thus also reflected in the permit requirement for wearing foreign military uniforms in Switzerland and Swiss military uniforms abroad (Ordinance on the Wearing of Foreign Uniforms in Switzerland and Swiss Military Uniforms Abroad, SR 125). 1

On the other hand, the uniform has a distinguishing function between civilian and military persons and thus justifies the presumption that the latter are legitimized to perform sovereign acts. Furthermore, in international armed conflict, the uniform serves as a distinguishing feature between protected persons and combatants (cf. Art. 44, no. 3, Additional Protocol to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Protocol I). Here, too, it is an indication of being able to participate lawfully in hostilities and to claim prisoner-of-war status. 2

Finally, the criminal offense is intended to ensure the constant readiness of the material serving the armed forces. One objection to this is that the offense is tailored to non-conscripts. It is difficult to imagine that uniformed non-conscripts could effectively jeopardize the operational readiness of the armed forces. 3

According to Art. 23 para. 1 lit. k CrimPC, Art. 331 SCC is subject to federal jurisdiction. 4

II. OBJECTIVE FACTS

A. The uniform of the Swiss Army

The term "army uniform" is to be interpreted broadly, as the French and Italian versions show ("l'uniform de l'armée" / "l'uniforme dell'esercito svizzero"). The facts include all official tenus of the Swiss Army (Army and Air Force). The uniform can be genuine or imitation. Thus, according to the opinion represented here, uniforms that are not in service also fall within the scope of 5 application as long as they strongly resemble the current one. Uniforms with a clear historical reference, however, are excluded.

6 With regard to the protected legal interest, not all uniform components (belt, T-shirt, etc.) fall under the protection of criminal law. The overall appearance of the perpetrator and the reference to the Swiss army generated by it are likely to be decisive. This applies to the initial uniform and regularly to uniform components with camouflage print. The latter may not be given to departing members of the armed forces as property (Art. 27 para. 1 lit. b Ordinance on the Personal Equipment of Members of the Armed Forces, VPAA, SR 514.10).

B. Unauthorized carrying

7 Service members are in principle prohibited from using the uniform for private purposes (Art. 114 para. 4 Military Act, MG, SR 510.10). Art. 21 VPAA regulates the exceptions and mentions, for example, participation in off-duty activities of military societies, military sports activities, employees of the Defense Group, political events (lit. a-c) and with the approval of the Defense Group: Officers' balls, historical parades and events, fairs, weddings and funeral ceremonies (lit. d).

8 For non-civil servants, there is no such general permission as in Art. 21 para. 1 lit. a-c VPAA. They must always obtain prior permission for use, e.g. for filming or theater performances.

9 In order to fulfill this requirement, the uniform must be worn and perceived by the public. This requirement can also be fulfilled in the digital space. Wearing the uniform in private, on the other hand, does not affect the protected legal interest and is not punishable.

III. SUBJECTIVE ELEMENTS OF THE OFFENSE

10 The elements of the offense can only be committed intentionally, whereby contingent intent is sufficient.

IV. PERSONAL SCOPE OF APPLICATION AND LIMITS OF JURISDICTION

Art. 331 SCC is not a special offense. However, insofar as the perpetrator is subject to military jurisdiction, the provisions of the MStG take precedence over Art. 331 SCC (Art. 9 para. 1 SCC). Specifically, service members are liable to prosecution for the misuse of army material by wearing their personal uniform or those of other Swiss army members without authorization (Art. 73 no. 1 MStG). In this case, the service members are subject to military jurisdiction both on and off duty (Art. 3 para. 1 no. 1 and 4 MStG). 11

The unauthorized wearing of the uniform may be considered as prohibited insidiousness in an international armed conflict (Art. 37 no. 1 Additional Protocol I to the Geneva Conventions relating to the Protection of Victims of International Armed Conflicts, SR 0.518.521, and Art. 23 lit. f Convention relating to the Laws and Customs of Land Warfare, SR 0.515.112). Art. 264g para. 1 lit. d SCC and Art. 112c para. d MStG each take precedence over Art. 331 SCC as lex specialis. 12

If the perpetrator performs an (unauthorized) official act while wearing the uniform without authorization, Art. 287 SCC takes precedence insofar as the perpetrator did not give other persons the impression that he or she was authorized to perform the official act by wearing the uniform. 13

In view of the personal scope of application, Art. 331 SCC has no great practical significance, which is why its deletion was considered. However, it seems justified to criminalize unauthorized carrying equally by both those on duty and those not on duty. 14

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