



**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS**

**SWITZERLAND: PHASE 2**

**REPORT ON THE APPLICATION OF THE CONVENTION ON  
COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN  
INTERNATIONAL BUSINESS TRANSACTIONS  
AND THE 1997 RECOMMENDATION ON COMBATING BRIBERY  
IN INTERNATIONAL BUSINESS TRANSACTIONS**

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## INTRODUCTION

### a) *Switzerland, an economic and financial centre*

1. Switzerland currently hosts some of the leading companies operating in global markets in industries as diverse as chemicals, machinery and financial services. Many firms from the OECD countries have also chosen Switzerland as the site of their European headquarters, their high-tech production or their research operations. Together with these large groups with their strong presence in foreign markets, are a multitude of small and medium-sized enterprises that are driven to do business abroad by the limited size of the domestic market.

2. In 2003, Switzerland ranked 14<sup>th</sup> amongst the OECD countries in terms of exports. Accounting for 41% of gross domestic product (GDP) in 2001, goods and service exports highlight the importance of foreign trade for Switzerland. The goods and products constituting the bulk of these exports were chemicals (35%), machinery and electronics (24%) and precision instruments, timepieces and jewellery (17%), which together accounted for three-quarters of Swiss exports. European Union countries were the primary destination of these exports (with 59% of the total), followed by transitional or emerging economies (15% of the total) the United States (11% of the total), developing countries (7% of the total)<sup>1</sup>.

3. In terms of foreign direct investment (FDI), and according to OECD statistics, Switzerland ranked 9<sup>th</sup> amongst OECD countries. Swiss FDI is undertaken primarily in the high technology, metallurgy and machinery sectors, as well as in insurance and financial services. Between 1990 and 2001, outward Swiss FDI increased fivefold; the main recipients of this investment were the EU countries (47%), the United States (24%) and the developing and emerging countries (22.5%).

4. The financial sector, accounting for 11% of gross domestic product (GDP), is another pillar of the Swiss economy. Switzerland is the world leader in private banking: according to some estimations, approximately 30% of the world's private wealth held outside the owners' countries of residence is managed in Switzerland. Assets managed in Switzerland in the form of customer deposits amounted in 2002 to some CHF 2 870 billion, or more than six times Swiss GDP (CHF 428 billion in 2002). At year-end 2001, the financial sector employed some 222 000 persons, roughly 115 000 of whom in banks and 63 000 in insurance undertakings (linked to the financial sector), with an additional 42 000 jobs in fiduciary and auditing firms and other financial service providers, accounting for 6.5% of aggregate Swiss employment in 2001. Switzerland also plays a significant role in terms of capital market transactions: in 2002, the Swiss stock exchange ranked eighth in the world in terms of market capitalisation<sup>2</sup>.

### b) *Switzerland's exposure to international bribery*

5. The Swiss financial centre, which attracts substantial volumes of foreign capital, can be a potential target for concealing the direct proceeds of bribery in foreign markets. This can be seen from the frequency with which foreign legal authorities turn to Switzerland for mutual assistance in such cases. The breakdown by country of residence of money laundering suspects in Switzerland, like the percentage of bribery cases underlying money laundering operations, as revealed by an analysis of money laundering suspicions reported to the federal authorities, are other indicators of this risk: in recent years, over half the persons suspected of money laundering activities in Switzerland have been non-residents, and between 20

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<sup>1</sup> Swiss Federal Customs Administration 2003 and *Statistical Data on Switzerland 2003* (Swiss Federal Statistical Office).

<sup>2</sup> *Swiss Financial Centre*, Swiss Federal Department of Finance, June 2003.

and 40 of the suspected money laundering cases reported to the federal authorities are linked to bribery<sup>3</sup>. At the time of Switzerland's Phase 2 review, two ongoing investigations for money laundering showed signs of an underlying offence of bribing foreign public officials.

6. But it is not the financial centre alone that risks being exposed to money from international corruption. Clearly, Swiss businesses tend to operate in sectors that are generally acknowledged to be less prone to bribery (high technology, metallurgy, machine-tools and industrial engineering). But large, small and medium-sized enterprises do business in certain foreign markets in which corruption can be rife, regardless of the industry. A number of recent cases in Swiss courts have shown that Swiss enterprises have not always been sheltered from behaviour involving international corruption, although the defendants in question were not charged with bribing foreign public officials, which was not a criminal offence in Swiss law until 2000. For example, a recent investigation of a case of bribery committed in the 1990s by a leading Swiss multinational, the world leader in its industry, in respect of securing a merchandise certification contract in Pakistan, led to the company's conviction for money-laundering in the summer of 2003. Another example involves a Kremlin procurement officer convicted of money laundering in 2002 by a Geneva court for taking substantial bribes (in exchange for awarding government contracts to two Swiss enterprises) and then laundering a portion of the proceeds in Switzerland.

7. The profiles of a number of cases under investigation at the time of the Phase 2 review of Switzerland also seem to confirm the involvement of Swiss firms in transnational bribery. While at that time there had been no conviction for bribery offences as defined in the OECD Convention<sup>4</sup>, among current investigations under the new offence of bribing foreign public officials, as written into Swiss law, at least one case, which was brought to the attention of judicial authorities in the canton of Zurich in connection with a mutual legal assistance request from Brazil, uncovered acts committed by a Swiss enterprise that may involve bribery of foreign public officials in international business dealings. Another investigation launched in the canton of Geneva concerned bribery of international civil servants.

*c) Awareness of bribery and the laundering of its proceeds*

8. In recent years, bribery and tainted bribe money have become an important topic of public debate in Switzerland, in the media and on the political scene. At both the federal and cantonal levels, the number of criminal investigations into bribery allegations has risen, and each year there are an average of twelve convictions for active or passive corruption of Swiss public officials. Investigative committees have been formed to shed light on domestic bribery cases. No fewer than some sixty written questions on the subject of bribery have been submitted by members of the federal parliament since the beginning of the 1990s. Domestic bribery of Swiss public officials has been the subject of three reports initiated by the federal government – the first dating from October 1996 on security controls and corruption; the second from March 1998 on corruption risks and security measures within the federal administration; and the third published in June 2003 and dealing with the prevention of corruption within the federal administration.

9. An equally great amount of attention has been paid to the theme of the Swiss financial centre's exposure to money laundering, including proceeds from bribery abroad. Switzerland has been a driving force in developing innovative measures within FATF. An entire legislative arsenal aimed at keeping funds of dubious origin from being injected into the financial sector has been developed over the past fifteen years to impose numerous obligations on banks that accept and keep client assets on deposit, or that

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<sup>3</sup> Money Laundering Reporting Office Switzerland (MROS), *6<sup>th</sup> Annual Report 2003* (March 2004).

<sup>4</sup> At the time of the Phase 2 review of Switzerland, while Swiss courts had in fact convicted a defendant of bribing foreign public officials (in 2001), the conviction involved offences outside the intended scope of the OECD Convention insofar as it involved payment of a bribe by a foreign citizen to an Italian customs official to obtain a stamp falsely attesting to the foreigner's entry into Italy.

provide investment advice. The fact that, since 2000, bribery of foreign public officials has been included on the list of basic violations for the purpose of enforcing money laundering legislation has strengthened the control mechanism. These legislative efforts have been seconded by industry professionals through numerous instructions, guidelines and training sessions for financial intermediaries, including banks, fiduciaries, wealth managers, and so on.

10. The broader problem of major economic crime and its increasingly international nature has also become a major topic of discussion, prompting a series of legislative and organisational reforms aimed at enhancing the effectiveness of the struggle against this type of crime. Among the measures taken is the decision, which has been implemented gradually since January 2002, to strengthen the powers of the Confederation in connection with a so-called “Efficiency Plan” by assigning it new procedural powers and new resources to tackle offences within the realms of international crime, money laundering, bribery of foreign public officials and economic crime. Likewise, to complement the measures that entered into force on 1 May 2000 and instituted the offence of bribing foreign public officials, the Criminal Code has stipulated since October 2003 that companies may now be held criminally liable. Lastly, plans to unify criminal procedures and thus to rectify the current multiplicity of procedures – at present, 29 different codes of criminal procedure are in effect: one for each canton and one for the Confederation, plus a military procedure and an administrative penal procedure – have been released for public consultation. At the conclusion of this process, by 2008 or 2010, Switzerland is expected to have a single code of criminal procedure applicable throughout Swiss territory.

11. The press has given these concerns extensive coverage: the number of dispatches about bribery and the laundering of its proceeds that were sent out to all Swiss media by the Agence Télégraphique Suisse (ATS) rose by roughly 300% between 1985 and 1997, reaching a total of 4 134 dispatches<sup>5</sup>. Swiss readers have thus been informed of important domestic corruption cases in which Swiss public officials have been implicated, but also of international cases in which Switzerland has been involved directly or indirectly because the bribe money had been deposited to bank accounts in Switzerland or because Swiss businessmen were suspected of participation in acts of bribery committed abroad. These dispatches have probably raised awareness in the Swiss public by showing that bribery is neither limited to others nor taboo. The extremely active dedication of a number of cantonal magistrates in the fight against major financial crime, assisted by police officers deeply involved in processing especially complex cases of economic crime, has also contributed to building public awareness of international corruption.

12. Even so, the vast majority of cases attracting media attention that have revealed linkages between Switzerland and other countries have generally been related to instances in which money from bribery abroad has been placed in Swiss banks, leading to protracted legal assistance procedures. Media accounts of corruption seem to have contributed to the perception in Switzerland that international bribery is a phenomenon that primarily originates abroad. So far, despite the Swiss authorities’ efforts to build awareness of the issues covered by the OECD Convention, that perception does not apparently seem to have **really** altered.

d) *Methodology and structure of the report*

13. The purpose of this report is to explore what Switzerland has done to enforce the legislation transposing the Convention, assess its application in the field and monitor Switzerland’s specific adherence to the 1997 Revised Recommendation. It reflects the Swiss authorities’ responses to the general and specific Phase 2 questionnaires, interviews with government experts, representatives of the business community, lawyers, accounting professionals and financial intermediaries, and representatives of civil society encountered during the on-site visit from 10 to 14 May 2004 (see attached list of institutions

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<sup>5</sup> Nicolas Queloz et al., *Processus de corruption en Suisse* (Basel: Helbing & Lichtenhahn, 2000), pp. 59-68.

encountered), a study of relevant legislation and independent analyses conducted by the Lead Examiners and the Secretariat.

14. Part A of the report covers the mechanisms put in place, within both the Swiss public and private sectors, to prevent and detect bribery of foreign public officials and it looks at how those mechanisms could be made more effective. Part B looks at the effectiveness of mechanisms to prosecute bribery of foreign public officials and related offences involving money laundering, accounting and taxation. Part C deals with the treatment of persons convicted of bribing foreign public officials and related offences. Lastly, the report concludes with specific recommendations formulated by the OECD Working Group on Bribery with respect to prevention and detection, as well as prosecution and sanctions. This part also highlights the issues that the Working Group feels warrant follow-up or a new examination in connection with ongoing efforts in this area.

## **A. PREVENTING AND DETECTING THE OFFENCE OF BRIBING FOREIGN PUBLIC OFFICIALS**

### ***1. Preventing acts of bribery of foreign public officials***

#### ***a) Awareness on the part of federal and cantonal government officials***

15. The number of investigations into bribery of Swiss public officials has risen in recent years, demonstrating the sensitivity of police and judicial officials to this type of crime. The entry into force of the new criminal law on bribery in 2000, and the transfer of powers to the Confederation regarding complex corruption cases – including those involving foreign public officials – have only heightened that awareness. In addition to information on the new legal framework, the government undertook companion measures to support the work of the courts and the police on both the federal and cantonal levels. Staff in the Office of the Attorney-General of Switzerland are given a special three-month training course, part of which focuses on corruption<sup>6</sup>, while the Swiss cantons' Conference of Directors of Justice and Police, in collaboration with the Confederation, decided to set up advanced training in combating economic crime, a number of modules of which deal with bribery of foreign public officials and related offences. The first diplomas were awarded in 2003.

16. Along with legislative and organisational measures, government endeavoured to make its officials aware of the new legal framework and anticipate corruption risks. At the federal level, awareness-building about corruption in foreign markets aim essentially at three categories of staff: those employed in departments in charge of granting bilateral Swiss aid, diplomatic personnel and those in charge of export credits. For example, foreign-based co-ordinating offices of the Directorate for Development and Co-operation in charge of contracts tied to bilateral assistance are instructed to report any instance of bribery to their direct superiors at headquarters immediately. Awareness-building and training diplomats about the importance of the fight against bribery is also undertaken by the Federal Department for Foreign Affairs: detailed instructions are given to the staff of Swiss missions abroad to assist Swiss companies affected by the new legislation (*e.g.* providing advice and recommending reliable lawyers) and which stipulate the actions to be taken if it is learned that a company has been asked for a bribe<sup>7</sup>; the theme of bribery of foreign public officials and its criminal implications and commercial repercussions are dealt with each year in a training workshop for trainee diplomats. Lastly, staff of the federal body in charge of granting export

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<sup>6</sup> At the time of Switzerland's Phase 2 review by the Working Group, the Swiss authorities indicated to the examining team that a continuing training programme partly devoted on corruption was being established by the Office of the Attorney General and federal criminal police.

<sup>7</sup> In addition, diplomatic personnel are prepared at all times to mediate vis-à-vis the foreign State in the event that bribes are solicited – just like the National Contact Point in respect of the OECD Guidelines for Multinational Enterprises.

guarantees, the ERG, is required to call the attention of applicants for guarantees to the fact that the granting and validity of guarantees is expressly contingent upon compliance with legal prescriptions concerning active corruption of foreign public officials. At canton level, most of the awareness-building measures taken by cantonal authorities so far seem to have approached the fight against bribery in rather general terms, or have focused on preventing bribery of their own officials.

b) *Preventive organisational measures in the business sector*

i) Compliance programmes of large Swiss enterprises

17. In the Swiss private sector, it is mainly large firms that factor in risks of bribery in foreign markets and that have set up systems (of varying comprehensiveness) in an attempt to keep their agents or employees from committing bribery offences. For most of these firms, the majority of whose employees and operations are based outside of Switzerland, their policies in this area seem to take account, in addition to the new Swiss anti-bribery law, the obligations imposed in countries other than Switzerland and the risk that the firm or its executive bodies will incur criminal or civil liability in those countries, as well as the potential impact of bribery allegations on the firm's reputation. In implementing prevention policies, such firms generally try to adopt uniform, group-wide standards rather than tailor them to each country's legislation.

18. Clearly, compliance policies can in some instances seem designed more to avert or mitigate any liability on the company's part than to actually reduce corruption, although it is difficult to draw firm conclusions in this area. Even so, a number of affairs involving large Swiss companies in or out of court (generally, but not exclusively, in areas not involving bribery) have convinced many of them, and especially publicly traded firms, of the potentially high cost of alleged improprieties. Corporate officers consider that it is in their firms' best interests to do everything possible to manage legal risks actively, in respect of bribery as with other, similar risks. The companies most successful in combating bribery do not stop at adopting codes of conduct; they commit publicly to zero tolerance of bribery at the highest levels of the company and apply their codes of conduct with determination and method<sup>8</sup>. Under this type of active approach, which even in very large corporations is nonetheless still the exception rather than the rule, internal sanctions, which can go as far as dismissal, are imposed regularly for violations of codes of conduct.

ii) Preventive measures within the economic fabric of other businesses

19. The prevention practices of other businesses has proved more muted. The review team found that familiarity with the new anti-bribery law was still limited. As of the date of the Examiners' on-site visit, the meritorious sensitisation efforts by government and certain Swiss NGOs would not appear to have significantly heightened awareness of the new offence among the small and medium-sized enterprises which constitute the majority of Switzerland's economic fabric (90% of registered businesses in Switzerland are SMEs)<sup>9</sup>.

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<sup>8</sup> The code of conduct introduced by one large Swiss enterprise operating in foreign merchandise inspection markets stipulates, for example, that "*neither customers' wishes, nor growth in turnover or profit, nor orders from hierarchical superiors, are more important than our integrity*". Compliance with the code, which is conveyed to all employees, is reviewed annually.

<sup>9</sup> The preliminary findings of a March 2004 survey of a sample of businesses conducted jointly by the Swiss chapter of the non-governmental organisation Transparency International (TI) and Economiesuisse (the main employers' organisation) and presented to the Examiners, tended to bear out this observation, even if the small size of the sample means that any conclusions that may be drawn from it should be treated with caution. From the 123 completed questionnaires (out of a total of 1 100 distributed), it emerged that 48% of respondents did not know that bribery of



20. In 2003, after an initial sensitisation campaign coinciding with the introduction of the new offence into Swiss law, the State Secretariat for Economic Affairs (SECO), in collaboration with other federal government departments, the Swiss Business Federation (“Economiesuisse”) and the Swiss chapter of the non-governmental organisation Transparency International, published a brochure to inform Swiss businesses operating abroad about the risks and consequences of bribing foreign officials. Published in four languages, with a print run of 30 000 copies distributed to businesses, umbrella organisations, members of parliament and Swiss missions abroad, posted on the Internet and covered by the media, the publication has undoubtedly helped make economic agents more aware of the new risks. Federal government employees, and those of SECO in particular, have also been made available to groups wishing to organise training sessions on the theme of bribery abroad, such as the workshops held by Business Network Switzerland (OSEC).

21. Nevertheless, a TI conference supported by SECO scheduled for year-end 2003 to present TI’s “Business Principles for Countering Bribery” to businesses had to be postponed until the end of October 2004 due to a lack of sufficient interest. The representative of the Swiss Trade Association SGV/USAM – a business organisation representing small and medium-sized Swiss enterprises – told the review team that his organisation let Economiesuisse take the lead in sensitising firms to the offence of bribing foreign public officials because, from his standpoint, SMEs were “not on the front line” with regard to corruption in foreign markets.

22. The recent introduction of criminal liability for legal entities offers interesting prospects for bolstering the preventive efforts of businesses: until now, the prevention policies mentioned above had been implemented in particular in a context of proper risk management with regard to general management principles and officers’ civil liability, and, for large firms in particular, with regard to the laws of a whole host of countries that might apply to their foreign operations. However, the potential impact on businesses of new provisions regarding criminal liability for legal entities will depend primarily on how those provisions are actually applied by the courts. They may have only limited effect if companies do not see them being effectively enforced and companies sanctioned, and the Examiners consider that there are several questions stemming from both the scope of the new rules and the prospects for their enforcement. These more specifically legal issues will be examined in the analysis of corporate liability in §§ 105-113.

**Commentary:**

*The Lead Examiners acknowledge the exemplary efforts of certain large Swiss corporations and a few SMEs in developing organisational preventive measures, but they regret that many small and medium-sized enterprises have little familiarity with the offence of bribing foreign public officials. They recommend that the Swiss authorities pursue and amplify their invaluable efforts to sensitise businesses to the anti-bribery provisions of Swiss law targeting the private sector, in co-operation with the relevant economic sectors, to focus specifically on small and medium-sized enterprises doing business abroad.*

iii) Prevention and detection by corporate accounting and auditors

23. In drawing up their accounts, all companies are subject to certain minimal accounting standards as stated by applicable legislation. Swiss accounting standards (Swiss GAAP or ARR standards) established by the Commission for the Swiss Accounting and Reporting Recommendations, a private-law foundation, on the basis of the principle of true and fair view of the firm’s financial position, are compulsory only for companies regulated by the SWX Swiss Exchange<sup>10</sup>. Many large Swiss corporations,

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foreign public officials was against the law and 45% were unaware of the new law on corporate criminal liability. 63% were aware that unlawful commission payments to public officials are non-deductible.

<sup>10</sup> Beginning in 2005, all publicly traded companies will be required to present their accounts according to IFRS (IAS) standards or US GAAP. *Repositionnement des Swiss GAAP RPC*, FER press release (6 January 2003).

most of them listed in Switzerland, have adopted International Accounting Standards (IAS) or those of the 4<sup>th</sup> and 7<sup>th</sup> EU accounting Directives for reasons of comparability, credibility or compatibility with foreign stock market regulations (the 4<sup>th</sup> Directive contains minimal obligations for advertising and accounting, whereas the 7<sup>th</sup> Directive deals with consolidated accounts). For other businesses, *i.e.* for most firms doing business in Switzerland<sup>11</sup>, there are no “generally accepted” accounting standards, because application of ARR standards is optional except for publicly traded firms and moreover, those standards deal primarily with the presentation of consolidated accounts.

24. In addition, the scope of the legal requirement to keep commercial accounts varies widely, depending on the type of business. The law gives each company the freedom to choose the number and presentation of its books. The same holds true of the presentation of accounts, which varies in comprehensiveness and level of detail: apart from certain major categories of firms that are required by law to use detailed presentation of accounts (such as those stipulated by Articles 23 et seq. of the implementing order for the Statute on Banks and Savings Institutions, or the minimal presentation format for corporate income statements and balance sheets set forth in Articles 663 and 663a of the Code of Obligations (CO), each business is theoretically free to choose its own classification and its own numbering scheme. Other provisions may contribute to a certain opacity, such as the fact that there is no legislation centralising the filing of annual reports, even in an abbreviated form<sup>12</sup>.

25. Regulatory gaps are compounded by shortcomings in the existing regime for auditing and auditors, which have resulted in a lesser degree of control in many companies. A certain number of entities, including corporations (*sociétés anonymes*, or SAs), publicly traded companies, banks, investment funds and limited partnerships with share capital (SCA), are required to have their accounts audited by an auditing body. While the Code of Obligations requires SAs to have their accounts audited by an auditor, no qualification, formal certification or supervision is generally required to exercise the profession of auditor at present. As noted during the on-site visit, in Switzerland, anybody can in theory be an auditor. Only auditors of “large” companies set up as SAs (*i.e.* SAs fulfilling two of the following three criteria for two consecutive tax years: assets exceeding CHF 20m, turnover exceeding CHF 40m, annual average of at least 200 employees) and companies subject to special laws (such as publicly traded companies, banks and investment funds) are required to be “qualified”. In other cases, the reliability of the control of corporate accounts exercised by auditors is weakened.

26. The prevention and detection function performed by auditors is diminished further by the lack of precise directives on the independence of the auditing body vis-à-vis the company being audited. While Article 727c CO prohibits any ties between a firm’s auditor and its board of directors or a majority shareholder, as well as work that is “incompatible” with the auditing mandate, representatives of the profession met during the on-site visit expressed uncertainty as to its scope. For that reason, the Directive on the Independence of the Swiss Institute of Certified Accountants and Tax Consultants, (the “Institute”)<sup>13</sup> (2001) which, according to a system of self-regulation and in the absence of legislation and supervision by the authorities, applies to all members of the Institute, should be strengthened in the near

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<sup>11</sup> Some 400 000 entities are believed to be required to maintain an accounting system and to compile annual accounts. According to a 1997 federal survey of private businesses, 287 300 out of 288 200 firms were SMEs. See LECCA (Federal Act on the Establishment and Control of Annual Accounts), Part 4 (Commentary) (Article 2), p. 101. According to a representative of the Swiss Institute of Certified Accountants and Tax Consultants, roughly 95% of Swiss businesses employ fewer than 20 people.

<sup>12</sup> As an accountant met by the Examiners emphasised, this can make it more difficult to gain access to essential information about a firm, such as its ownership of foreign subsidiaries.

<sup>13</sup> The Institute is a private self-regulating organisation encompassing 900 businesses and 4 600 individual accountants. It is the only entity empowered to certify accountants in Switzerland. However, Swiss auditors need not be accountants in order to exercise their profession.

future to bring it more closely into line with the standards of the International Federation of Accountants (IFAC) so as to emphasise the importance of the objectivity and independence of auditors.

27. Aware of these problems, the federal authorities have launched a reform process to improve the effectiveness of controls and the transparency of annual accounts. In March 2003, the initial draft of a federal Act on the Establishment and Control of Annual Accounts (LECCA) was split into two bills, one dealing with control and the other with the preparation of annual accounts. The first, being deemed the more urgent, was advanced in time. The Message approved by the Federal Council on 23 June 2004<sup>14</sup> concerning the amendment of the Code of Obligations (audit requirement under company law) and the federal Act on the Accreditation and Supervision of Auditors, envisages a complete overhaul of the audit system in Switzerland. Amongst other things, the reform envisages specifying the duties of auditing bodies and reinforcing their independence. The system itself would also be changed from self-regulation to a system of government supervision. A national supervisory authority would be empowered to grant accreditation for auditing services and would supervise the auditing bodies of public enterprises and their main affiliates. The second bill, on the preparation of annual accounts, will most likely be attached to the ongoing revision of company law and submitted for public consultation in 2005.

**Commentary:**

***The Examiners congratulate the government for its commitment to reform regarding the establishment and auditing of accounts, as well as the qualification, accreditation, supervision and independence of auditors. In this context, the Examiners recommend that the Swiss authorities vigorously pursue their efforts to ensure greater corporate transparency in order to enhance prevention and detection of acts of bribery in accordance with Article 8 of the Convention and the Revised Recommendation. Given the current situation in Switzerland, especially with regard to the independence of auditing bodies, the Lead Examiners invite the federal authorities to modernise the audit system, particularly by taking advantage of recent movement on the legislative front to accelerate the process of reform.***

- c) *Preventive organisational measures in the financial sector*
- i) Due diligence requirements and precautionary measures for financial intermediaries

28. In order to prevent the use of the Swiss financial centre for laundering purposes, in 1990 Article 305<sup>ter</sup> of the Criminal Code created the offence of lack of vigilance with regard to financial transactions by persons who in the course of their duties accept assets belonging to third parties, keep them on deposit or assist in investing or transferring them. Article 305<sup>ter</sup> takes special aim at the financial sector, notably bankers, fiduciaries, precious metals traders, currency traders, wealth managers, investment advisers, life insurers, casinos and the post office.

29. Due diligence obligations for financial intermediaries were enshrined in Swiss law through the framework Money Laundering Act (MLA). Some 6 700 financial intermediaries, including some 400 banks, 20 casinos, 2 000 wealth managers, 1,000 lawyers, hundreds of fiduciary companies and, since January 2002, domiciliary companies through their bodies in Switzerland<sup>15</sup>, are subject to the MLA. Many of the obligations imposed on the financial sector under the Act seek to compel persons carrying on a business as financial intermediaries to put into place an organisation to prevent the laundering of bribe money and dubious financial movements. These obligations include establishing the identity of customers,

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<sup>14</sup> Federal gazette of 20 July 2004, p. 3745 ff.

<sup>15</sup> Under Swiss law, "domiciliary companies" include all company vehicles, irrespective of their legal form, designed to enable a beneficial owner to conceal his assets. Domiciliary companies include trusts, *Anstalts* and family foundations (these are foreign, not Swiss, legal forms which can operate on Swiss financial markets). On this topic, see the 2002 *Annual Report* of the Money Laundering Control Authority.

identifying beneficial owners, re-verifying the identity of customers and beneficial owners, clarifying the economic background and purpose of business relationships or transactions, as well as the duty of establishing and preserving appropriate documentation with a view to meeting possible requests for information or sequestration from prosecuting authorities.

30. The Act also requires financial intermediaries to take organisational measures needed to prevent money laundering, and in particular to ensure that employees are given sufficient training and that controls are performed. Furthermore, in order to be authorised to practice, any financial intermediary must demonstrate, *inter alia*, that it has a suitable organisation, *i.e.* an organisation meeting the organisational requirements of the MLA and other relevant legislation and para-legislation. For example, the Swiss Federal Banking Commission's new Ordinance on the fight against money laundering, which entered into force in July 2003, spells out the obligations of the MLA for establishments directly subordinated to its supervision: under the Ordinance, banks and securities dealers must henceforth identify, on the basis of predefined criteria, all existing or new business relationships involving increased risk and implement a computerised transaction surveillance system capable of detecting unusual transactions. Financial intermediaries that own foreign branches or direct a financial group that includes foreign companies must establish a comprehensive system for managing legal and reputational risks. Other obligations of an organisational nature, such as adopting internal money laundering guidelines, ensuring that employees receive regular training and instituting supervisory systems and in-house anti-money laundering departments, were already contained in previous circulars<sup>16</sup>. Similar principles may be found with increasing frequency in the regulation of non-bank sectors. Lastly, the law on corporate criminal liability (Article 100<sup>quater</sup> CP) institutes an obligation to take all necessary measures to avoid bribery and money laundering. This provision applies to financial intermediaries, which are required to take organisational measures to forestall such offences or to ensure that the measures in place are effective and to strengthen them if necessary, in particular through training, controls, internal reports and the establishment of a specialist internal unit.

ii) Supervisory mechanisms

31. Nevertheless, such measures to avert money laundering offences can achieve credibility only if an adequate supervisory mechanism is in place to enforce them effectively. To control money laundering, Switzerland has chosen, in the non-bank sector, to encourage self regulation within the framework of a mechanism that calls on private supervisory authorities and administrative control authorities<sup>17</sup>. However, professional communities – self-regulating organisations (SRO) – when monitoring enforcement of the legal principles of due diligence and when defining instruments for regulating professional practices, are required to co-operate closely with the relevant supervisory authorities, and the most important regulations and guidelines of these self-regulating organisations must be approved by the Money Laundering Control Authority (principle of supervised self-regulation). Thus, the Swiss Federal Banking Commission is responsible for directly supervising and controlling some 400 banks, 100 or so securities dealers and roughly 50 investment funds; the Swiss Federal Office of Private Insurance has direct control over 3 of 26 life insurance companies (the others being supervised indirectly by the self-regulating organisation of the Swiss Insurance Association); and the Swiss Federal Gaming Board supervises the 19 casinos under a concession granted June 2004. The Money Laundering Control Authority oversees some 6 200 financial intermediaries (wealth managers, investment fund managers and intermediaries performing fiduciary,

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<sup>16</sup> Circular CFB 91/3, which took effect in May 1992 and was replaced in July 1998 by Circular CFB 98/1.

<sup>17</sup> The system for financial institutions in the banking sector differs from the system for other financial intermediaries, since the Federal Banking Commission has exclusive powers to control compliance with MLA requirements by the institutions it supervises. Although the Swiss Bankers Association (SBA) has created a Supervisory Board responsible for enforcing the formal rules for the identification of customers and beneficial owners laid down by the Due Diligence Agreement, this field remains subject to the supervision of the SFBC.

foreign exchange, funds transfer or other functions) under its authority<sup>18</sup>, either indirectly – through 12 self-regulating organisations – or directly.

32. The supervisory and control authorities have a broad spectrum of sanctions at their disposal to restore legal order. They may admonish less-than-scrupulous behaviour, require institution of organisational methods and, in cases of serious failings, relieve the bodies responsible of their functions or – the ultimate sanction – revoke a financial intermediary’s licence to do business and order liquidation<sup>19</sup>. They may also file criminal charges for lack of due diligence in financial transactions under Article 305<sup>ter</sup> of the Criminal Code. In practice, as all of the participants in panels on money laundering stressed, priority is given to corrective organisational measures: only rarely do violations of the law lead to licence revocation, as shown by the Control Authority’s practice with regard to money laundering in the financial segment under its supervision<sup>20</sup>. A similar remark could be made regarding the sanctions imposed by the Swiss Federal Banking Commission: only four establishments had their licences revoked in 2002<sup>21</sup> – and for improprieties having nothing to do with the Act’s money laundering provisions. The very small number of criminal convictions for “lack of due diligence” – one or two in recent years – is one more indication of the limited use that supervisory and control authorities make of the most dissuasive sanctions at their disposal to correct the malfunctions they detect in the financial sector.

**Commentary:**

*The Lead Examiners applaud the efforts undertaken by the Swiss authorities to prevent the financial centre from being used for money laundering, especially in connection with bribery in foreign markets. The credibility of measures to prevent such use depends on an effective supervisory mechanism and effective sanctions. In this context, the Examiners recommend that the Swiss authorities make the supervisory authorities more aware of the full range of penalties available with a view to sanctioning more dissuasively any non-compliance with due diligence obligations observed.*

**2. Detecting acts of bribery of foreign public officials and related offences**

33. In Switzerland’s fight against economic crime, judicial control is generally not used in the first instance, but only when one of the parties involved invokes it, e.g. by fulfilling its reporting obligation or filing a complaint. Since 2002, police units have been set up at the federal level to deal with major economic and financial crime, to review the situation, complemented by units in a number of cantons, but until now there have been few cases in which prosecutors themselves have taken the initiative: investigations of international bribery and money laundering are most often triggered by action taken abroad (a police request or rogatory commission), reports of suspected money laundering or – more rarely – complaints from the private sector.

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<sup>18</sup> Any financial intermediary not already subject to one of the other supervisory authorities is required to be affiliated with a self-regulating organisation, which is in turn subject to supervision by the Federal Control Authority, or else it must submit to direct supervision by the Control Authority. Of the 6 200 or so financial intermediaries subordinated to the Federal Control Authority, most are affiliated to a self-regulating organisation, and approximately 300 are supervised by the Control Authority directly.

<sup>19</sup> Financial intermediaries working without authorisation are punished by a fine under the provisions of the federal law on administrative criminal law.

<sup>20</sup> As of the date of the on-site visit, while the Money Laundering Control Authority had ordered the liquidation of companies in seven cases and the striking-off from the trade register of two sole traders (who cannot be liquidated), these decisions concerned only unauthorised pursuit of the activity of intermediary. Breaches of due diligence obligations have given rise only to decisions whose aim is to modify the internal organisation of the financial intermediaries concerned. Cases where intermediaries are excluded from the SRO to which they were affiliated for violating due diligence requirements should be added to these decisions.

<sup>21</sup> Swiss Federal Banking Commission, *Rapport de gestion 2002*, pp. 42-44, 120.

a) *Detection based on private self-regulation in the financial sector*

34. To facilitate detection of money laundering operations, Swiss lawmakers have imposed a general obligation to report suspicions of laundering activities. This obligation, which is written into Article 9 MLA, applies to any financial intermediary that knows or presumes on the basis of *substantiated* suspicions that assets involved in a transaction or business relationship originated in a money laundering operation or another crime, including bribery of foreign public officials. In addition to the obligation to report such suspicions, the financial intermediary must immediately freeze the assets entrusted to it and that are connected with the information reported, and, for the duration of the freeze, the intermediary is prohibited from informing its customer or any third party of the report<sup>22</sup>. The reporting obligation complements the right (not the obligation) of asset managers<sup>23</sup> to report to the competent authorities evidence underlying the suspicion that assets come from a crime, under Article 305<sup>ter</sup> subparagraph 2 of the Criminal Code. Reports should be filed with the Money Laundering Reporting Office Switzerland (MROS), which provides the interface between financial intermediaries and criminal prosecutors.

35. The effectiveness of such a system is predicated mainly on the diligence with which financial intermediaries and, where applicable, their supervisory bodies fulfil their obligation to report information to MROS. Here, the statistics compiled by the Reporting Office in its annual reports show that practices vary widely from one profession to another: while the proportion of reports filed by banks since the beginning of the decade has ranged between 75% (in 2000) and 35% (in 2003), reports from wealth managers, investment advisers and fiduciaries have remained basically insignificant (with fiduciaries accounting for 5.6% of aggregate reports in 2003, and wealth managers and investment advisers for 2.5%). In the view of the Lead Examiners, the commercial consequences that the reporting obligation may have, the possibilities for avoiding the obligation by declining a business relationship, and – in some cases – a certain latitude for interpreting the notion of “substantiated suspicion”, might explain the diversity of practices regarding the reporting obligation. According to certain industry representatives interviewed by the Examiners, the explanation lies elsewhere: the scant number of reports filed by certain intermediaries is due to the high quality of the reports filed, all of which are based on *substantiated* suspicions of money laundering.

36. It is undoubtedly not an easy task for the supervisory bodies to ensure that the obligation to report is always enforced. A glance at the Money Laundering Control Authority’s resources illustrates the question: stretched by the diversity of its assigned tasks – which range from authorising financial intermediaries to checking on the activities of self-regulating organisations – and having 25 posts to do so, it is not always easy for the Authority to detect all violations of the Act<sup>24</sup>. During their discussions with the

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<sup>22</sup> The intermediary is required to maintain the freeze until advised of a decision by the competent authority for a period of time not exceeding five business days from the time the suspicion of laundering activity was reported to the Office. Nearly a billion Swiss francs was frozen and reported by the banks on suspicions of bribery-related money laundering, or roughly one-fifth of aggregate freezes effected under the Swiss Money Laundering Act between 1998 and 2003.

<sup>23</sup> This notion extends farther than the circle of financial professionals (ATF 129 IV 338). Here, the Federal Tribunal has ruled that a person who, under mandate to another, transports sums of money belonging to a third party from a foreign country into Switzerland, pays them into the bank account of an enterprise that he controls and has those funds transferred to the accounts of other persons in accordance with instructions under the mandate is engaging in a financial affair and as such falls under the scope of Article 305<sup>ter</sup> subparagraph 2 of the Criminal Code.

<sup>24</sup> For example, the Swiss Federal Banking Commission, at 1 September 2003, had, for the supervision of some 500 subordinated establishments, a staff of approximately 130, roughly 50 of whom were directly involved in anti-laundering supervision (statistical data of the Swiss Federal Banking Commission in *Combating Money Laundering in Switzerland. Status: October 2003*, p. 73), plus approximately 460 persons assigned by auditing companies to the external auditing of those establishments. The Swiss Federal Gaming Board (SFGB) at 1 January 2004 had, out of some 30 staff members about 15 involved in anti-money laundering supervision of the approximately twenty establishments under its control and the Swiss Federal Office of Private Insurance (SFOPI) had a staff of about 40 to directly or indirectly supervise 26 private insurance companies.

examining team, the supervisory authorities mentioned that their control usually took place only after the fact, once revelations in the press, an international rogatory commission or an investigation by a Swiss magistrate had uncovered suspicions of money laundering operations in establishments that it supervised, and had thus drawn attention to the fact that the intermediary's detection and reporting work had not been done properly<sup>25</sup>.

37. The Money Laundering Act lists a variety of administrative penal offences, beginning with non-compliance with the reporting obligation, even if through negligence, punishable by a fine of up to 200 000 Swiss francs (€133 000). Administrative Penal Law governs the procedure in this area, and the Federal Department of Finance is empowered to file charges: while prosecution and punishment of violations of the Criminal Code [money laundering (Article 305<sup>bis</sup>) and lack of vigilance in financial operations (Article 305<sup>ter</sup>)] are subject to the jurisdiction of criminal courts, prosecution of violations involving reporting obligations is handled by the Department of Finance, pursuant to Article 39 of the MLA. In practice, prosecutions are rarely initiated by the administrative penal authority, which intervenes only if a violation has been duly noted by the relevant supervisory authority. The current case law of the Department of Finance shows very few convictions, nearly all of them for doing business without a licence and none – as of the time of the on-site visit – for violations of Article 9 of the MLA.

38. Ultimately, however, counter-laundering legislation, while already highly sophisticated, allows to slip through the cracks of reporting obligations a number of professionals whose business would make them a useful source of prevention and detection of money laundering operations related to bribery in foreign markets, or who are only partially subject to those obligations, depending on which operations they perform (to the extent that these professionals' activity falls under the definition of financial intermediary, these professionals are required to comply with the law's anti-laundering requirements). These include people in legal professions (lawyers and notaries) and in finance (wealth managers, for example) consulted by a corrupt business to set up "slush funds" or off-balance sheet assets through the creation and administration of a "letter box company" in an off-shore location. According to the information gathered by the Examiners during their on-site visit, such consultations would not be subject to anti-money laundering rules. In the federal authorities' opinion, however, they would be punishable in Swiss law on the grounds of complicity in money laundering.

**Commentary:**

***The Lead Examiners deem that the explicit obligation, under the Money Laundering Act and industry regulations, for financial intermediaries to inform the Money Laundering Reporting Office of suspicions of criminal origin of assets that they manage is an important measure in the struggle against international bribery. The Lead Examiners recommend that the Swiss authorities invite supervisory organisations to use the full range of sanctions available to them to take action against any failure to comply with the reporting obligation.***

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<sup>25</sup> The 2003 Annual Report of the Swiss Federal Banking Commission, published in April 2004, cites several cases of this type: suspicious movements of \$84 million linked to "politically exposed persons" in Central Asia and oil companies, with the bank failing to fulfil its obligation to notify criminal prosecutors or the Commission, uncovered in the course of an investigation by a Swiss magistrate; unusual transactions in the account of a long-standing client of another bank uncovered in conjunction with a request from foreign authorities for mutual legal assistance in the realm of bribery and money laundering and showing that the bank had failed to fulfil its obligation to verify the background of the transactions.

b) *Detection outside the financial sector*

i) Revelations from executive bodies and other corporate entities

39. A 1997 survey of Swiss businesses showed that while 62% of them admitted to having been victims of economic crime within their midst, only one in eight such cases were reported to the criminal authorities<sup>26</sup>. The company's reputation, the trust of customers or creditors, and the interests of shareholders are factors that can prompt companies not to report violations committed in-house to the police or even to issue denials if information on the commission of such violations leaks out of the company, or – as recounted by a representative of the media to the examining team – to be tempted to apply pressure on the management of newspapers that consider reporting the story.

40. At the time of the on-site visit, irregularities, and even violations of the law, detected by an auditing body also had little chance of becoming known outside a business. Of course, auditors were bound by law to notify the board of directors in writing of any violations of the law that they may have encountered in the course of their audit and, in the event of violations that the law terms "serious", to submit the matter to a general meeting of shareholders (Article 729b, §1, CO)<sup>27</sup>. However, the decision to inform a general meeting could prove very delicate. Apart from the fact that the rules applicable to auditors formulated by the Swiss Institute of Certified Accountants and Tax Consultants stipulated explicitly – in violation of Article 8 of the OECD Convention – that bribery-motivated irregularities did not fall into the category of fraud and violations of the law<sup>28</sup>, executive bodies whose behaviour might be subject to question could exert pressure on auditors not to inform the general meeting. At the time of the review of Switzerland, no ongoing procedure for active corruption of a foreign public official had been initiated because of an auditor's report.

41. However, the situation is likely to change in the relatively near future. The new standards, adopted by the Swiss Institute of Certified Accountants and Tax Consultants in June 2004 and due to be introduced gradually from 1 January 2005, emphasise the effectiveness of measures designed to detect embezzlement, insist on the need for auditors to approach corporate accounts critically and no longer expressly consider that bribery does not fall into the category of fraud and violation of the law<sup>29</sup>. On the contrary, Standard 250 on "reference to laws and regulations in auditing financial statements", which gives examples of situations that can alert the auditor to a company's non-compliance with the law, refers to cases which could conceal the payment of bribes to foreign public officials (commission on sales or agent's commissions that are out of proportion to the services rendered, unusual transactions in tax havens, etc.). Initially, these standards will apply only to large corporations<sup>30</sup> and companies subject to special laws (such as publicly traded companies, banks and investment funds). The conduct of audits in other companies will continue to be governed by Standard 9 concerning "Fraud and the auditing of annual accounts" of the Audit Standards 2001, which excludes irregularities for the purpose of bribery from the category of fraud and violations of the law.

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<sup>26</sup> Revisuisse, *Wirtschaftskriminalitat*, Zurich: Revisuisse Price Waterhouse, 1997.

<sup>27</sup> Provisions governing corporations (*sociétés anonymes*) stipulate that a general meeting, informed of irregularities and deeming that those irregularities are detrimental to the firm, may decide to file suit. Shareholders and creditors citing direct or indirect damage may also take such action (Article 754 CO).

<sup>28</sup> §2.4 of Standard 9 concerning "Fraud and the auditing of annual accounts", Audit Standards 2001 of the Swiss Institute of Certified Accountants and Tax Consultants: [http://www.chambre-fiduciaire.ch/management/file/AUDIT\\_2001.pdf](http://www.chambre-fiduciaire.ch/management/file/AUDIT_2001.pdf)

<sup>29</sup> Swiss Audit Standard 240 concerning "Fraud and error – the auditor's responsibility". Swiss Audit Standards, 2004 edition: [http://www.treuhand-kammer.ch/FRA/pdf/neu\\_ps\\_fr.pdf](http://www.treuhand-kammer.ch/FRA/pdf/neu_ps_fr.pdf)

<sup>30</sup> See the definition of large corporations given above in paragraph 25.



42. In addition, the bill to amend the Code of Obligations included in Switzerland's legislative programme for 2003-2007 contains a new Article 728c ("Mandatory notice of the auditing body") designed to ensure that all violations of the law, and especially criminal offences, found by an auditor are brought to the attention either of the general meeting, if the violation is "serious", or, in other cases, to the board of directors or, if the board of directors takes no action, to the general meeting<sup>31</sup>.

*Commentary:*

*Bearing in mind the reform of audit standards engaged by the Swiss Institute of Certified Accountants and Tax Consultants, the Lead Examiners recommend the Swiss authorities to encourage the Swiss Institute of Certified Accountants and Tax Consultants to complete as soon as possible the changes in audit standards currently under way. Furthermore, the Lead Examiners recommend the Swiss authorities to consider extending the requirements concerning mandatory notice by auditors in the bill amending the Code of Obligations by establishing an express obligation on auditors to report to the prosecution any indication of possible corrupt practices if a firm's executive bodies, duly notified, choose not to act.*

ii) Detection based on reports by private-sector employees and officials of government agencies

43. The possibility that an employee of a company or financial institution who has witnessed irregularities would decide to reveal those irregularities to the authorities also seems rather slim; as of the date of the Phase 2 review of Switzerland, prosecuting authorities present during the visit were not aware of any case of whistleblowers denouncing corrupt activities on the part of their firms. In the opinion of Transparency International and the trade unions interviewed, the main reasons for this are labour laws that do not effectively protect employees from unfair dismissal (the indemnity for unfair dismissal is limited by law to six months' salary at most, often reduced in practice by the courts), the absence of any obligation for employers to reinstate employees who are victims of unfair dismissal, and the relatively small size of the country: a whistleblower, labelled as an informant, would be very quickly excluded from the labour market, Swiss law having no specific provisions to protect employees' "right to warn", or to guarantee that they be reinstated if dismissed unfairly.

44. On the contrary, potential whistleblowers, as workers within the meaning of Swiss law, are subject to a number of restrictive legal obligations. Among these are a loyalty obligation, enshrined in Article 321a, §1 CO, by virtue of which "workers ... shall faithfully uphold the employer's legitimate interests", an obligation which, in the case law of the Federal Tribunal (AFT 104 II 28), is even greater for managers, *i.e.* those most apt to be in a position to detect violations in the course of their duties alongside the executive bodies. Another obligation is that of "discretion", set forth at Article 321a, para. 4 CO, under which a firm's employees may not reveal to third parties any facts that might impair the firm's reputation or standing, even if those facts are substantiated, and this also applies to punishable or unlawful acts by the employer (*e.g.* unfair competition, tax evasion)<sup>32</sup>. The same holds true for company directors, accounting professionals and staff lawyers who, having detected fraudulent operations or unlawful acts, wish to notify prosecutors: the applicable obligations of professional secrecy, discretion or legal or conventional reserve in most cases prohibit them from revealing spontaneously what they uncover in the course of their duties.

<sup>31</sup> Cf. Message 01.082 concerning amendment of the Code of Obligations (auditing requirement in company law) and the federal Act on the Accreditation and Supervision of Auditors approved by the Federal Council on 23 June 2004, pp. 3800-1. Under the terms of provisions governing corporations (*sociétés anonymes*), a general meeting, informed of irregularities and deeming that those irregularities are detrimental to the firm, may decide to file suit. Shareholders and creditors citing direct or indirect damage may also take such action (Article 754 CO).

<sup>32</sup> According to the federal authorities, "preponderant" private interests (*i.e.*, of third parties) or public interests can in certain cases justify disclosure of such facts outside the firm. However, the worker must first advise his or her superior, and may advise the competent authority only if the employer fails to react; if the authority takes no action, the facts may then be disclosed to the public.

Article 730 CO thus expressly imposes a discretion requirement on auditors. Directors' discretion obligations stem from the loyalty obligation and Article 162 of the Criminal Code (violation of business secrecy).

45. In view of the principle established in a federal court judgment (ATF 127 III 310) and endorsed by legal commentary, whereby an employee's loyalty obligation creates an obligation not only to abstain from any behaviour that may prejudice the employer's legitimate interests but also to intervene actively, for example by informing the employer of irregularities and anomalies found within the firm, the scope of the employee's option to approach the firm's executive bodies would seem, in the Examiners' opinion, to be equally limited in practice. As pointed out earlier in this report, the company's image and the trust of its customers and creditors are factors that may encourage senior managers not to bring a reported offence to the attention of the police.

46. The option available to any person – including those bound by professional secrecy – under Article 305<sup>ter</sup> para. 2 of the Criminal Code to report to prosecutors any evidence underlying a suspicion that assets in their custody, or in respect of which they offer advice as to investment or transfer, have been derived from bribery in foreign markets, also seems to run up against a number of obstacles when one attempts to exercise it. The position of individuals required by law to verify the origin of assets may prove delicate, to say the least, insofar as a person who reports a suspicion without sufficient proof violates professional secrecy and is thus liable to criminal sanctions under Articles 162 (violation of business secrecy) and 321 of the Criminal Code and Article 47 of the Banking Act. As a result, it is of paramount importance to ascertain what degree of certainty is required to justify filing a report. In the Examiners' opinion, however, the few guidelines laid down on this subject in the Message of the Federal Council are vague<sup>33</sup>, and the review team's interviews with financial intermediaries during the on-site visit showed a generally strict interpretation of the notion of "substantiated suspicion".

47. In the Examiners' opinion, the probability that an official of a communal, cantonal or federal government agency would report suspicions of bribery offences would also seem fairly limited in practice. In Switzerland, labour law and federal criminal procedure, like the criminal procedure and civil service rules of many Swiss cantons, impose no general reporting obligation on public officials<sup>34</sup>. On the contrary, under their terms of employment, federal, cantonal and communal public officials are bound by professional secrecy and to divulge a secret without the written consent of a higher authority is punishable under Article 320 of the Criminal Code<sup>35</sup>. Pursuant to a ruling by the Federal Tribunal, all of the facts of which a public official becomes aware in the course of his duties, and that must remain secret because of their nature, the circumstances involved or special instructions, are covered by secrecy requirements (ATF 114 IV 44 in *Journal des Tribunaux* 1989 IV 51), and it is up to the canton or the Confederation to determine how those requirements can be lifted, with some favouring an open approach and others exercising greater restraint. In any event, it is up to the hierarchically superior authority responsible for

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<sup>33</sup> "What is required is not 'proof' in the strict sense, nor vague suppositions or impressions, but 'evidence', *i.e.* elements substantiating suspicion, and which can be backed up to criminal prosecutors": FF 1993 III 317.

<sup>34</sup> Among the cantons that do not specifically require their officials to advise criminal prosecutors of crimes and misdemeanours detected while performing their duties are cantons that a review of recent court cases shows to be especially exposed to money laundering operations and acts of corruption involving foreign markets – the cantons of Ticino and Zurich. Among those that do impose a general reporting obligation on their officials are the cantons of Bern, Uri, Schwyz, Obwalden, Nidwalden, Basel, St. Gallen, Neuchâtel, Valais and Geneva. Article 11 of the Criminal Procedure Code of the canton of Geneva states: "Any authority, civil servant or public official who, in the course of his duties, shall become aware of a crime or misdemeanor that should be prosecuted as a matter of course is required to advise the public prosecutor's office promptly."

<sup>35</sup> A deposition made as part of a procedure with no prior authorisation is punishable; a civil servant's testimony is nonetheless valid and can be used.

lifting secrecy requirements to take a decision after weighing the advantage of keeping the secret against that of revealing it in the interests of justice.

48. Similar rules apply to the staff of the Swiss development agency: under internal instructions, they are required to report any suspected bribery, as defined in Article 322<sup>septies</sup> of the Criminal Code, to their direct superior, who will then conduct the necessary investigations before deciding whether or not to pass the facts on to prosecutors. Likewise, in the context of export guarantees, if there are reasonable grounds to suspect a breach of the provisions of the Criminal Code concerning bribery, the mechanism for notifying the prosecuting authorities presupposes that the superior authorities of the ERG, the organisation responsible for granting export guarantees, will have previously lifted the professional secrecy obligation.

49. Whistle blowing issues would also sometimes seem to be under-estimated by the authorities. While the situation varies from one canton to another, it was noted during the on-site visit that all the necessary attention was not always paid to information reported anonymously, unless the elements provided were sufficiently credible and specific. In the words of a staff prosecutor in the Office of the Attorney-General of Switzerland, anonymous denunciations require “extra prudence”, i.e., a preliminary examination to determine whether there is a substantiated suspicion thereby distinguishing between unsubstantiated denunciations and those that are justified<sup>36</sup>. Recent court cases in Switzerland, as recounted to the examining team by the Swiss chapter of Transparency International and other NGOs, show examples of informers who were considered suspect, if not found guilty themselves, after having alerted prosecutors to persons suspected of bribery. One example of this is a public official in Fribourg who had reported irregularities within the local police and found himself charged and convicted of violating professional secrecy; or a civil servant in Zurich who reported bribery in the city’s wastewater treatment system and ended up being dismissed and facing criminal charges for the very act of bribery he had reported, but who was finally cleared by an investigative board two years later<sup>37</sup>.

50. Lastly, a person questioned in the course of an investigation may also fear the vengeance of the accused, since law enforcement agencies cannot guarantee that the names of witnesses will not be divulged during the procedure, except in situations in which knowledge of the witness’s identity would constitute a threat to life or limb for the witness or a member of his family. If that is the case, the court can direct that measures be taken to ensure his safety, and in particular to restrict or rescind the right of the defence to hear witnesses, e.g. through the use of technical procedures whereby the witness can be invisible during his hearing or his cross-examination<sup>38</sup>. However, there are no real witness protection programmes: while the Federal Police has a personal protection service, it is used primarily for dignitaries, not for endangered witnesses, accusers or repentant criminals. This situation, acknowledged to be unsatisfactory by most of the magistrates met by the review team and cited by banking professionals as discouraging spontaneous revelations – deemed too dangerous – of money laundering cases, might vanish if the federal parliament were to adopt the proposed unification of criminal procedure, which contains special witness protection

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<sup>36</sup> Approximately ten motions on the subject of whistleblowers have been tabled by federal parliamentarians over the past five years. If, in its responses, the Federal Council admitted the importance of ensuring “a climate conducive to reporting”, neither would its intention be “to favour informants *per se*” (Response of the Federal Council of 26 February 2003 to a question regarding the fight against bribery).

<sup>37</sup> See the decision of the Administrative Tribunal of the canton of Fribourg of 29 October 1999, rejecting the informant’s appeal of the punishment imposed on him. For his part, the head of the garage was transferred to another post. Regarding the case of the civil servant in Zurich, see *Das Magazin*, No. 52/96. For federal employees, including those of firms in which the Confederation has a majority shareholding, a mechanism exists that guarantees their anonymity and protection if they decide to advise Federal Financial Control (CDF), the competent authority in the matter, of evidence of bribery. It is up to CDF to verify the information and, where appropriate, to inform the prosecuting authorities of the matter.

<sup>38</sup> On this point, for example, see Article 43, §1A of the Code of Criminal Procedure of the Canton of Fribourg and Article 124-3 of the Code of Criminal Procedure of the Canton of Bern.

provisions and also allows for the Confederation and the cantons to establish genuine witness protection programmes.

*Commentary:*

*The Examiners invite the Swiss authorities to develop new means that could enhance detection of acts of bribery and in this context, to examine the means of ensuring the effective protection of persons cooperating with judicial authorities, especially workers who disclose in good faith suspected acts of bribery, in order to encourage them to report such acts without fear of losing their job. In addition, given the legislative work undertaken in this area, the Examiners encourage Switzerland to pursue its efforts to provide effective protection for witnesses.*

iii) Bribery of foreign public officials detected by the tax authorities

51. To date, the tax authorities have not yet detected any irregularities involving foreign bribery. Cantonal and federal tax administrations could constitute a source of information for prosecutors, especially insofar as, since the federal Act of 22 December 1999 entered into force on 1 January 2001, “hidden commissions” within the meaning of Swiss criminal law paid to Swiss or foreign public officials are neither tax-deductible nor justifiable business expenses<sup>39</sup>. A number of constraints on tax officials emerged from a review of the laws and from discussions during the on-site visit.

52. The first constraint stems from the tax authorities’ insufficient capacity to check the legality of operations and the accuracy of taxpayer filings. Apart from the problem of weak investigative powers – discussed below – certain government tax agencies at times seem to have to make do with limited human resources. For example, the 30 agents dealing with collection of tax arrears and the 20-odd with tax evasion in the canton of Geneva have to manage between 500 and 600 cases per year. Tax inspectors’ awareness of suspicious payments involving bribery could also be improved. Training has been provided to representatives of all canton administrations, in particular by the Federal Tax Administration. In addition, some cantons and the federal administration have dispensed intensive training on the subject of unlawful commissions. However, no circular has been published for federal or cantonal agents about non-deductibility for tax purposes, control procedures or how to deal with suspected bribery of Swiss or foreign public officials because the government considers that such a circular can be issued only on the basis of the first experiences to be had in this area. The examiners are concerned that such experiences may never occur.

53. Other shortcomings stem from laws that may hinder co-operation between the tax authorities and criminal prosecutors. The first difficulty originates in the lack in some cantons and within the federal administration – as described above – of a general obligation for civil servants to report criminal offences to the prosecuting authorities. This first obstacle is heightened in the tax sphere by the general principle of tax secrecy.

54. At the federal level, tax secrecy is imposed by Article 110 of the Federal Direct Taxes Act (LIFD).<sup>40</sup> For the cantons, Article 39(1) of the Federal Act on Harmonisation of Cantonal and Communal Direct Taxes (LHID), contains a general obligation of tax secrecy for tax officials.<sup>41</sup> In the absence of a

<sup>39</sup> See Annex 2 for the relevant legislative measures establishing the principle of the non-deductibility of “hidden commissions”.

<sup>40</sup> Article 110 LIFD provides as follows: “(1) Persons responsible for enforcing this Act, or who collaborate in its enforcement, must maintain secrecy in respect of facts of which they become aware in performing their duties, as well as deliberations of the authorities, and they shall refuse to allow third parties to consult tax records. (2) Information may be disclosed insofar as federal law expressly provides a basis for its disclosure.”

<sup>41</sup> Art. 39(1) provides as follows : “Persons responsible for carrying out tax legislation are required to observe secrecy. The obligation to inform is reserved, insofar as it is provided for by a provision of federal or cantonal law.”

contrary legal provision, tax secrecy prohibits federal and cantonal tax officials from disclosing information about cases of bribery of foreign public officials to the prosecuting authorities.

55. According to the Swiss authorities, the cantons which impose a general reporting obligation on public officials "generally consider that the prosecution of serious criminal offences takes precedence over the tax secrecy obligation". During the on-site visit, a representative of the tax services of the canton of Geneva, in which an obligation to report criminal offences exists, confirmed that the Geneva tax authorities transmit information about criminal offences to the prosecuting authorities.

56. In contrast, at the federal level and in all the cantons that do not have such a reporting obligation, such as the cantons of Zurich and Ticino, the obligation to inform is not reserved and officials are therefore bound by tax secrecy. The Swiss authorities have stated that in these jurisdictions, "it is generally accepted that tax secrecy obligations contained in cantonal and federal laws do not preclude disclosure to criminal investigators of information they require in the context of an investigation of offences within the meaning of criminal law". Following the on-site visit, the Swiss authorities stated that information could sometimes even be provided spontaneously, without the prosecuting authorities having to request it. Questioned about the legal basis for these practices, the Swiss authorities indicated that they are based in part on Article 100 of the Federal Act on Criminal Procedure which provides that "everyone is qualified to report infractions that are prosecuted as a matter of course pursuant to federal law". However, this provision, which does not refer to tax secrecy, does not appear to apply if the corruption case is subject to cantonal jurisdiction. In addition, the Swiss authorities indicate that a transfer of information can be based on the consent of the superior authority of the authority that is confronted with the facts relating the corruption. This practice is essentially based on article 320(2) CP which provides that the disclosure of a secret by a public servant "will not be punishable if it is done with the written consent of the superior authority". According to the Swiss authorities, this provision has been applied to this end in a Federal Tribunal case, albeit an unpublished one.<sup>42</sup> The Swiss authorities thus consider that for cantons without any general obligation to report crimes, article 320(2) CP together with the consent of the competent superior authority should suffice to permit the tax authorities to derogate from the principle of tax secrecy established in article 39 LHID. The examiners nonetheless consider that given the absence of any clear provision providing for the possibility of reporting, tax officials could find the tax secrecy provisions of Article 39 §1 LHID and Article 110 LIFD highly dissuasive, to say the least.<sup>43</sup>

**Commentary:**

***The Examiners consider that Switzerland ought to take steps to allow, facilitate and encourage the forwarding of suspicious case files from the tax authorities to criminal prosecutors. Furthermore, given that non-deductibility for tax purposes is expressly limited to payments encompassed by the definition of bribery offences in the criminal law, the Swiss authorities should consider publishing circulars or instructions for tax officials explaining the nature of the new offence and its tax aspects, including***

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<sup>42</sup> The Swiss authorities have indicated, however, that these cases remain subject to authorisation by the higher authority, i.e. the Director of the Federal Tax Administration.

<sup>43</sup> Article 110 raises another potential problem because its scope is explicitly extended to persons who "collaborate" in the enforcement of tax law, and in Switzerland it is the cantons that are principally responsible for administering federal tax law. In most cases, improper deduction of an unlawful commission will constitute a violation of both cantonal and federal law on direct taxes and the cantonal official will thus be required to collaborate in applying federal tax law in this context. Given that Article 110 limits exceptions to tax secrecy solely to those instituted by federal law, it is not certain that a cantonal law, even one which requires criminal offences to be reported to the prosecuting authorities, would be sufficient to lift tax secrecy. However, the Swiss authorities have indicated that they consider that cantonal law may derogate from the federal tax secrecy obligation set forth at Article 110 LIFD pursuant to Article 39 §1 LHID.

examination procedures and how to proceed if bribery is suspected.<sup>44</sup> Consequently, the Examiners recommend that, in accordance with the intention expressed by Swiss authorities, Switzerland draft a circular for the federal and cantonal tax administration specifying the nature and tax aspects of the offence in order to encourage the detection of acts of foreign corruption, and revise disclosure rules so as to ensure that officials who discover suspicious cases report them to the relevant judicial authorities.

c) *Requests for mutual assistance and the foreign press as sources of information for Swiss prosecutors*

57. The magistrates interviewed by the examining team confirmed that it is first and foremost foreign magistrates that trigger bribery investigations by Swiss authorities, after they have launched investigations of such offences and extended them to Switzerland (in most cases for laundering the proceeds of bribery). Such was the case of a matter being dealt with by Zurich cantonal authorities at the time of the on-site visit, involving suspicions that a Swiss company had bribed Mexican public officials; the case had been brought to the attention of the Swiss authorities in connection with a request for international legal assistance regarding the laundering of bribe money (in excess of €650 000) that had been deposited in a bank account in Switzerland.

58. Information published in the foreign press or passed along by Swiss newspapers appear to be a second major source of detection available to magistrates. The Geneva prosecutor's office explained that it conducted systematic Internet searches to keep abreast of cases having repercussions in Switzerland. Money laundering cases reported by MROS are also a useful source of information for launching prosecutions, although a number of magistrates interviewed by the examining team indicated that in a significant number of cases (29% of all reports in 2003, according to the 2003 MROS annual report), reports are prompted by reading information covered by the press, or by the initiation of investigations by criminal prosecutors, thus alerting the management of financial institutions. Corrupt behaviour also comes to light during investigations of economic crime, which lead to the discovery of facts that nothing would have suggested at the outset.

59. Police officers and magistrates thus admitted that a large number of criminal violations probably escape their knowledge and, because of the specific nature of the offences (especially when they involve acts of bribery of public officials in foreign markets), remain unknown to the authorities. Cantonal magistrates who do not have rules requiring their public officials to assist in detecting criminal offences stated that a general and formal obligation for any public official to report any suspected bribery to criminal prosecutors would bolster their detection abilities. Adopting legislation to enhance protection for "whistleblowers" and ensure protection for witnesses was also deemed likely to make detection more effective.

*Commentary:*

*The Lead Examiners recommend that the Swiss authorities consider establishing in federal legislation a formal obligation for any federal authority, civil servant or public official, including staff responsible for granting export credits, to report to the relevant authorities any evidence of acts of bribery. They further recommend the Swiss authorities to engage in consultations with the cantons so as to encourage them to institute a similar obligation in cantonal legislation where such an obligation is lacking. In this context, the Examiners encourage Switzerland to continue its efforts to raise awareness of international bribery offences on the part of officials of cantonal and federal governments who might play a role in detecting and reporting such acts.*

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<sup>44</sup> On the issue of the alignment of the scope of non-deductibility with the criminal law, see the section below on "Prosecution of the non-deductibility for tax purposes of undue payments to foreign public officials", §§ 138-142.

## **B. PROSECUTING BRIBERY OF FOREIGN PUBLIC OFFICIALS AND RELATED OFFENCES**

### ***1. Procedures, investigation methods and mutual legal assistance***

a) *The Confederation's new powers in procedures relating to transnational bribery, money laundering and related offences*

i) Prosecuting bribery of foreign public officials and related offences

60. In Switzerland, a federal State, powers of criminal prosecution, sentencing and enforcement lie mainly with the 26 cantons and half-cantons that make up the State. By virtue of the principle of subsidiarity, the Confederation has traditionally had jurisdiction over only a limited number of criminal offences, mostly against the federal state and the community, such as bribery of federal officials, terrorist acts and counterfeiting.

61. However, on 22 December 1999, the Swiss parliament decided to change the way in which powers to prosecute economic and financial crimes were distributed between the Confederation and the cantons. The Confederation was given exclusive powers relating to "organised crime". In addition to offences committed by a criminal organisation or the offence of taking part in or supporting such criminal organisation (as defined in the Criminal Code) and the new offence of "financing terrorism" (Article 260<sup>quinquies</sup> CP) introduced into the Criminal Code in 2003, the Confederation was given powers to prosecute bribery (including bribery of foreign public officials) and money laundering and the related offence of lack of vigilance in financial transactions and the right of disclosure. The Confederation was also given discretionary powers, concurrently with the cantons, with regard to particularly complex economic crimes (accounting offences and other offences involving patrimonial assets). This redistribution of powers, enshrined in Article 340<sup>bis</sup> of the Criminal Code, came into effect on 1 January 2002 as part of a wider set of measures designed to improve efficiency and legality in criminal prosecutions.

62. These measures mostly came about from the realisation that money laundering, bribery in foreign countries and other types of economic crime were highly complex affairs and that the way in which competence was divided between cantons on the one hand and cantons and the Confederation on the other created a problem for investigations which, by their very nature, have an intercantonal and international dimension. These factors were deemed to require greater coordination of procedures or even centralised procedures<sup>45</sup>.

63. For a case of bribery of foreign public officials or money laundering to be referred to the federal authorities, the offence must have been committed mainly in a foreign country (Article 340<sup>bis</sup>, para. 1a) or committed in several cantons with none of them being clearly predominant (para. 1b). The Confederation has subsidiary powers relating to major economic crimes when a canton expressly asks it to take over proceedings or when the Confederation finds that no canton has taken up the case. When these conditions are met, the Office of the Attorney General carries out the initial investigation in cooperation with the federal criminal police. If the presumptions are found to be well grounded, the Attorney General refers the case to the federal investigating magistrate for preliminary investigation, during which the magistrate continues to examine the facts of the case. In the third phase, the Attorney General must then decide whether or not to prosecute and, if so, brings the prosecution before the federal criminal court. If the federal authorities are not granted jurisdiction, responsibility for prosecuting offences continues to lie with the cantons.

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<sup>45</sup> See Parliament Services memorandum 98.009 at [www.parlament.ch](http://www.parlament.ch).

64. Whether the competent prosecuting authorities are federal or cantonal, in principle they have a duty to prosecute all offenders when sufficient evidence exists to presume that a crime has been committed, even if the victim does not press charges. Swiss criminal procedure is based on the obligation to prosecute, a rule which is enshrined in all legislation. The only exception concerns offences against essentially private interests that cause minimum social disturbance, which excludes bribery of foreign public officials, money laundering and related accounting offences, all of which must be prosecuted.

65. However, an exception to the obligation to prosecute is allowed by the principle of discretionary prosecution contained in laws in Geneva, Jura, Neuchâtel and the canton of Vaud and accepted, albeit in a rather less clear-cut way (in general for so-called low-level crime), in certain cantons of German-speaking Switzerland (e.g., Basel-Town and Basel-Country). Under this principle, the prosecuting authorities decide whether to bring a prosecution or to discontinue proceedings; if proceedings have already begun, they may also decide to drop the case. Criminal justice priorities are decided by the prosecuting authorities. In contrast, the principle of mandatory prosecution, enshrined in the laws of the cantons of Glaris, Solothurn, Appenzell Inner Rhodes, Grisons and Valais and, for economic and financial crime, most cantons of German-speaking Switzerland, is that all offences that come to the attention of the prosecuting authorities (public prosecutor or investigating magistrate depending on the circumstances<sup>46</sup>) should be systematically prosecuted and punished<sup>47</sup>.

ii) The need for more effective prosecution of transnational economic crime

66. The many specialists in the field have long drawn attention to the urgent need to prosecute economic crime more effectively. At the heart of the debate lies the split between cantonal and federal procedures and all the attendant difficulties.<sup>48</sup> But that is not the only issue. Several persons interviewed during the visit mentioned difficulties in the workings of the justice system in certain cantons, sometimes ill-suited to highly complex transnational bribery and money laundering cases.

67. The problems mentioned included shortages, among the police and judiciary of certain cantons, of staff with sufficient technical skills in matters of transnational economic crime. In this context, mention was made of the lack in Switzerland of compulsory, general, institutionalised training for staff in cantonal prosecutors' offices and the offices of investigating magistrates, as well as for staff of the Office of the Attorney General and federal police<sup>49</sup>. Consideration is given to the different levels of complexity of large-scale economic crime where relevant, in courses for those intending to pursue a career in the police or public prosecutor's office or as investigating magistrates. Courses at postgraduate level have existed since 2001, focusing in particular on economic crime. In practice, however, skills are mostly acquired on the job and depend to a great extent on the personality of the individual concerned.

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<sup>46</sup> There are three different ways of triggering prosecutions in Switzerland: 1) the state prosecutor initiates proceedings and refers cases to the investigating magistrate for investigation (Confederation, the cantons of Geneva, Neuchâtel and Jura and, with certain specific features, Aargau and Uri); 2) the state prosecutor has exclusive powers to initiate proceedings and investigate the case (cantons of Basel-Town and Ticino); 3) the investigating magistrate decides whether to initiate proceedings and investigate the case (all the other cantons).

<sup>47</sup> The federal code of procedure does not contain any provisions relating expressly to the principle of discretionary prosecution.

<sup>48</sup> It is in order to remedy this problem, economise resources, rationalise investigations and ensure more effective prosecution that the "Efficiency Plan" aims to create a unified system of criminal procedures applicable throughout Switzerland.

<sup>49</sup> As noted earlier in the report, staff in the Office of the Attorney-General of Switzerland and members of the federal police are given a specific three-month training course focusing on the federal authorities' new powers in criminal matters.



68. Some of the magistrates met by the Examiners mentioned a lack of resources, which they said was due above all to insufficient allocation of resources that depend directly on political authorities. Each canton is responsible for equipment and infrastructure, human resources and information systems. Several cantonal magistrates emphasised that it was often at great cost, especially in their private life, that the most determined amongst them managed to wrap up complex cases involving major economic and financial crime.

69. The need for specialist training and the allocation of sufficient resources have a direct effect on methods of investigation. That is the case with regard to undercover work - which will be admissible throughout Switzerland in transnational bribery cases as soon as the federal law of 20 June 2003 on undercover investigation comes into effect (scheduled for 2005) - and the use of informers. It emerged from interviews conducted during the on-site visit that cantonal investigators have made little use of this method to date. Another issue concerns the accounting documents seized during investigations. In many cases, investigators need help from accountants in order to understand them, but the lack of resources in certain cantons may prevent magistrates or police officers from using experienced professionals to establish a comprehensible pattern of movements of funds.

iii) The Confederation's competence in practice

70. It is as a result of observations like these that the Confederation, and no longer the cantons, has been given statutory powers to conduct investigations into complex bribery and money laundering cases and, in the sphere of economic crime, to initiate proceedings itself or take over existing proceedings at a canton's request. However, aside from the different notions contained in Article 340<sup>bis</sup> para. 1 of the Criminal Code ("predominantly committed", "in several cantons", "clearly predominant") many questions of interpretation are raised on which the Federal Court was due to rule in several pending cases at the time of the on-site visit. This in turn opens up the possibility that cases where the law intended the Confederation to have sole jurisdiction would in fact remain in the hands of sometimes ill-equipped cantons. Furthermore, the lack of resources available to the federal authorities at the time of the on-site visit raised doubts as to their capacity to fully assume their new tasks.

71. At the time of Switzerland's Phase 2 examination, the criminal investigation department of the Federal Office of Police had, out of a total staff of 450, 150 investigators, 15 of whom were specialised in bribery offences. With 24 teams of federal prosecutors, consisting of a federal prosecutor, a deputy prosecutor or an assistant and a clerk, which were simultaneously responsible for investigating and prosecuting offences against the community (e.g. counterfeiting, breaches of the law on war material, crimes involving explosives, etc.), offences against the interests of the international community (genocide), international or supracantonal organised crime, money laundering and bribery offences, complex economic crimes, and for responding to requests for mutual legal assistance from third countries in cases under federal jurisdiction for offences committed in Switzerland, the federal authorities were overloaded with cases to the extent that some proceedings had to be adjourned<sup>50</sup>. According to the figures provided by the federal authorities to the Lead Examiners, of 398 proceedings initiated in 2003, 58 "complex major investigations" had been carried out between January and the end of December 2003<sup>51</sup>. In 2002, due to lack

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<sup>50</sup> Of this total, at the time of the on-site visit, 26 public prosecutors (and their assistants) were involved in cases relating to money laundering, bribery and organised crime. Six were responsible for crimes against the community and two also specialised in genocide issues.

<sup>51</sup> On 30 June 2003, of 385 proceedings initiated, 75 "major complex investigations" had been opened, according to the figures reported to the examining team at the time of the evaluation of Switzerland by the Working Group. In 2002, of a total of 87 proceedings initiated during that year, 47 "complex major investigations" had been carried out between January and the end of December 2002; the others had had to be postponed. The largest number of these investigations involved money laundering. In second place came investigations of crimes committed by a criminal organisation within the meaning of Article 340<sup>bis</sup> of the Criminal Code, mainly relating to international drug trafficking. The third category concerned passive procedures for international mutual legal assistance (i.e. procedures for which the state

of availability, the Office of the Attorney General has not been able to take advantage of Article 340<sup>bis</sup> para. 2 of the Criminal Code which allows the federal authorities to take on complex cases of economic crime at the request of a canton or to begin proceedings on their own initiative when no canton has taken up the case.. The few cases involving economic crime taken on by the Office of the Attorney General in 2002 all originated in reports from the Money Laundering Reporting Office Switzerland (MROS) concerning suspicions of complex fraud or money laundering preceded by an initial offence, especially fraud<sup>52</sup>.

72. And yet parliament has resolved to establish a suitable structure to enable the Confederation to prosecute the offences referred to in Article 340<sup>bis</sup> of the Criminal Code. A plan has been drawn up, providing for the gradual introduction of these new structures. A first set of measures in 2002 involved recruiting the best magistrates and cantonal police officers to bolster the Office of Federal Examining Magistrates, the Federal Office of Police and the Office of the Attorney General. Further recruitment took place in 2003 and continued in the first half of 2004 before being halted. An ambitious multi-year financial plan has also been drawn up. However, the federal authorities, faced with the need to improve the Confederation's finances, have had to make budget cuts, and the cuts also affect the credits needed to carry out the Efficiency Plan.

73. As a result, at the time of the on-site visit and in the opinion of the Lead Examiners, implementation of the Efficiency Plan was out of kilter: cantons were forwarding a growing number of cases to the federal authorities under the new rules of jurisdiction, while the resources available to the federal authorities were increasing more slowly than planned, affecting their ability to deal with such cases effectively, and hence potentially confronting the authorities with the need to assign priorities to different types of crime. As Valentin Roschacher, Switzerland's Attorney General, explained in a statement to a Swiss newspaper in February 2004, not refuted before the Examiners: "Many of the human and financial resources earmarked by the Confederation for the fight against drug trafficking, bribery and money laundering have now been allocated to anti-terrorism measures, because these investigations are very demanding and we regard them as extremely important. We have to set priorities"<sup>53</sup>.

*Commentary:*

*The Lead Examiners applaud the efforts made by the Swiss authorities to make the criminal prosecution of large-scale economic crime, transnational bribery and money laundering more efficient. However, the wish to create a strong, independent and central federal prosecuting authority cannot be achieved unless this authority has the necessary resources. In this context, the Lead Examiners invite the Working Group to monitor this situation in order to establish that Switzerland continues to provide the federal prosecuting authorities with the resources necessary to prosecute effectively the offence of bribery of foreign public officials.*

b) *The conduct of investigations*

i) Evidence, proof, investigative methods and limitation periods

74. Swiss criminal law allows for a wide variety of methods of proof, ranging from a magistrate's deductions from presumptions and evidence to direct proof such as written documents, witness statements, confessions and evidence of facts from the police, investigating magistrates and experts. In gathering

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prosecutor of the Confederation has not yet begun an investigation concerning the same facts). See Response of the Federal Council of 7 March 2003 to a parliamentary question (question 02.3734).

<sup>52</sup> Response of the Federal Council of 7 March 2003 to a parliamentary question (question 02.3734).

<sup>53</sup> Valentin Roschacher, Attorney General of Switzerland, in February 2004, in *NZZ am Sonntag*.

evidence, Swiss prosecutors have considerable means of investigation, initially during the preliminary enquiry and to an even greater extent during the actual investigation phase. The aims are to obtain testimony through questioning, the hearing and confrontation of witnesses and the use of experts to make findings of fact and to carry out technical examinations; to find and preserve material evidence by using measures such as searches, the lifting of banking secrecy and seizures, including the freezing of bank accounts<sup>54</sup>; and measures to ensure the presence of the accused or any person liable to provide information (custody, release on bail, court supervision, etc.). When evidence uncovered fortuitously reveals the perpetration of an offence unconnected to the prosecution in progress, the authorities are also allowed to use and seize such evidence (unless the documents or objects at issue are covered by a secret that the law protects absolutely, such as a lawyer's professional secrecy obligation).

75. In addition to these classic methods, investigators and magistrates dealing with bribery and money laundering cases can use more sophisticated techniques to gather material evidence. These include the possibilities for intercepting telephone calls and internet communications available to investigators during investigations relating to money laundering offences since the entry into force on 1 January 2002 of the federal law on the surveillance of correspondence by post and telecommunications, extended since 1 October 2003 to investigations relating to transnational bribery offences by the federal law amending the Criminal Code and the federal law on the surveillance of correspondence by post and telecommunications. On 20 June 2003, parliament also adopted a new law on undercover investigation, offering the possibility of using this technique throughout Switzerland in the event of a bribery offence, in particular pursuant to Article 322<sup>septies</sup> CP. In contrast, the use of agents provocateurs is formally prohibited both by law (e.g. Article 215, para. 1 of the Bern code of criminal procedure or Article 6 R of the Zurich cantonal police service regulations) and by federal case law.

76. In carrying out their investigations, magistrates and police officers are no longer subject to time bars which, until recently, did not always take adequate account of the complexity of cases involving economic and financial crime. The entry into force on 1 October 2002 of new rules on time limits for criminal prosecution should make the work of police officers, magistrates and prosecutors easier. The new time limits (15 years for bribery and money laundering offences, for example, and 7 years for related offences such as accounting offences) now take better account of the complexity of such cases.

## ii) Gathering evidence abroad

77. In many of the cases of economic and financial crime that the Swiss justice system has to deal with, especially those involving money laundering and bribery of foreign public officials, a full understanding of all aspects of the case can be achieved only with the effective cooperation of third countries. Examination of such cases shows that, with very few exceptions, temporary seizure of the proceeds of the crime, the gathering of evidence of their origin and, later, confiscation of the proceeds, require effective cooperation between the authorities of several states. (Once such exception was the case of bribes paid to high-ranking Russian officials, where the documentary evidence proving the criminal origin of the commissions paid to them could be obtained in a situation where not only had the financial transactions taken place in Switzerland but the companies paying the bribes were also Swiss.) Since the new law on bribery came into force in May 2000, Switzerland has requested assistance from foreign authorities in nine bribery cases<sup>55</sup>. Requests for mutual legal assistance are sent either through the mutual

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<sup>54</sup> Even the Federal Court (Civil Bench of the Federal Court, judgment 1.A 94/2001) has acknowledged the admissibility of the freezing and seizure of accounts which might contain funds resulting from bribery, held by persons benefiting from immunity such as a foreign Head of State. The courts can order the seizure of assets or the freezing of bank accounts anywhere in Switzerland by issuing a written order with which the financial institutions concerned must comply immediately, even if the order is appealed.

<sup>55</sup> None of them involved an extradition request.

legal assistance unit of the Federal Office of Justice or directly to the foreign authority if that procedure is allowed under the relevant treaties<sup>56</sup>.

78. Cooperation arrangements work well with most countries that are signatories to the Convention. For example, assistance in the bribery cases mentioned above was granted on each occasion by the country to which the requests were addressed and documents were returned relatively quickly, within six to twelve months. In contrast, the Examiners met magistrates who deplored a lack of cooperation from other countries, some of them major financial centres through which commissions or bribes are passed to foreign public officials, which either quite simply refuse to cooperate with foreign judiciaries or cooperate only on terms that are often difficult to meet.

iii) Mutual legal assistance: Switzerland's treatment of international rogatory commissions

79. If Swiss magistrates often seek assistance from third countries in order to complete their investigations, they are also solicited by foreign authorities for investigations of bribery offences having ramifications in Switzerland. According to figures from the Federal Office of Justice provided to the Examiners, in 2003 alone Switzerland received 1 218 requests for assistance (relating to all types of offences), without counting those transmitted directly to cantonal enforcement authorities under treaty arrangements. In recent years, the Swiss justice system has been - and in some cases still is - occupied with several important cases involving suspicions of bribery relating to foreign markets. They include the case of bribes paid by Elf, the French oil company, which mobilised magistrates and financial analysts from the canton of Geneva for several years and revealed over 300 Swiss bank accounts; the suspicions of illegal commissions paid in the context of the sale of French frigates to Chinese Taipei; and the request for assistance from Sweden, sent to Switzerland in 2003, concerning suspicions of bribes paid to Swiss agents and consultants by a Swedish group in 1998-99.

80. Switzerland easily agrees to cooperate: the forty or so international rogatory commissions and the ten or so extradition requests in bribery cases received by the Swiss authorities since the new bribery laws came into force have all been carried out. In its most active form, mutual legal assistance includes the possibility for Swiss judges to spontaneously send a foreign prosecuting authority evidence they have gathered during their own investigations. Under Article 67(a) of the Federal Law on International Mutual Assistance in Criminal Matters (IMAC), judges are even authorised to transmit information which is normally covered by secrecy (banking documents, for example) if it is of such a nature as to enable their foreign colleagues to make a request for mutual assistance to Switzerland. Interim measures such as freezing accounts and seizing assets can also be taken in urgent cases once a request for assistance has been announced (in that case the competent authority gives the country making the request a deadline for submitting a formal request), or even when a request does not meet all the statutory formal requirements. This occurred in a recent request for assistance from Brazil in a bribery case: in summer 2003, the Federal Court upheld an order issued by the Office of the Attorney General freezing 31 million euros deposited in Switzerland, pending communication of the missing documents.

81. Requests for mutual legal assistance are generally turned down for one of three reasons. First, they may be refused because they relate to tax matters. Article 3.3 IMAC states that a request will be refused if it relates to "an offence which appears to be aimed at reducing fiscal revenues". Second, they may be refused because they do not satisfy the dual criminality criterion, although Federal Court case law allows the competent authorities to take a flexible approach. Their task is solely to examine whether the offence committed abroad would also constitute an offence under Swiss law if it was committed in a similar context and under similar circumstances (ATF 125 II 569 ss). Furthermore, the dual criminality condition is assessed according to the prevailing law in the requested country at the time the decision to

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<sup>56</sup> Such treaties have been concluded with Germany, Austria, France and Italy.

submit a request for assistance is taken and not according to the law in force at the time the offence is committed or at the time the international rogatory commission is received (ATF 122 II 421). Likewise, the Swiss authorities, basing their position on another Federal Court ruling that a request for mutual legal assistance in a money laundering case which did not state the prior offence was sufficiently substantiated, agree to cooperate even when the mere existence of suspicious transactions gives grounds for a suspicion of money laundering in Switzerland (ATF 129 II 97 ss).

82. The third reason for refusing assistance set forth in Article 1(a) IMAC concerns requests that would prejudice the "essential interests of Switzerland". However, it has not been used to date as grounds for turning down a request for assistance in cases involving economic or financial crime or sensitive contracts or high-ranking foreign politicians. This can be seen from the rejection by the Federal Department of Justice and Police – which is responsible for assessing appeals that invoke the "essential interests of Switzerland" – of such appeals in bribery cases relating to the sale of arms to Indian and African leaders<sup>57</sup>.

83. While Switzerland generally easily agrees to cooperate in criminal matters, the length of procedures can sometimes reduce their effectiveness. Although the appeals process has been greatly simplified in recent years, several federal and cantonal magistrates met by the Examiners criticised the appeals process for often pointlessly delaying investigations. The fact that even defendants residing abroad can lodge appeals was criticised on the grounds that 97 per cent of them were ultimately rejected. According to one former magistrate from Geneva, such appeals, used solely as a delaying tactic by particularly obstructive defence lawyers, hold up the execution of a foreign request for assistance for one year on average. A report from the USIS project (a joint project of the Confederation and the cantons reviewing Switzerland's internal security system) noted in 2001 that appeals, and the resulting procedural delays, could "in some cases lead to offences being time-barred"<sup>58</sup>.

84. Appeals also substantially increase the workload of the Swiss justice system, since hearings have to be held and substantiated decisions have to be written. The human resources available to the cantons are not always sufficient to cope with the additional workload, forcing prosecuting authorities to put certain cases of domestic economic crime to one side so that they can respond to requests for assistance.

*Commentary:*

*The Examiners applaud the great diligence with which the authorities grant mutual legal assistance in cases of economic and financial crime, including cases relating to bribery of foreign public officials, thus actively contributing to the fight against bribery engaged by the countries that have signed the OECD Convention. However, they note that the possibilities for appeals tend to draw out procedures, with the risk of hampering the assistance granted by Switzerland. For that reason, the Examiners invite the Swiss authorities to pursue the efforts undertaken to bolster the effectiveness of the prosecution of offences relating to the bribery of foreign public officials by considering measures to streamline the process of appeal with respect to mutual judicial assistance requests.*

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<sup>57</sup> In late 1999, for example, the federal authorities rejected an appeal on the grounds of Article 1(a) IMAC against the decision of the Swiss authorities, in the context of a request for assistance, to transmit bank documents that could allow the Indian authorities to establish proof of bribery in a contract involving the purchase of 410 howitzers for a total value of 1.4 billion US dollars. Some of the bribes paid to Indian public officials, amounting to over 40 million US dollars, are alleged to have passed through bank accounts in Zurich and Geneva. More recently, the Department rejected an appeal on the grounds of Article 1(a) IMAC filed by Genevan lawyers in January 2004 against the Swiss courts' decision to transmit to the French and Chinese Taipei authorities bank documents discovered by a federal investigating magistrate in the case of illegal commissions for the sale of frigates to Chinese Taipei in 1991.

<sup>58</sup> USIS, *Réexamen du système de sécurité intérieure de la Suisse – 1<sup>re</sup> partie, état des lieux*, 26 February 2001, p.71.

## 2. *Establishing the offence of bribery of foreign public officials*

85. It is for the "plaintiffs in criminal proceedings (public prosecutor and complainant or civil plaintiff) to establish the existence of each element of the offence and the guilt of the accused".<sup>59</sup> However, the burden of proof on the plaintiffs is lightened by the particular role of magistrates in criminal proceedings. Contrary to the adversarial system, in which the judge is basically regarded as a referee, in the mixed system generally used in Switzerland the magistrate takes a more active role in the process and seeks, as of right and without restriction, the evidence needed to reveal the truth. The parties can bring forward evidence, but the search for evidence is primarily the responsibility of the specific actors in criminal proceedings (examining magistrates and police under their direction), which are required to act on their own initiative, without being bound by the parties' submissions or offers of evidence. Trial judges also have a duty of investigation and can supplement the evidence transmitted by investigating magistrates. It is on the basis of the evidence before them that trial judges, in full discretion, come to an opinion – their firm conviction ["intime conviction"] – as to the guilt of the accused. The judge may consider any evidence, even circumstantial evidence.<sup>60</sup> Intent will often be deduced from the material circumstances of the case. For example, a district court found that the facts as established, in particular the payment of a sum of money to a public official in the context of a procedure for granting residence permits, constituted grounds for supposing that the perpetrator intended to buy the public official's favour.<sup>61</sup> The Swiss authorities have reported on a judgment which found that, in the new law of domestic bribery, it is no longer necessary for the offender to have acted with the intention that the granting of the favour should be followed by an act of the public official contrary to the duties of his office. The intent to commit a lesser infraction [dol éventuel] can suffice. In that particular case, the perpetrator knew that his interlocutor was a public official, clearly wanted to influence him in a procedure for granting quotas and was aware that he would succeed in doing so.<sup>62</sup>

86. At the time of Switzerland's Phase 2 examination, the courts had judged only one case of foreign bribery involving Article 322<sup>septies</sup> of the Criminal Code since it came into effect.<sup>63</sup> It resulted in a conviction in a court order (without opinion). No specific interpretation of the elements of the infraction was given. Other proceedings under Article 322<sup>septies</sup> were pending but, being in their very early stages, had not yet led to any interpretation of the law. Under these circumstances, the Lead Examiners reviewed certain cases involving domestic law and mutual legal assistance.

### a) *Treatment of the offence of offering a bribe*

#### i) Offering, promising or giving

87. Article 322<sup>septies</sup> follows the terms of the Convention by making it a criminal offence to "offer, promise or give" any undue advantage in order to obtain a benefit in return from a foreign public official. The offence is deemed to have been committed as soon as the perpetrator offers, promises or gives an advantage, even if the official does not provide the benefit in return. In a case concerning bribery of Swiss public officials, a court found that placing an envelope containing CHF 2 500 on the desk of a police

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<sup>59</sup> Gérard Piquerez, *Manuel de procédure pénale suisse*, § 1161.

<sup>60</sup> *Id.*, §§ 1162, 1184, 1193.

<sup>61</sup> Zurich District Court, judgment of 19 February 2002, GG010628/U1.

<sup>62</sup> Supreme Court, Zurich, SB020400/u/gk.

<sup>63</sup> For the terms of Article 322<sup>septies</sup>, see Annex 2 of this report.

officer was sufficient to constitute the giving of an undue advantage even though the police officer did not accept the envelope.<sup>64</sup>

ii) The definition of undue advantage and socially accepted practices

88. Examination of Swiss case law involving Swiss public officials generally confirms a broad interpretation of what constitutes an undue advantage. The advantage may be material (a gift in cash or kind) or immaterial (sexual favours, promotion), direct (immediate or with directly visible effects) or indirect (in the longer term or procuring a benefit by ricochet). However, Swiss law considers that the requirement that the advantage should be undue also gives a certain latitude for excluding insignificant and socially accepted gifts from the scope of the offence. Article 322<sup>octies</sup> para. 2 considers that there are no grounds for prosecution if the payment or the offer of payment, the gift or the procuring of any other advantage is "of minor value in conformity with socially accepted practices". In the Phase 1 examination, the Swiss authorities explained that this concerns advantages which are insignificant and deemed to present no risk of inciting public officials to behave in a manner inconsistent with their duties.

89. In the Phase 1 examination, the Swiss authorities also stated that advantages of minor value are neither permitted, nor a socially accepted practice, where they incite public officials to behave in a manner inconsistent with their duties, or are likely to influence them in the exercise of their discretion. Following the on-site visit in Phase 2, the Swiss authorities reiterated this position and pointed out that the effect of this interpretation was to automatically exclude application of Article 322<sup>octies</sup> para. 2 to Article 322<sup>septies</sup> (and Article 322<sup>ter</sup>). In other words, in cases of corruption as defined in Swiss law (*i.e.* when the benefit sought from the public official would constitute a breach of his duties or would depend on the exercise of his discretion), no payment could be regarded as a socially accepted practice.<sup>65</sup>

90. The OECD Working Group considered that Switzerland's argument in Phase 1 would be satisfactory provided the Swiss courts systematically adopted this approach and did not refer to social practices accepted in the foreign public official's country.<sup>66</sup> Since then, four domestic law judgments have been issued on the subject. However, they do not appear to automatically exclude the possibility of socially accepted practices in bribery cases. Firstly, the case law referred to by the Swiss authorities thus indicates that the courts resolve this issue on a case-by-case basis by reference to, among other things, the nature of the payment. The judgments considered that relatively minor payments were not socially accepted practices and were thus undue. In one case under the previous rules, inviting a police officer to a circus was deemed a socially accepted practice; on this basis, the court concluded that the offence set forth under former Article 316 CP (which stated that the advantage should be undue, without mentioning the notion of socially accepted practice) was not committed.<sup>67</sup> Secondly, there is nothing in the text of Article 322<sup>octies</sup> para. 2 to suggest that the notion of socially accepted practice is excluded in bribery cases.<sup>68</sup> Lastly, a

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<sup>64</sup> Judgment of the Criminal Court of the Canton of Lucerne of 2 May 2003, No. 00/691. The offence of giving an undue advantage does not exist in foreign cases (see below, §§ 93-95), but it contains the same text referring to a person who "offers, promises or gives" an undue advantage as the offence of corruption of a foreign public official.

<sup>65</sup> On the important distinction in Swiss law between, on the one hand, the offence of corruption, which requires that the benefit from the public official should be in breach of his duties or constitute an exercise of his power of discretion, and, on the other hand, the offence of offering or accepting an advantage, where the desired benefit is the official's accomplishment of his duties, see the section below on "Payments to public officials for doing their duty and the domestic law infraction of offering an advantage", §§ 93-95.

<sup>66</sup> See Phase 1 Report, § 1.1.4 and Evaluation § 1.

<sup>67</sup> As all the judgments have been delivered in domestic law cases, the question of reference to foreign social practices does not arise.

<sup>68</sup> See Message 99.026 § 23 ("As the margin title indicates, Article 322<sup>octies</sup> applies to all corruption offences constituting the new Title 19 (Article 322<sup>ter</sup> to 322<sup>septies</sup>)").

magistrate from a cantonal prosecutor's office told the Examiners that the impact of Article 322<sup>octies</sup> para. 2 in corruption cases had been the subject of discussions in that canton and that the prosecutors has decided that the act cannot be a socially accepted practice when cash is involved. This interpretation by prosecutors differs from that of the central authorities, according to which the notion of socially accepted practice is excluded in corruption cases.

- iii) Anteriority of the advantage and the relation of equivalence between the advantage and the benefit in return

91. Under the previous legislation, both legal commentators and case law "were unanimous in considering that neither the giver nor the beneficiary were punishable for a payment made as a reward after the accomplishment of an act contrary to the duties of office" (Message 99.026 § 212.33). This problem seems to have been solved by the new law, which now applies equally to payments made after the breach of duty.<sup>69</sup> Likewise, the Swiss authorities indicated that the Federal Tribunal does not require concrete proof of an illicit agreement for each advantage received, solicited or promised, or for each act contrary to the duties of office. The public official's acts simply have to be "determinable generically".<sup>70</sup> In the terms of another judgment, there is equivalence "provided that the objective content of the act in question is known at least in broad outline"<sup>71</sup>. The Federal Tribunal thus takes into consideration objective criteria such as the amount of the advantage, the closeness in time, the frequency of contacts between the giver and the beneficiary and the identical nature of their areas of activity.<sup>72</sup>

**Commentary:**

*The Examiners applaud the official position of the Swiss authorities according to which the notion of socially accepted practices cannot apply to cases of corruption as defined in Swiss law. However, in view of the difficulties of interpreting the notion of socially accepted practice mentioned by the public prosecutors, and in view of the current wording of the law, the Examiners invite the Working Group to monitor the interpretation of the notion of socially accepted practice in future case law.*

- b) *Treatment of the notion of foreign public official and their acts*

- i) The notion of a foreign public official.

92. Swiss law seems to clearly define the outer limits of what constitutes a public official or state employee ["fonctionnaire"]. The Message describing the new legislation undertakes a refined analysis of the question and of relevant Swiss case law.<sup>73</sup> Cases of bribery of Swiss public officials dealt with by the Swiss courts provide several examples of persons deemed to be "public officials", including a person employed by the administration under a private law contract who is subject to the supervision and direction of the State; an employee of a private company commissioned and controlled by the State (*e.g.* to provide water or electricity); the managers of a private engineering company commissioned by the State to plan,

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<sup>69</sup> One ambiguity remains, however. Whereas the French and German versions of the law are clear, the Italian version states that the undue advantage must be promised or procured to a public official "*per indurlo a commettere un atto o un'omissione*" in connection with his official activity and contrary to his duties, creating an apparent need to establish that the offer of the advantage preceded the act or omission. However, the legislature's intention seems clear because the Message indicates that the explicit purpose of the proposed text was to "abandon" the requirement that the breach of duties must be subsequent to the payment. There is not as yet any case law on the subject.

<sup>70</sup> ATF 118 IV 316, cited in Message 99.026 § 212.4.

<sup>71</sup> See Message 99.026 § 212.4 note 127 citing the judgment.

<sup>72</sup> ATF 118 IV 316, cited in Message 99.026 § 212.4.

<sup>73</sup> See Message 99.026 §§ 212.12, 212.13.



prepare the procurement and supervise the realisation of public works because, according to the Federal Council, the award of public contracts is "clearly a State prerogative". Article 322<sup>octies</sup> para. 3 takes account of the notion of a de facto public official by stating that individuals who carry out public functions are deemed to be public officials.

ii) Payments to public officials "so that he accomplishes the duties of his position" and the domestic law offence of giving an advantage

93. Switzerland has introduced two distinct types of offence for bribery of Swiss public officials. The offences defined at Articles 322<sup>ter</sup> and <sup>quater</sup> apply to payments made to an official for an act that is "contrary to his duties or depends on the exercise of his discretionary powers". The offences defined at Articles 322<sup>quinquies</sup> and <sup>sexies</sup> apply to payments made to an official "so that he accomplishes the duties of his position". In Swiss law, the former offences are generally referred to as active or passive corruption while the latter is referred to as the giving or acceptance of an advantage.<sup>74</sup> The offence set forth at Article 322<sup>septies</sup> applicable to foreign public officials covers only active corruption as defined in Swiss law, *i.e.* only cases of payments made to an official for an act that is "contrary to his duties or depends on the exercise of his discretionary powers". Cases where a payment is made to a foreign public official so that the official accomplishes the duties of his position are not covered by Article 322<sup>septies</sup> whatever the amount of the payment.

94. The SECO descriptive brochure about the foreign bribery offence contains examples which illustrate some of the Examiners' concerns in this regard. In examining the case of a payment of 10 000 dollars to obtain official acts abroad, the brochure considers its permissibility solely from the standpoint of the nature of the foreign official's act, without considering the amount of the payment, and concludes that the payment is lawful provided that the official's act constitutes performance of a duty. The Examiners find that 10 000 dollars is a substantial amount of money in many countries, even leaving aside the possibilities of repeat payments, but consider that the most serious problem is the absence of any limit on the amount of payments of this type.<sup>75</sup> Following the on-site visit, the Swiss authorities have acknowledged that the example in the brochure was poorly chosen and have indicated that it will be changed on the SECO website and in any potential future versions of the brochure.

95. In this context, a Swiss judge raised a serious and worrying problem: in order to establish the existence of the offence set forth at Article 322<sup>septies</sup>, the prosecuting (and other judicial) authorities all face the practical problem of proving that the foreign official had a degree of discretion under foreign law, which can be very difficult to prove. Given the absence of any limit on the amount of payments for inducing an official to accomplish his duty, such proof must be furnished in all cases, even when very large amounts of money are involved. During Phase 1, the Swiss authorities contended that the problem would not be important in practical terms since, in their opinion, "it is unlikely that anything other than small

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<sup>74</sup> In domestic cases, the courts must distinguish between the two offences but both are sanctioned. Thus, the Swiss authorities indicated that in a judgment of 28 October 2002 involving a domestic public official, the Supreme Court of the canton of Zurich found that, in the context of a procedure for granting residence permits with cantonal quotas, the public official had a sufficient degree of discretion for the offence to be the one set forth at Article 322<sup>ter</sup> CP, not the one set forth at Article 322<sup>quinquies</sup> (Zurich, SB020400/u/gk).

<sup>75</sup> According to Message 99.026 to the parliament, it was not necessary to criminalise giving undue advantages to foreign public officials because the Convention "does not concern bribes paid in foreign countries to induce underpaid local officials to do their duty". When the law was passed, Switzerland considered that the Convention required only "an extended definition of the breach of the duties of office that also covers the exercise of discretion", basing its position in particular on Commentary 3 of the Convention (Message 99.026). However, the analysis in the Message does not refer to the limit on facilitation payments, which are intended to induce an official to perform his duty, to the "small" payments referred to in Commentary 9.

facilitation payments would be made for non-discretionary acts", and they reiterated this point in the context of the Phase 2 review.

*Commentary:*

*The Examiners invite the Swiss authorities to follow the relevant future case law closely in order to ensure that, except where small facilitation payments are involved, an official's acceptance of an undue advantage is deemed contrary to his duties and therefore constitutes the basis of a corruption offence.*

c) ***The Federal Tribunal Judgement of 5 December 2003***

96. A judgement by the First Public-Law Chamber of the Federal Tribunal, ruling on the admissibility and scope of a request for mutual legal assistance concerning a former Head of State, offered some hypotheses about the meaning of Article 322<sup>septies</sup>, in particular with regard to the concept of official duties, the definition of a foreign public official and the impact of solicitation (Judgement 1A 213/2003 of 5 December 2003). Although the Federal Tribunal did not rule on the application of Article 322<sup>septies</sup>, but on the criteria of dual criminality necessary to grant mutual legal assistance, the Lead Examiners were concerned about the impact of this judgement, as it is the only ruling thus far that has interpreted Article 322<sup>septies</sup>. In this regard, an investigating magistrate met during the on-site visit thought that the Tribunal's comments might indicate possible points of controversy and invite commentary from legal theorists.

97. A summary of the factual context is needed here. According to the statement of facts in the mutual assistance request, in 1989 a company F.\_\_\_ concluded an agreement with an African company N.\_\_\_ in which the African State had a 70% interest. The contract concerned the construction of a plant in this State at a cost of several billion Deutschmarks. After his accession to power several years later, the new Head of State of this country allegedly "*demande to profit from the fulfilment of the project*". For the next five years, F.\_\_\_ allegedly paid more than 700 million DM to companies and foundations controlled by the Head of State and his close relations using the cover of fictitious services and false invoices.

98. The rationale of the Tribunal, which doubted that the alleged acts fell within the scope of the official duties of the Head of State because he was alleged to have intervened in the management of N., a private firm in which the State had a 70% stake, raises an initial question. Such an approach, if it were to be applied, would be incompatible with the letter of the Convention. A Head of State generally has extensive powers in economic, political and social matters and the fact that he exerts pressure on a private firm is not sufficient to remove his action from the sphere of his official duties. This conclusion is all the more compelling when the firm has a value of several billion Deutschmarks and would even apply if the firm were totally private with no State equity ownership. In the Examiners' opinion, a broad definition of a Head of State's sphere of private action, especially any extension of that sphere to behaviour towards private companies, would run the risk of widespread abuse if it were adopted by the relevant Swiss courts. The Tribunal's suggestion that Article 322<sup>septies</sup> would require the Head of State's acts (or omissions) to be committed "directly" in the performance of his official duties also raises concerns on the part of the Examiners, since the requirement that there be a "direct" connection features neither in the Convention nor in Swiss law<sup>76</sup>.

99. The Tribunal's analysis, according to which Article 322<sup>septies</sup> would not apply when the foreign public official has solicited the accused for payment of the undue advantage also raises questions. In its opinion, the Tribunal stated that "it would be difficult to categorise such behaviour as the offence

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<sup>76</sup> The Tribunal's focus on the question of whether the "acts" of which the Head of State "was accused" ["les actes reprochés"] were committed in the performance of his official duties also raises another difficulty: the official's act to be assessed in light of "official duties" in the context of foreign bribery is the act expected to be taken in return for the undue payment, not the official's possible solicitation of a bribe.

prohibited by Article 322<sup>septies</sup>, since the accused had not “spontaneously” offered, promised or given an advantage to the Head of State, but had acted “at his request”. The Swiss law does not contain the word “spontaneously”<sup>77</sup>. The fact that the analysis might suggest that a Head of State’s status as a foreign public official would depend on his particular action in each case also raises questions: admittedly, the language of Article 322<sup>septies</sup> applies to members of the executive only by a general reference to “persons acting for a foreign State ... as a member of ... another authority”; nevertheless, the legislature’s intent that the law should apply to undue payments to foreign Heads of State is clear, as Message 99.026 rightly emphasises (§ 221.1) that “the Convention has as its first objective the limitation of the flow of large payments, intended particularly to bribe Heads of State and ministers”.

100. The First Public-Law Chamber of the Federal Tribunal made its analysis of criminal law in the context of a request for international mutual legal assistance, and this is a specific aspect of the case that must be respected. However, this ruling was made in a situation in which there was no other interpretation of Article 322<sup>septies</sup>, and for this reason may have considerable authority since it was handed down by the Federal Tribunal. The Swiss authorities have indicated that the Chamber’s analysis concerned the behaviour of parties as a whole and only addressed the issue of official duties. More generally, the Swiss authorities have emphasised that the clear text of the law prevails in any event. Nevertheless, the judgement may raise doubts not only about the concept of official duties, but also about the impact of solicitation and the definition of a foreign public official. Given the possible impact of this judgement on legal debate in Switzerland, it is important to follow the evolution of case law as well as practice with regard to investigations and prosecutions on this issue. Likewise, given the practical importance of solicitation in the context of international transactions, more should be done, in the context of general efforts to increase awareness, to make businesses better aware of the issue.

*Commentary:*

*The Examiners note that the only existing case law with regard to Art. 322septies could be interpreted as deviating on several points from the terms of the Message or the law. The Examiners recommend follow-up by the Working Group in order to verify that the application of Art. 322septies by the Swiss judicial authorities confirms (1) a broad conception of the definition of the exercise of official duties of a Head of State; (2) its application to cases of solicitation by the foreign public official; and (3) an application of the concept of foreign public officials that includes Heads of State and the highest authorities of the State.*

d) *Jurisdiction and the problem of participation*

101. Article 3 of the Criminal Code provides that the Swiss authorities have jurisdiction if the offence has been committed in Switzerland. Article 7 para.1 of the Criminal Code states that “a crime or misdemeanour is deemed to have been committed at the place where the offender committed the act and at the place where the result occurred”. According to the Swiss authorities, the commission of the act within the meaning of Article 7 covers all types of conduct which make up the elements of the offence.<sup>78</sup> However, in their answers to the questionnaire (p. 32), the Swiss authorities said that “mere acts of participation (incitement, complicity, etc.)” committed by foreigners in Switzerland do not provide sufficient grounds for attributing jurisdiction to the Swiss courts when the principal foreign perpetrator acted abroad, apparently because such acts of participation are deemed to have been committed abroad.

102. Defined in these terms, the concept of participation raises some questions. As regards jurisdiction, the Convention requires each party to take such measures as may be necessary to establish its

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<sup>77</sup> The SECO descriptive brochure states that a Swiss company that accedes to a foreign public organisation’s request for undue payments is guilty in Switzerland of bribing foreign public officials.

<sup>78</sup> See Phase 1 Report § 4.1 and note 28.

jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory. It further provides that the territorial basis for jurisdiction should be interpreted broadly so that an extensive physical connection to the bribery act is not required.<sup>79</sup> The Examiners consider that in a case where a person in Switzerland intentionally incites another person to bribe a foreign public official and that the bribery takes place, that person should be tried and sentenced by the Swiss courts. The same applies to a person in Switzerland who intentionally aids and abets the commission of bribery in another country.

103. The Swiss authorities contend that they can partly close this gap through jurisdiction on the basis of nationality when the person guilty of complicity or incitement is Swiss. However, jurisdiction based on nationality applies only to Swiss citizens and not to permanent or long-standing residents.<sup>80</sup> Switzerland also partly extended its territorial jurisdiction over foreigners in the revision of the general part of the Criminal Code adopted in December 2002, which will come into force in 2006. Under the new provisions (art. 7 P-CP), Switzerland will have jurisdiction when an offence is committed abroad by a foreigner if the offender is in Switzerland and is not extradited for reasons other than the nature of the act (for example, if extradition would leave the offender liable to the death penalty or to penalties that imply loss or diminution of bodily integrity). However, the provision applies only if the foreign state submits an extradition request, which will often not be the case. It will not apply to foreign legal entities since they are not liable to extradition.

104. The Swiss authorities also consider that nationality jurisdiction applies to Swiss companies and that the nationality of legal entities will be determined by their registered office.<sup>81</sup> According to them, the prosecuting authorities would have no difficulty opening an investigation into a Swiss company, one of whose employees bribes a foreign public official in a foreign country, in application of the principle of jurisdiction based on the nationality of the offender. As regards territorial jurisdiction with regard to foreign companies, it is unclear whether jurisdiction over the company will be based on the place of the organisational acts or omissions or the place of the acts of bribery. Article 100quinquies deals with procedure but is essentially limited to the sole question of how the enterprise is represented in the procedure. Some of those interviewed expressed fears that the new law is inadequate in this respect.

*Commentary:*

*The Examiners consider that the Working Group should verify whether, on the basis of evolving practice, the current basis of territorial jurisdiction is sufficiently effective to combat bribery of foreign public officials, in the light of the rule according to which the commission in Switzerland by a foreigner of acts of incitement, authorisation or complicity in bribery of a foreign public official committed by a foreigner are deemed to have taken place abroad.*

### 3 *The liability of legal persons*

105. Article 100<sup>quater</sup> of the Criminal Code institutes two systems of criminal liability for enterprises.<sup>82</sup> Both establish defective organisation as a condition for corporate criminal liability. Paragraph 1 states that the enterprise is liable when the individual perpetrator of an offence cannot be identified because of the enterprise's lack of organisation. It applies to all criminal offences. Paragraph 2 establishes, for certain specific crimes, including domestic and foreign bribery, the enterprise's parallel liability due to defective

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<sup>79</sup> See Convention Article 4(1); Commentary § 25.

<sup>80</sup> See Article 6 CP (referring to "any Swiss person").

<sup>81</sup> On the new rules concerning liability of enterprises set forth at Articles 100<sup>quater</sup> and 100<sup>quinquies</sup> of the Criminal Code, see the following section.

<sup>82</sup> See Annex 2 of this report for the text of Articles 100<sup>quater</sup> and 100<sup>quinquies</sup>.

organisation. The application of paragraph 2 does not require the parallel sanctioning of a natural person. There must be an offence and for which the enterprise is liable. It is not necessary that the natural person responsible have been convicted or sanctioned. Paragraph 3 sets out the criteria for applying sanctions and paragraph 4 defines the notion of an enterprise.<sup>83</sup> These provisions have not yet been applied in practice. In the opinion of the legal experts interviewed, liability under Paragraph 2 is more important than liability under Paragraph 1 where bribery is concerned.

a) *The Paragraph 2 offence*

106. In order to incur liability on the basis of Article 100<sup>quater</sup> para. 2, the enterprise must not have taken all reasonable and necessary organisational measures to prevent the individual from committing the offence. According to an article written by a judge from the Court of Cassation, "the enterprise is not charged with money laundering or bribery but with having participated in the offence through its defective organisation".<sup>84</sup>

107. The Examiners have considered whether this provision is consistent with the OECD Convention. The Convention makes no reference to defective organisation as a condition for criminal liability. Liability for defective organisation can be analysed as liability for additional negligence over and above commission of the act of bribery. The Message to Parliament when the enterprise liability bill was introduced states that the maximum fine of five million Swiss francs should be applied only rarely since the "criminal fault attributed to enterprises – namely their lack of organisation – may generally be treated as an act of negligence"<sup>85</sup>. The addition of a further element compared to the text of the Convention needs to be evaluated carefully, both in principle and in its application.

108. A representative of the Federal Office of Justice opined that Swiss law was in some respects stricter than certain other systems because liability for defective organisation as set forth at Article 100<sup>quater</sup> can arise from acts of bribery committed at all levels of the enterprise. Other systems do not require proof of defective organisation, but require acts linked to bribery of certain senior executives or specific bodies.

109. On this point, it should be noted that Paragraph 2 does not contain any rules for attribution of the individual's act of bribery to the enterprise. The text specifies neither which "individuals" nor which acts of bribery by such persons can trigger an examination of the enterprise's state of organisation. In order to find the rules for attribution, it is necessary to apply the criterion contained in Paragraph 1, namely "a crime or misdemeanour committed within an enterprise in the pursuit of its commercial activities in conformity with its objects". However, the connecting factor of an act "within an enterprise", while it seems to include acts by all bodies and employees of the enterprise, is, in the Examiners' opinion, open to interpretation. It has never been construed and could limit application of the text, for example when an employee of an affiliate makes an undue payment for the company's benefit, or when the enterprise uses an outside intermediary. The Swiss authorities note that the notion of "committed within an enterprise" implies the existence of a certain organisational or hierarchical link between the individual and the enterprise. On that basis, they conclude that the agent may be a *de jure* or *de facto* body, an employee occupying a senior managerial function, or a mere employee with no particular powers. With regard to outside agents, they consider that

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<sup>83</sup> The notion of enterprise, defined at Article 100<sup>quater</sup> para. 4 of the Criminal Code, includes any structure, whatever its purpose, lucrative or not. Legal theorists consider that these provisions also apply to foreign enterprises. See Bernard Bertossa, *De quelques problèmes pratiques de mise en oeuvre*, in "La punissabilité de l'entreprise". However, one author has pointed out that the legal forms of an "enterprise" are defined in terms of Swiss law and that uncertainty may exist in relation to the application of the texts to legal forms that do not exist in Swiss law, such as trusts. See Vincent Jeanneret in "La punissabilité de l'entreprise", special issue of *L'expert-comptable suisse*, June-July 2003, p.8.

<sup>84</sup> Robert Roth, *Une responsabilité sans culpabilités?* in "La punissabilité de l'entreprise", p. 20.

<sup>85</sup> Message 98.038, § 217.422.

all external agents fall within the definition of Article 100<sup>quater</sup>, but Swiss commentators appear to be divided on this question. The idea of an act of bribery being committed "in conformity" with the enterprise's objects is surprising, but Swiss prosecutors and judges considered that the notion could be interpreted as applying to acts within the enterprise's sphere of activity, the purpose being to exclude private acts by employees of the enterprise. However, this interpretation would have to be confirmed by case law.<sup>86</sup>

110. The notion of "all reasonable and necessary organisational measures to prevent such an offence" also raised questions, particularly when applied to transnational bribery. There is nothing in the text of the law or in the legislative history to shed light on the concept.<sup>87</sup> The legal writing seen by the Examiners considers it only in very general terms. A representative of the Federal Office of Justice said that the provision had been discussed in a parliamentary committee and that experts had been consulted in drawing up the text but the discussions have not been published. For the money laundering offence, there are several sources outside the criminal law to establish standards of organisation for financial intermediaries<sup>88</sup>, but that is far from the case where bribery is concerned. One academic article notes that the main sources for such organisational standards in bribery cases would be international, primarily the OECD Convention, the Revised Recommendation and the OECD Guidelines for Multinational Enterprises.<sup>89</sup> However, the article considers that it would be difficult for these standards to constitute extra-criminal rules of conduct governing criminal liability because they are little-known and do not derive from an explicit delegation of authority like the one that gave rise to the development by SROs of standards in money laundering.<sup>90</sup> Moreover, it is far from certain that such standards would be sufficiently explicit to enable prosecutors to prove defective organisation.

111. According to the Swiss authorities, as far as organisational measures are concerned, consideration must be given to a general due diligence obligation which extends to the overall activity of the enterprise. According to them, this obligation is well-known in relation to offences committed through negligence by individuals. Here, case law has established what is understood by the term "duties of diligence" in certain professions (doctors, skiing instructors, mountain guides), even though the law is silent on that point. In other words, the situation is comparable and case law needs to develop what is to be understood by "reasonable and necessary organisational measures". The Swiss authorities consider that the courts will have to consider what another, comparable enterprise would reasonably have done, what instructions were given, what controls were in place, what internal information was provided and what the overall organisation was.

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<sup>86</sup> In Swiss law, companies are not in principle liable for the acts of their affiliates. According to Alain Macaluso, as subsidiaries are legally independent companies, an offence can only be imputed to another company if the company concerned is a guarantor. Parent companies will in all events incur liability when the company is a single unit, which thus requires economic unity. Consideration will be given to the size of one company's shareholdings in the other and to other evidence of the existence of a close link (power to issue instructions, identity of senior managers, confidence engendered and appearances created). See Alain Macaluso, *La responsabilité pénale de l'entreprise*, Commentaire des art. 100quater et 100quinquies CP, Schulthess 2004, p. 101-103.

<sup>87</sup> Message 98.038 of 21 September 1998 concerning the revision of the general provisions of the Criminal Code and the introduction of corporate criminal liability analysed a draft bill that did not contain Paragraph 2. The paragraph was added during the debate in parliament, but the debate contained no discussion of the origins or interpretation of the provision. See Message 02.052 § 2.2.3, FF 2002 5014.

<sup>88</sup> For external sources of organisational standards for money laundering, the key provision would appear to be Article 8 of the Money Laundering Act, supplemented by the many rules introduced by the relevant entities pursuant to the delegation contained in Article 8, but there are others. See Roth in "La punissabilité de l'entreprise", p. 22.

<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid.*, p. 20, 24 (emphasising that extra-criminal rules of conduct are "more numerous and, above all, have an infinitely greater normative force" in the realm of money laundering than in the realm of bribery).

112. Under these circumstances, in the Examiners' opinion it seems inappropriate to place the burden of proof on the prosecutor (or magistrate). The enterprise is much more familiar than the judiciary with the nature of its own internal organisation, its qualities and its defects. The justice system will probably find it difficult to prove defective organisation, especially when an enterprise is part of a complex group, and this could deter prosecutions.<sup>91</sup> A judge pointed out in this regard that the law's generality could be a damper on prosecutions and that its application would pose serious difficulties of interpretation. Consequently, case law interpretation could be very slow to develop, particularly because firstly, the only offences genuinely likely to give rise to prosecutions are money-laundering and bribery, and secondly, the notion of defective organisation will probably be different for different offences.<sup>92</sup> Even when the act of bribery has been committed in the enterprise's interest, it could be easy for the enterprise to avoid liability. Another concern is that the mere fact of an enterprise demonstrating that it is organised in compliance with international organisational and managerial standards would suffice for it to avoid liability.<sup>93</sup> In the opinion of the Swiss authorities, conversely, it is not so difficult to furnish proof of defective organisation. According to them, steps should be taken to assess whether employees have been sufficiently informed, supervised and controlled. The fact that an enterprise is organised in compliance with international management standards will not be sufficient to rule out all liability on its part; it will be one element to take into consideration among others, but the notion of organisation in Article 100<sup>quater</sup> goes further. In their opinion, shifting the burden of proof in criminal cases would contravene Article 6 of the European Convention on Human Rights.

b) *The Paragraph 1 offence*

113. The Paragraph 1 offence provides for liability of the enterprise if an offence cannot be attributed to any specific individual because of the enterprise's lack of organisation. The enterprise's liability is explicitly subsidiary and cannot coexist with the liability of an individual. In general, the legal experts interviewed by the Examiners considered that Paragraph 1 would not be widely applied in practice. An article written by one of the lawyers interviewed said that many considered that Paragraph 1 "would be applied seldom or very seldom because the dual condition of an unidentified offender and a lack of organisation that did not allow the offender to be identified would be extremely difficult to prove."<sup>94</sup>

*Commentary:*

***The Examiners consider that the introduction of new rules on corporate criminal liability is definitely a step in the right direction. However, given the lack of case law thus far, they are not convinced that the new rules will be able to ensure the imposition of effective, proportionate and dissuasive sanctions. They***

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<sup>91</sup> It is unclear, however, whether organisation is assessed at all levels of the enterprise and whether failings at lower levels can constitute the offence. Following the on-site visit, the Swiss authorities indicated that the assessment of organisation should be "general", which could require an enormous amount of work in the case of a large firm. The nature of liability also seems vague. Some interviewees described an obligation of results whereas others described it more as an obligation of means. As noted, one legal theorist has described it as a sort combined guilt: the enterprise's negligence allowed the perpetrator of the money laundering or bribery offence to put his intention into effect. See Roth, p. 22.

<sup>92</sup> Apart from bribery and money laundering offences, the only offences to which Paragraph 2 applies are two new terrorism-related offences and the offence of participation in a collective undertaking, which is "very awkward to apply and at present virtually a dead letter in Switzerland". See Roth, p. 20.

<sup>93</sup> Defective organisation as an additional element for corporate liability raises other questions. In a large corporate group, for example, the operational organisation is very often dissociated from the legal organisation of the group's subsidiaries. A realistic analysis of the organisation under these conditions would focus at least in part on the organisational measures of the group as a whole, including the parent company and the group's other subsidiaries. However, it is uncertain that a realistic approach to the assessment of organisation can coexist with purely legal rules attributing the act of bribery to the enterprise, like those contained in Paragraph 1 (which also apply to Paragraph 2).

<sup>94</sup> See e.g. Vincent Jeanneret, "Une loi bâclée?" in "La punissabilité de l'entreprise", p. 8.

*consider that it is necessary that the Working Group follow up this issue, on the basis of evolving practice, in order to establish whether, in the light of the concept of lack of organisation, the application of Article 100<sup>quater</sup> ensures effective, proportionate and dissuasive sanctions.*

## **C. SANCTIONING BRIBERY OF FOREIGN PUBLIC OFFICIALS AND RELATED OFFENCES**

### ***I. Convictions and penalties for bribery***

#### ***a) Applicable Penalties and sentencing***

##### **i) Applicable Penalties**

114. Under the new criminal measures introduced by Switzerland in application of the Convention, any Swiss manager – and indeed any individual – who pays a bribe to a foreign public official in order to obtain an advantage in an international business transaction is liable to a maximum of five years' imprisonment. Another consequence of such offences may be to compromise the person's professional activity, since penalties may include expulsion from Switzerland for foreigners (Article 55 of the Criminal Code) and disqualification from a profession, industry or business (Article 54). The courts can also order confiscation of assets deriving from the bribery offence or "intended to decide or reward" a bribed partner (Article 59), award the bribe money or amount of the fine to the injured parties (Article 60) and order publication of the judgment.

115. If all reasonable and necessary organisational measures have not been taken to prevent commission of the bribery offence within the enterprise, the company may also incur criminal liability. However, the penalty is limited essentially to a fine, which may be as much as CHF 5 million (approx. €3.3 million). There is no provision in criminal law for the suspension or prohibition of industrial or commercial activities, including exclusion from eligibility for subsidies or participation in public procurement procedures<sup>95</sup>. It is only indirectly, under the terms of the law governing federal and cantonal public procurement contracts or contractual clauses attached to export guarantees, that the company can be threatened with temporary exclusion from municipal, cantonal or federal contracts or the suspension of export privileges. Nor does the new law provide for offences committed by companies to be placed on criminal record, though the courts can order confiscation of corporate assets. According to the magistrates interviewed, this option has frequently been used in the past, even before corporate criminal liability was introduced.

##### **ii) Elements taken into consideration by the criminal judges when sentencing**

116. In practice, in accordance with the general rules of Swiss criminal law, penalties are determined according to the circumstances of the offence and the personality of the offenders. Under the terms of Article 63 of the Criminal Code, it is up to the courts to determine the penalty "according to the offender's guilt, taking account of motive, previous convictions and personal situation". If the offender repeats the offence within 5 years of the first conviction, Article 67 provides for an increase in the term of imprisonment which, in the case of bribery of foreign public officials, may be extended up to as much as twenty years. If offences coincide (for example, accounting and tax offences in addition to the bribery offence), the courts can increase the term of imprisonment to a maximum of seven and a half years if the principal offence of bribery is compounded by other less serious offences.

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<sup>95</sup> None of the ancillary penalties set forth in Articles 51 to 56 of the Criminal Code may be ordered against an enterprise. All those that could be supposed to apply to an enterprise are subject to the condition that a principal custodial sentence must have been imposed, rendering them inapplicable to legal entities.



117. These provisions of a general nature are complemented by a principle of discretion set forth at Article 322<sup>octies</sup> of the Criminal Code which applies to all the provisions of new Title 19 "Bribery" of the Code. This article allows for the full rigour of the criminal law to be tempered in a manner ranging from mitigation of the penalty to abandonment of proceedings or complete absolution from penalty when the objective and subjective circumstances of the act (perpetrator's fault) and the practical consequences of the act "are so insignificant that a penalty would be inappropriate" (Article 322<sup>octies</sup>, para. 1). A recent judgment of the Supreme Court of the canton of Zurich gives some indication as to the scope of this discretion. In determining whether it should apply, the important factors are the objective and subjective elements of the offence, the advantage expected in return and the seriousness of the offence. The objective facts and the offence must be less serious than those generally encountered in bribery offences, and the difference must be sufficiently clear for the imposition of a penalty to be unjustified from a general and special preventive standpoint<sup>96</sup>. With the introduction of the new general section of the Criminal Code, an identical general discretion clause (Article 52) will apply to all offences.

118. For legal entities, the criteria to be taken into consideration by the courts when deciding the applicable sentence are set forth at Article 100<sup>quater</sup>, para. 3 of the Criminal Code, which concerns the fine that may be imposed on enterprises, establishments and other legal entities convicted of not having taken the necessary organisational measures to prevent the commission of the bribery (or money laundering) offence. The courts determine their liability according to the seriousness of the crime, the organisational failing and the damage caused, as well as the legal entity's economic capacity. The Message to parliament on the introduction of corporate liability says that the maximum fine of CHF 5 million should rarely be imposed: "As the criminal fault attributed to enterprises – namely their lack of organisation – may generally be treated as an act of negligence, the maximum penalty should rarely be imposed"<sup>97</sup>.

119. In view of the principles in criminal matters described so far and an interpretation of the criminal law that is extensively "disconnected" from other areas of the law, especially civil and administrative law, it is difficult for the time being to anticipate how the criminal courts will find on the question of the degree of organisational failings when deciding their sentence. All the lawyers and judges interviewed by the Examiners agreed that specific case law is likely to emerge at best only within the next three to five years and, with it, autonomous sentencing standards with regard to what constitutes a "lack of organisation" within the meaning of Article 100<sup>quater</sup>, para. 3 of the Criminal Code. It transpired from discussions with lawyers and judges that proof of appropriate organisation would be a key defence for enterprises in the trial courts and that it would be up to the courts to decide the amount of the fine taking into account, *inter alia*, the seriousness of the enterprise's lack of organisation.

120. The courts' assessment of an enterprise's "economic capacity" was a further source of uncertainty. While large corporations will doubtless be solid enough to withstand the new rules on corporate liability, in the Examiners' opinion courts could be receptive to counter arguments that excessively heavy fines could destroy small firms and thus strike at the heart of the small business sector that is a mainstay of the Swiss economy. However, a recent cantonal court judgment implies that a manager of a company who thinks he can escape liability by invoking the "state of necessity" set forth at Article 34 of the Criminal Code could find his argument summarily dismissed. The case in question, mentioned earlier in the section of the report dealing with the elements of the offence, concerned the payment of a sum of money (CHF 5 000, or approx. €3 200) to a Swiss official responsible for granting residence permits to cabaret dancers. The accused argued that, without the permits, the opening of his cabaret would have had to be postponed, causing him a net loss of CHF 70 000 (€45 000) a month. The Zurich District Court dismissed the "state of necessity" argument, considering on the contrary that the threat to the offender's assets could have been prevented using legal channels, and in particular by consulting a lawyer who would have told him what to

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<sup>96</sup> Supreme Court, Zurich, SB020400/u/gk which, in the case in question, did not accept that the rule should apply.

<sup>97</sup> Message 98.038, § 217.422.

do. If some misconduct on the part of the official had caused the owner of the cabaret a financial loss, he could also have sued the administration on the grounds of state liability<sup>98</sup>.

b) *Sentences pronounced by the Swiss criminal courts*

i) Primary and ancillary penalties imposed by the criminal courts

121. The sentencing practice of the Swiss criminal courts in cases involving economic crime in general and bribery of Swiss public officials in particular suggests – and the view is shared by the judges interviewed by the Examiners during the on-site visit – that penalties in domestic bribery cases, like those imposed for comparable offences, are not in general particularly heavy or dissuasive. Although prison sentences are frequently imposed, they are generally suspended; if they are not suspended, the average term is 18 months<sup>99</sup>. The judges interviewed said that prisoners generally served two-thirds of their sentence - provided that the legal conditions for release on parole were met (Article 38 CP) – with no possibility of receiving a pardon or some other form of remission.

122. The courts sometimes add one or more of the ancillary penalties provided by criminal law to the custodial sentence. In the only trial for bribery of a foreign public official that had taken place at the time of Switzerland's Phase 2 review, involving a foreigner who had offered an Italian customs official CHF 800 (€517) for a false stamp on his passport, the court of the canton of Ticino added expulsion from Switzerland for three years to the primary penalty of a 30-day suspended prison sentence.

123. Sentences can sometimes be mitigated because of the length of judicial proceedings when the court finds that the investigation has not been conducted "within a reasonable time" as set forth in Article 29(1) of the Federal Constitution<sup>100</sup>. This happened in a recent bribery case in Ticino involving a police superintendent, two customs inspectors and a cigarette smuggler. Although the four accused were given prison sentences of 16 to 18 months for the active and passive bribery offences of which they were convicted, the court considered that the sentences should be entirely suspended because six to eight years had elapsed between the time when the offences were committed and the trial<sup>101</sup>.

ii) The ancillary measure of confiscation

124. Confiscation, hitting directly offenders' pocket books, can prove to be a powerful measure and, as one of the federal judges interviewed by the Examiners suggested, it can counterbalance the fact that the primary penalties imposed by the Swiss courts for economic and financial offences tend to be modest and not particularly dissuasive. Switzerland takes a proactive approach in this area. Although there are no official statistics, a Federal Department of Finance survey showed that cantons confiscated CHF 51 million (€33 million)<sup>102</sup> in 1998-99. In the canton of Geneva, assets representing over €39 million have been seized and confiscated over the last ten years in the course of investigations reaching beyond Switzerland's borders<sup>103</sup>. Although most of the confiscation orders issued to date have concerned cases of organised crime or money laundering, some involved bribery of Swiss public officials. In a recent case involving a

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<sup>98</sup> Zurich District Court, judgment of 19 February 2002, GG010628/U1.

<sup>99</sup> Swiss Federal Statistical Office, Neuchâtel.

<sup>100</sup> This article states: "Every person has the right in legal and administrative proceedings to have the case treated equally and fairly, and judged within a reasonable time".

<sup>101</sup> *Giornale del Popolo* (Italian Swiss daily newspaper) (10 September 2002 and 17 October 2002).

<sup>102</sup> Federal Department of Justice and Police, *Message concernant la loi sur le partage des valeurs patrimoniales confisquées* (Berne, October 2001).

<sup>103</sup> Figure quoted by Bernard Bertossa, then Geneva's Attorney General, in a speech given on 26 October 1999 in Geneva.

bribe paid to a police officer in Lucerne, the courts confiscated CHF 2 500 (€1 613) corresponding to the police officer's illegal remuneration<sup>104</sup>.

125. Under Articles 58 and 59 of the Swiss Criminal Code judges are *required* to order "the confiscation of objects that have been used or were intended to be used to commit an offence or that are the proceeds of an offence, if such objects compromise [...] the moral order or public policy" as well as "assets that are the result of an offence or were intended to decide or reward the offender." In Switzerland, confiscation can apply to assets that are the proceeds of the bribery offence (for example, objects acquired with the proceeds of the bribery offence<sup>105</sup>) and those used to commit the offence. Assets invested in Switzerland that derive from a bribery offence may also be confiscated as proceeds of money laundering. To that end, one important task of the police and investigating authorities is to provisionally seize all objects or assets liable to be confiscated by the courts, with or without the consent of their holder. As seizure is broadly interpreted in Swiss law, it may concern movables such as a car, or real estate (in which case premises may be sealed off or the real property may be designated as non-transferable in the land register), or assets such as contracts, receivables, intangible assets, etc., or bank accounts, which are frozen.

126. Confiscation is not linked to conviction of the offender. If the offender manages to escape Switzerland's criminal authorities, the assets may still be confiscated under a separate procedure specifically designed to secure confiscation. The fact that the assets concerned may not be available, either because they have disappeared or because they have been incorporated into other assets in such a way that they cannot be identified with certainty, does not prevent a penalty from being imposed. Instead of the assets being confiscated, the original holder is simply ordered to pay the state the same value in compensation. If the proceeds of the bribery offence or the assets used to commit it have been transferred to a third party, the third party may be liable to confiscation or ordered to pay a compensating amount. The third party can escape a confiscation or compensation order only if he can prove that he was unaware that the assets were of unlawful origin and that he provided consideration commensurate with their value. As mentioned earlier in this report, the magistrates interviewed by the Examiners said that the main obstacle to application of the provisions of the Swiss Criminal Code relating to confiscation concerned the shortcomings of international mutual legal assistance, which in some cases made it difficult, if not impossible, to establish proof of the criminal origin of the assets in question and hence to confiscate them.

127. In its most active form, confiscation includes the possibility for the Swiss criminal authorities to order restitution in place of confiscation. This occurred in the case of bribes amounting to almost €8 million paid by two Swiss firms to high-ranking Pakistani politicians in order to win a goods inspection contract, following which a Genevan court ordered the funds invested in Switzerland to be confiscated and repatriated to Pakistan. For obvious reasons – not to destroy the reparatory and preventive intention of confiscation by returning the confiscated assets to foreign authorities that are still corrupt or would grab them for their personal profit – confiscated assets are returned on a case-by-case basis, taking account of whether the official is still in office or the politician still in power or whether the regime that has succeeded the previous one continues to engage in the same practices.

***Commentary:***

***The Lead Examiners applaud Switzerland's proactive policy in the confiscation of assets deriving from or related to bribery.***

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<sup>104</sup> Criminal Court of the canton of Lucerne, case 2003 00/691.

<sup>105</sup> Although at the time of the Phase 2 review there were no examples of a situation in which a judge had ordered confiscation of the advantages and benefits obtained through bribery, all the members of the judiciary interviewed by the Examiners (prosecutors, investigating magistrates and judges) emphasised that Articles 58 and 59 of the Criminal Code allowed them to do so.

c) *Exclusion from public procurement contracts and export subsidies*

i) Exclusion from public procurement contracts

128. An earlier draft of the law introducing criminal liability of legal persons contained provisions that would have enabled the courts to order dissolution of the enterprise or a ban on carrying on a commercial activity. However, parliament decided to remove these sanctions from the final text. It is thus only indirectly, under the terms of the law governing federal and cantonal public procurement contracts or contractual clauses attached to export guarantees, that a company can be threatened with temporary exclusion from municipal, cantonal or federal contracts or the suspension of export privileges. However, even if a company has been convicted of a bribery offence, there seems little risk in practice that it will be excluded from public procurement contracts or public subsidies, even though exclusion can be a very powerful tool since it could encourage enterprises to take practical steps to prevent bribery.

129. Swiss public procurement law is complex, since 26 cantonal regulations coexist alongside the federal law of 16 December 1994 on public procurement. There is no across-the-board rule relating to the conditions under which an awarding authority can exclude a bidder or revoke a contract after it has been awarded. These conditions vary from one canton to another and between the cantons and the Confederation; furthermore, they contain no explicit reference to conviction for bribery (of Swiss or foreign public officials) as grounds for exclusion. The rules governing cantonal and municipal public procurement simply refer to the general notion of "professional misconduct duly established by a court judgment" as grounds for exclusion<sup>106</sup>, while Articles 11 and 3(2)a of the Public Procurement Act – which define the grounds for refusal to award a contract or exclusion from Confederation public procurement procedures – make no explicit reference of that type.<sup>107</sup> Given that the awarding authorities met during panel discussions showed limited awareness of the existence in Swiss law of the offence of bribery of foreign public officials, as the examining team found during the on-site visit, it seems very uncertain, in the Examiners' opinion, whether the grounds for exclusion contained in cantonal and federal regulations would actually be applied to a bidder convicted of bribing foreign public officials<sup>108</sup>.

130. Even if an awarding authority were to try and apply the conditions for excluding an enterprise convicted of bribery, the authority's capacity to discover whether a bidder has a criminal record is limited in practice since there is no formal process whereby it can find out whether an enterprise or an employee

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<sup>106</sup> Cantonal and municipal public procurement procedures are governed by the Intercantonal Agreement on Public Procurement of 25 November 1994 (AIMP, RS 172.056.4), which is why they all include the ground of exclusion for "professional misconduct duly established by a court judgment" set forth at paragraph 27, letter H of the agreement's guidelines for implementation.

<sup>107</sup> Under the terms of Article 3(2) of the Public Procurement Act, the awarding authority "is not required to award a contract according to the terms of this Act: a) when it could be contrary to morality or endanger public order and safety; b) when protection of the health and life of persons, animals or plants so requires; or c) when it infringes intellectual property rights." Under the terms of Article 11, the awarding authority can revoke the award or exclude certain bidders from the procedure (...) "*in particular* when: a) they no longer meet the qualification criteria set forth at Article 9 [bidder's financial, economic and technical capacity]; b) they have provided false information to the awarding authority; c) they have failed to pay all or some taxes or social contributions; d) they do not comply with the requirements set forth at Article 8 [bidder's compliance with equal pay for men and women for services rendered in Switzerland]; e) they have concluded agreements which significantly restrict or prevent all effective competition; f) they are the subject of bankruptcy proceedings." The moral integrity clause designed to prevent bribery in federal public procurement procedures that the Federal Purchasing Commission (an interdepartmental strategic and coordinating body) advises federal awarding authorities to include in their contracts targets only gifts or other advantages that the bidder might offer or solicit in order to win a federal contract and not bidders who might previously have been involved in the bribery of Swiss or foreign public officials.

<sup>108</sup> At the time of the Phase 1 review, the Swiss authorities said that at that time there had been no cases of exclusion from public procurement contracts on the ground of bribery (Phase 1 Report, para. 3.5).

has been prosecuted or convicted under Articles 322<sup>septies</sup> et 100<sup>quater</sup> of the Criminal Code. Combined with the limited investigative resources available to awarding authorities, the absence of any formal procedure for the exchange of information could hinder enforcement of cantonal regulations, like those of the canton of Valais, which state that conviction for professional misconduct constitutes grounds for exclusion if it occurred "within two years preceding the tender procedure"<sup>109</sup>. If information about the conviction is not forthcoming in good time, the Examiners fear that the sanction of exclusion cannot be imposed in all cases.

ii) Withholding or withdrawing export guarantees

131. The risk that a company involved in a bribery case might have an export guarantee withheld or withdrawn seems more real in practice, although up to the time of the on-site visit, the withholding or withdrawing of guarantees had been based on the commission of offences other than those set forth in the provisions of the Swiss Criminal Code relating to bribery. In contrast with public procurement regulations that make no express mention of bribery as grounds for exclusion, failure to comply with legal requirements, especially those relating to bribery of foreign public officials, is explicitly stated as a reason for withholding or withdrawing a guarantee on all guarantee application forms managed both by the ERG (a federal body responsible for granting export guarantees and the main source of public guarantees in Switzerland) and by the federations specifically responsible for granting guarantees in the chemical, textile and watch making industries.

132. For all that, the organisations have some latitude in their assessment of facts that might justify withholding or withdrawing a guarantee, as an ERG representative acknowledged. Only a "serious breach of statutory requirements" constitutes grounds for temporary exclusion from new guarantees, and even that is a discretionary not an automatic criterion, as the Federal Council made clear in a statement of 6 September 2000 in response to a parliamentary question<sup>110</sup>. Lastly, the question arises as to the ability of organisations to detect whether a guarantee application is linked to bribery or whether the applicant has already been convicted of bribing foreign public officials. In both cases, essentially the guarantee organisation can base any decision to withhold or withdraw a guarantee or exclude an applicant solely on the applicant's compliance with its obligation to declare any past or present involvement in an activity contrary to statutory requirements<sup>111</sup>. Aware of this problem, at the time of the on-site visit the ERG was thinking of setting up a screening mechanism that would enable its staff to be more vigilant with regard to applications relating to high-value projects in countries or sectors of activity (construction, public works, etc.) that are particularly sensitive to bribery.

*Commentary:*

***In order to strengthen the overall effectiveness of the penalties for the offence of bribery of foreign public officials, the Lead Examiners recommend that the Swiss authorities envisage, in the context of the revision of the federal law on public procurement, measures to temporarily or permanently ban any company convicted of bribery of foreign public officials from participating in public procurement procedures, and that a similar treatment be envisaged for access to export credits.***

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<sup>109</sup> Article 23 of the ordinance on public procurement of 11 June 2003 of the Conseil d'Etat of the canton of Valais.

<sup>110</sup> According to the "notice" concerning the criminal law on bribery published by the ERG. See also the Federal Council answer to motion 00.3303 on "combating bribery in connection with export credits and guarantees" filed on 20 June 2000 which says: "In the event of a serious breach of statutory requirements, it is possible for a limited period not to grant any new guarantee to the person infringing the law."

<sup>111</sup> As explained to the Examiners, it is not the ERG's practice to ask for a copy of an individual's criminal record, which is deemed not to be a useful source of information since applications to the ERG are made by enterprises and not by individuals as such.

## 2. *Penalties for money laundering linked to bribery of foreign public officials*

133. Money laundering has been a criminal offence in Switzerland since 1990 under Article 305<sup>bis</sup> of the Criminal Code, which states that any person “who commits an act such as to impede identification of the origin or the discovery or confiscation of assets which he knew or must have presumed to have originated in a criminal offence” is liable to a fine or imprisonment. In recent years there have been about a hundred convictions a year for money laundering offences<sup>112</sup>. The Money Laundering Reporting Office says that in 2002 and 2003 on average 77.5 per cent of suspicious transaction reports it receives are forwarded to the judiciary, representing about 450 cases a year, not including proceedings that magistrates initiate themselves on the basis either of mutual assistance requests from other countries or spontaneous reports made directly to the federal, cantonal and communal police authorities<sup>113</sup>.

134. Members of the judiciary put forward several explanations for the relatively small number of money laundering convictions, leaving aside differences between cantons' degree of sensitivity to money laundering and their approach to such cases. (Some cantons have made the fight against money laundering a priority and as such are particularly active in prosecuting the offence; others take a more formalistic and less proactive stance.) The first explanation, given by all those interviewed on the subject, pointed to the difficulty of furnishing sufficient proof of the criminal origin of dirty money invested in Switzerland, except when the investigation was initiated in the context of a mutual assistance request, which the magistrates interviewed said often made it easier to identify the offence committed before the money was laundered in Switzerland, or when plaintiffs provided evidence. Other factors which sometimes made it difficult to furnish decisive proof of the criminal origin of funds invested in Switzerland included the lack of cooperation from certain foreign judicial authorities and the complexity of financial circuits.

135. The second explanation related, in certain cases, to the difficulty, for prosecuting authorities and subsequently for the courts, of proving that the person concealing the funds knew or should have presumed that they were of criminal origin. Some financial intermediaries, charged with participating in financial transactions that have no objective justification, in order to avoid conviction, apparently shelter behind the fact that investing funds not declared in their home country (tax evasion) is not an offence in Switzerland, maintaining that they thought the funds were simply undeclared, not of criminal origin. In the absence of direct proof that the financial intermediary knew of the criminal origin of the funds, it would be possible for the sanction not to be imposed. According to non-governmental money laundering experts interviewed by the Examiners, the possibility of taking refuge behind the alibi of tax evasion would in some cases enable money launderers to go unpunished.

## 3. *Liability for accounting and tax offences*

### a) *Prosecution of accounting offences*

136. Swiss courts have a whole catalogue of criminal offences available to them for sanctioning conduct of the type prohibited by Article 8 of the OECD Convention. Article 251 of the Criminal Code, for example, concerns forgery and the use of forgery, especially documents used to conceal payment of a bribe

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<sup>112</sup> A federal police analysis of money laundering convictions between 1998 and 2003 shows that in over 80 per cent of convictions the offences underlying the money laundering offence relate to drug trafficking; the underlying offences in the other cases relate, in descending order, to fraud, "gangsterism" and bribery: FedPol, *Rapport 2003 sur la sécurité intérieure de la Suisse* (Berne, May 2004), p. 64.

<sup>113</sup> According to MROS statistics, 515 cases were transmitted to the prosecuting authorities in 2002. Police crime statistics published in April 2003 indicated that in 2001-02 there were 154 cases involving spontaneous reports of money laundering (Article 305<sup>bis</sup>) and lack of vigilance in financial transactions (Article 305<sup>ter</sup>). As the number and quality of reports from the financial sector are increasing, it is expected that they will lead in the near future to an increase in the number of proceedings and, possibly, criminal convictions.

to a foreign public official. Articles 152 and 153 on the provision of false information about commercial companies cover the publication of accounts that do not give a fair presentation of the company, including false information contained in a report to the shareholders' meeting such as the auditor's report referred to in Article 729 of the Code of Obligations. Charges of false accounting with the intention of concealing payment of bribe in a foreign country can also be brought on the basis of fraud under Article 146 of the Criminal Code, which covers cases in which the governing bodies or partners of an enterprise record accounting entries that have no basis in fact, such as the keeping of fictitious accounts or any other act intended to conceal secret commissions.

137. Responsibility for keeping full and proper accounts lies firstly with an enterprise's decision-taking bodies and it is in that capacity that they could incur liability. Of course, auditors may also incur liability for accounting offences. However, given the principle in Swiss criminal law that deliberate fault is required in order for liability to be incurred except where expressly provided otherwise, an auditor will be convicted only if it is found, for example, that he prepared an auditor's report knowing that the information in it was false. An auditor will incur no criminal liability if he issues an inaccurate report having been misled by the company's executive bodies. In practice, although there have been prosecutions for forgery and fraud (no Swiss court has yet convicted anyone for falsifying accounts in order to conceal acts of bribery), accounting professionals acknowledged to the Examiners that penalties were mild and hence not particularly dissuasive. The non-dissuasive nature of penalties is further exacerbated by the relatively small number of convictions each year for "failure to comply with legal rules on accountancy" (six on average) and for "false information" (one or two a year). In the opinion of a former prosecutor interviewed by the Examiners, many small structures would possibly not keep adequate accounts because of the mildness of penalties.

*Commentary:*

*The Lead Examiners consider that Swiss criminal law contains measures that can effectively sanction the fraudulent conduct referred to at Article 8 of the OECD Convention. However, they note that the sanctions imposed are mild and hence little dissuasive.*

b) *Prosecution of the non-deductibility of undue payments to foreign public officials*

138. As described in the section on "Bribery of foreign public officials detected by the tax authorities" at §§ 51-56 above, Switzerland has changed its legislation to prohibit the deduction of "hidden commissions within the meaning of Swiss criminal law". Panel participants clarified that this phrase refers to the offences set forth at Articles 322<sup>ter</sup> to 322<sup>octies</sup> of the Criminal Code. One consequence of aligning the tax treatment of hidden commissions with the criminal law of Articles 322<sup>ter</sup> to 322<sup>octies</sup> is to incorporate into tax law the potential problems mentioned at §§ 88-90, 93-95 and 117 above, relating to (a) the payment of large amounts to a foreign public official so that he accomplishes they duties of his position; (b) the notion of an advantage so insignificant that a penalty would be inappropriate (Article 322<sup>octies</sup>, para. 1), and (c) the notion of an advantage in conformity with socially accepted practice (Article 322<sup>octies</sup>, para. 2). In all three cases there is no offence under Swiss criminal law and consequently deduction is not prohibited under tax law. As noted above, these complexities of interpretation make it all the more important to provide tax inspectors with training and to issue a circular clarifying these notions in a practical way.

139. Swiss tax law contemplates three main types of procedure against a taxpayer who intentionally tries to claim undue payments as deductible expenses: collection of tax arrears (an administrative procedure to collect tax, without penalty); tax evasion (an administrative procedure for non-declaration of an element of income or fortune, with a fine ranging from one third to three times the amount of the undeclared tax); and tax fraud (a criminal procedure for a criminal offence with the possibility of imprisonment for up to three years, but which requires proof that false, falsified or inaccurate documents –

accounting records, for example – were used to mislead the tax authorities).<sup>114</sup> Only tax fraud, which is narrowly defined, gives rise to criminal proceedings and is thus public at a certain stage. Cases of non-payment or tax evasion can be settled discreetly between the tax authorities and the taxpayer<sup>115</sup>. In practice, however, tax fraud seems to play a relatively marginal role in the Swiss tax system. Criminal convictions are rare – fifty or so a year in all cantons. Most such cases concern the managers of an individual enterprise or sole proprietorship who have kept false accounts.

140. Although the law imposes significant restrictions on the transmission of information from the tax authorities to the criminal authorities (see above §§ 51-56), the tax laws provide for extensive cooperation between the tax authorities and some other authorities for the purposes of applying the tax laws<sup>116</sup>. A federal tax official noted that there are currently four cases in which hidden commissions are suspected in domestic matters, which have arisen in the context of application of federal withholding tax. However, leaving aside information from public agencies, the investigative resources available to the tax authorities (other than the special tax investigation division of the Federal Tax Administration), appear far from sufficient to discover the existence of improper deductions. The Swiss authorities recently acknowledged that in a tax evasion procedure, "as a matter of political choice, the tax authorities had no powers of investigation, so as not to penalise the person concerned. They could not search a person's premises, confiscate objects, hear witnesses or order detention. Bank secrecy remained intangible."<sup>117</sup> This lack of investigative powers, including the impossibility of gaining access to bank records, also applies to the collection of tax arrears procedure.

141. Traditionally, the lack of investigative powers was partly compensated by the power of the tax authorities to require a person to furnish relevant documents, under penalty of a fine. In a tax evasion case, however, this was recently declared contrary to Article 6.1 of the European Convention on Human Rights since it infringes the taxpayer's right to remain silent and not to incriminate himself or herself<sup>118</sup>. The authorities consider that the principles of the *J.B.* judgment do not apply to the collection of tax arrears procedure. But given the marginal importance of tax fraud in the Swiss system, such a situation could encourage taxpayers to claim hidden commissions as deductible expenses because they may hope that they will only have to pay the tax to which they are actually liable in the context of a collection of tax arrears procedure<sup>119</sup>. Nevertheless, in this case the taxpayer runs the risk of criminal sanctions for tax fraud. However, panel members expressed the view that Swiss firms would generally tend to respect the ban on deducting such expenses.

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<sup>114</sup> For example, Article 59 of the Tax Harmonisation Act (LHID) entitled "Tax Fraud" states that "a person who, with the intention of evading tax, uses documents that are false, falsified or contain inaccurate information ... shall be liable to imprisonment or a maximum fine of 30,000 francs" and that the general provisions of the Criminal Code apply.

<sup>115</sup> See D. Masméjan, "Le Conseil fédéral évoque la levée du secret bancaire en cas de soustraction fiscale" (13 Septembre 2001, *Le Temps*).

<sup>116</sup> See LIFD, Articles 111-12; LHID, Article 39 paras. 2-3.

<sup>117</sup> *J.B. v. Switzerland*, European Court of Human Rights, 3 May 2001, § 59.

<sup>118</sup> *J.B. v. Switzerland*. The tax evasion procedure is an administrative one but the Court based its characterisation as a criminal offence mainly on the applicable penalty, a fine being punitive and dissuasive.

<sup>119</sup> During the on-site visit, the Swiss authorities acknowledged that the *J.B.* judgment posed problems for the Swiss tax system as a whole and noted that a commission was looking at possible responses. At least one canton has changed its law so as to make tax evasion a criminal offence and require the taxpayer to choose between an administrative procedure, with the provision of documents, or a criminal procedure, made public when proceedings are initiated, but the authorities acknowledged that it was uncertain whether such changes were consistent with federal law. Another means available to the Swiss authorities is the federal withholding tax, which the Confederation collects at source on payments made by Swiss debtors. By its nature, however, it does not seem to be of much use in the fight against bribery of foreign public officials.



142. Limited investigative powers further compound the problem of the capacity of tax officials to distinguish between hidden commissions, which are prohibited, and undue payments to private agents, which are deductible. In the specific case of payments to foreign public officials through one or more private intermediaries, the authorities are not in a position to identify all the real beneficiaries of the undue payments. One possible way of overcoming the lack of means would be to expand investigative powers along the lines of those of the special tax investigation division (DEFS), a unit of the federal tax authority which has similar investigative resources to those available to the criminal prosecution authorities<sup>120</sup>. As things stand at present, the DEFS can intervene only when there has been a "serious tax infraction", defined as the continuous evasion of substantial amounts of tax (Articles 175 and 176) or when a criminal tax offence has been committed (Articles 186 and 187). Tax fraud is a criminal tax offence but tax evasion is not.

*Commentary:*

*The Examiners are pleased that Switzerland is currently studying the problem of the tax authorities' lack of investigative powers in the light of the J.B. judgment. In this context, the Examiners encourage Switzerland to ensure that payments made to private agents, which as such are tax-deductible, correspond to genuine services provided and cannot be used to conceal payments whose ultimate beneficiary is a foreign public official.*

## **RECOMMENDATIONS**

143. Consequently, on the basis of the Working Group's conclusions concerning Switzerland's application of the Convention and the revised Recommendation, the Working Group makes the following recommendations to Switzerland. In addition, the Working Group recommends that certain issues should be re-examined in the light of on-going case law and practice.

### **a) Recommendations**

*Recommendations to ensure the effectiveness of measures to prevent or detect the bribery of foreign public officials*

144. With regard to awareness-building efforts to promote the OECD Convention and the offence of bribing a foreign public official under the anti-bribery provisions of Swiss law, the Working Group recommends that Switzerland:

- a. Pursue and amplify its awareness-building efforts directed at the private sector, paying particular attention, in co-operation with the relevant economic players, to small and medium-sized enterprises operating internationally [Revised Recommendation, Articles I and V.C.i)].
- b. Pursue its efforts to raise awareness within the public administration, paying attention in particular to cantonal and federal employees who could play a role in detecting and reporting acts of bribery [Revised Recommendation, Articles I and VI. ii)].

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See LIFD, Articles 190-95.

145. With respect to other preventive measures, the Working Group recommends that Switzerland:

- a. Pursue its efforts to ensure greater transparency in corporate accounts and the independence of auditing bodies, and encourage the Swiss Institute of Certified Accountants and Tax Consultants to complete promptly the on-going process of amendment of auditing standards [Convention, Article 8; Revised Recommendation, Article V.A.iii); Annex to the Revised Recommendation, paragraph 7].

146. With regard to detection, the Working Group recommends that Switzerland:

- a. Consider the establishment in federal legislation of a formal obligation for any federal authority, civil servant or public official, including those in charge of export credits, to report indications of a possible act of bribery to competent authorities, and engage consultations with the cantons so as to encourage them to institute a similar obligation in cantonal legislation where such an obligation is currently lacking. [Revised Recommendation, Article I].
- b. Proceed, in accordance with Switzerland's expressed position, to the drafting of a circular for federal and cantonal tax authorities specifying the nature and tax aspects of the foreign bribery offence, so as to encourage detection of acts of bribery abroad, and to review disclosure rules to ensure that officials discovering suspicious facts report them to the competent judicial authorities [Revised Recommendation, Article IV].
- c. Examine measures to ensure effective protection for persons cooperating with enforcement authorities, and especially for employees who in good faith report suspected acts of bribery so as to encourage such persons to report them without fear of dismissal [Revised Recommendation, Article I; Annex to the Revised Recommendation, paragraph 6].
- d. Given the important role of the auditing of accounts in detecting suspicious transactions related to the bribery of foreign public officials, consider extending mandatory reporting obligations for auditors contained in the draft bill to amend the Code of Obligations, by establishing an express obligation for auditors to report to the prosecutorial authorities any evidence of possible corrupt practices by the entities whose accounts they audit in the event that the entities' executive bodies, after being duly advised, refrain from taking action [Revised Recommendation, Article V iv)].
- e. Raise the awareness of supervisory authorities about the importance of utilising the full range of available sanctions so as to punish more dissuasively any infringements of vigilance requirements established with regard to the fight against money-laundering and of the obligation to report suspected money laundering related to foreign bribery [Convention, Article 7; Revised Recommendation, Article I].

*Recommendation to ensure effective prosecution of the offence of bribing foreign public officials and related offences*

147. With regard to prosecution and sanctions, the Working Group recommends that Switzerland:

- a. Pursue the efforts undertaken to bolster the effectiveness of the prosecution of offences relating to the bribery of foreign public officials, by considering measures to streamline the process of appeal with respect to mutual judicial assistance requests [Convention, Article 5 9; Revised Recommendation, Article I; Annex to the Revised Recommendation, paragraph 8].
- b. In order to strengthen the overall effectiveness of sanctions for the offence of bribery of foreign public officials, consider, in the context of the amendment of the federal law on public

procurement, the temporary or permanent disqualification from any public procurement of enterprises convicted of bribing foreign public officials, and consider a similar approach for export credits [Convention, Article 3.4; Revised Recommendation, Article II.v) and Article VI.ii)].

**b) *Follow-up by the Working Group***

148. The Working Group will follow up on the issues listed below, in light of evolving practice, in order to check:

- a. With respect to the liability of legal persons, whether, taking into account the notion of defective organisation, the application of article 100quater of the Criminal Code provides for effective, proportional and dissuasive sanctions for foreign bribery [Convention Article 2, 3(1). ]
- b. Whether, recognising the positive efforts undertaken, Switzerland continues to make available to the prosecutorial authorities of the Confederation the necessary resources to ensure the effective enforcement of the offence of bribery of foreign public officials [Convention Article 5, Revised Recommendation, Art. I; Annex to the Revised Recommendation, paragraph 6].
- c. Whether enforcement of Article 322<sup>septies</sup> of the Criminal Code by the judicial authorities leads to:  
(i) a broad interpretation of the definition of the exercise of the official functions of a head of state; (ii) its application in cases involving solicitation by the foreign public official; and (iii) an application of the notion of foreign public official that includes heads of state and a country's highest authorities [Convention, Article 1].
- d. The application of the notion of socially accepted practices, including the question of whether it is excluded from the scope of application of Article 322<sup>septies</sup> of the Criminal Code in accordance with the opinion expressed by Switzerland [Convention, Article I].
- e. Whether, excluding the case of small facilitation payments, an official's acceptance of an improper advantage constitutes the basis for the offence of bribery [Convention, Article 1 (1)].
- f. Whether the current basis for territorial jurisdiction, in light of the rule that the commission in Switzerland by a foreigner of an act of instigation, authorisation or complicity in the bribery of foreign public officials committed by a foreigner is deemed to take place abroad, is sufficiently effective to combat the bribery of foreign public officials [Convention, Articles 4(1), 4(4)].

## ANNEX 1

### *Abbreviations*

ATF	<i>Arrêt du Tribunal fédéral</i> – Federal Court judgment
CC	Swiss Civil Code of 10 December 1907
CF	<i>Conseil fédéral</i> – Federal Council
CO	Swiss Code of Obligations of 30 March 1911 and 18 December 1936
CP	Swiss Criminal Code of 21 December 1937
DEFS	Special tax investigation division of the Swiss Federal Tax Administration
DPA	Federal law of 22 March 1994 on administrative criminal law
ERG	Swiss Export Risk Guarantee Agency
FATF	Financial Action Task Force
FedPol	Federal Office of Police
FOJ	Federal Office of Justice
FOPI	Federal Office of Private Insurance
IMAC	Federal law of 20 May 1981 on international mutual assistance in criminal matters
JdT	<i>Journal des Tribunaux</i> – Court Gazette
LECCA	Federal law on the establishment and control of annual accounts (draft)
LFIS	Federal law of 20 June 2003 on secret investigation
LHID	Federal Act on the harmonisation of cantonal and communal indirect taxes
LIFD	Federal law of 14 December 1990 on direct federal tax
MLA	Money Laundering Act
MPC	<i>Ministère public de la Confédération</i> - Office of the Attorney-General of Switzerland
MROS	Money Laundering Reporting Office Switzerland
NGO	Non-governmental organisation
PPF	Federal law on criminal procedure
SECO	State Secretariat for Economic Affairs
SFBC	Swiss Federal Banking Commission
SME	Small and medium-sized enterprises
SA	<i>Société anonyme</i> – Joint-stock corporation
SARL	<i>Société à responsabilité limitée</i> – Limited liability company
SRO	Self-regulating organisation
TC	<i>Tribunal cantonal</i> – Cantonal Court
TF	<i>Tribunal fédéral</i> – Federal Tribunal

#### *Cantons:*

AG	Argovia	NE	Neuchâtel
AR	Appenzell Outer Rhodes	NW	Nidwalden
AI	Appenzell Inner Rhodes	OW	Obwalden
BE	Bern	SG	Saint-Gall
BL	Basel-Country	SH	Schaffhausen
BS	Basel-Town	SO	Solothurn
FR	Fribourg	SZ	Schwyz ZH Zurich
GE	Geneva	TI	Ticino
GL	Glaris	TG	Thurgovia
GR	Grisons	UR	Uri
JU	Jura	VD	Vaud
LU	Lucerne	VS	Valais
		ZG	Zug

## ANNEX 2

### *Relevant legislation*

#### 1. Swiss Criminal Code (extracts)

##### **Title Nineteen: Corruption**

##### **1. Corruption of Swiss Public Officials**

##### **Active Corruption<sup>121</sup>**

###### **Article 322ter**

Any person who offers, promises or gives any undue advantage to a member of a judicial or other authority, a state employee ["fonctionnaire"], an expert, translator or interpreter employed by any authority, an arbitrator or a member of the armed forces, for the benefit of such person or any third party, for the commission or omission of an act in relation to his official functions that is contrary to his duties or depends on the exercise of his discretionary powers, shall be liable to reclusion for a maximum term of five years' or imprisonment.

###### **Passive Corruption**

###### **Article 322quater**

Any person who, as a member of a judicial or other authority, a state employee ["fonctionnaire"], an expert, translator or interpreter employed by any authority or an arbitrator solicits, elicits a promise of or accepts an undue advantage, for his benefit or that of any third party, for the commission or omission of an act in relation to his official function that is contrary to his duties or depends on the exercise of his discretionary powers, shall be liable to a maximum term of five years' imprisonment.

###### **Giving of an Advantage**

###### **Article 322quinquies**

Any person who offers, promises or gives any undue advantage to a member of a judicial or other authority, a state employee ["fonctionnaire"], an expert, translator or interpreter employed by any authority, an arbitrator or a member of the armed forces so that he accomplishes the duties of his position shall be liable to imprisonment or a fine.

###### **Acceptance of an Advantage**

###### **Article 322sexies**

Any person who, as a member of a judicial or other authority, a state employee ["fonctionnaire"], an expert, translator or interpreter employed by any authority, or an arbitrator solicits, elicits a promise of or accepts an undue advantage so that he accomplishes the duties of his position shall be liable to imprisonment or a fine.

#### **2. Active Corruption of Foreign Public Officials**

###### **Art. 322septies**

Any person who offers, promises or gives an undue advantage to any person acting for a foreign State or an international organisation either as a member of a judicial or other authority, a state employee ["fonctionnaire"], an expert, translator or interpreter employed by any authority, an arbitrator or a member of the armed forces, for the benefit of such person or any third party, for the commission or omission of an act in relation to his official functions that is contrary to his duties or depends on the exercise of his discretionary powers, shall be liable to reclusion for a maximum term of five years' or imprisonment.

#### **3. Common provisions**

###### **Article 322octies**

1. If the offender's guilt and the consequences of his act are so insignificant that a penalty would be inappropriate, the competent authority shall waive prosecution, judicial proceedings or the imposition of a penalty.
2. Advantages authorised by department regulations and advantages of minor value in conformity with socially accepted practices shall not be considered undue advantages.
3. Individuals who carry out public functions are deemed to be public officials.

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<sup>121</sup> For ease of presentation, the margin notes in the Criminal Code have been placed before the relevant provision.

## **Criminal liability of legal entities**

### **Article 100<sup>quater</sup>**

1. A crime or misdemeanour committed within an enterprise in the pursuit of its commercial activities in conformity with its objects shall be imputed to the enterprise if it cannot be imputed to any specific individual because of the enterprise's lack of organisation. In such case, the enterprise shall be liable to a maximum fine of five million francs.

2. In the case of an offence under Articles 260<sup>ter</sup>, 260<sup>quinquies</sup>, 305<sup>bis</sup>, 322<sup>ter</sup>, 322<sup>quinquies</sup> and 322<sup>septies</sup>, the enterprise shall be punished independently of the punishment of any individual if it must be criticized ["s'il doit lui être reproché"] for having failed to take all reasonable and necessary organisational measures to prevent such an offence.

3. The courts shall set the amount of the fine taking into consideration the seriousness of the offence, the lack of organisation, the damage caused and the economic capacity of the enterprise.

4. The following are deemed enterprises within the meaning of this article:

- a) private law legal persons;
- b) public law legal persons except for territorial corporations;
- c) companies;
- d) single-person enterprises.

### **Article 100<sup>quinquies</sup>**

1. If criminal proceedings are initiated against the enterprise, the enterprise shall be represented by a single person who must be authorised to represent the enterprise in civil matters without restriction. If, after a reasonable lapse of time, the enterprise fails to appoint such a representative, the investigating authority or the courts shall appoint the person who, among those empowered to represent the enterprise in civil matters, will represent it in the criminal proceedings.

2. The person who represents the enterprise in the criminal proceedings shall have the rights and obligations of a defendant. The other representatives referred to in paragraph 1 are not obliged to give evidence.

3. If a criminal investigation is opened for the same offences or for related offences against the person who represents the enterprise in the criminal proceedings, the enterprise shall appoint another representative. If necessary, the investigating authority or the courts shall appoint another representative within the meaning of paragraph 1 or, failing that, a qualified third party.

### **Money laundering (Article 305<sup>bis</sup>)**

1. Any person who commits an act such as to impede identification of the origin or the discovery or confiscation of assets which he knew or must have presumed to have originated in a criminal offence shall be liable to imprisonment or a fine.

2. In serious cases, the penalty shall be reclusion for a maximum term of five years or imprisonment. The custodial sentence shall be consecutive with a maximum fine of one million francs. A case is serious when the offender: a) acts as a member of criminal organisation; b) acts as a member of a gang formed to systematically launder money; c) generates substantial revenues or profit from money laundering.

3. Offenders are also liable when the principal offence has been committed in another country and is punishable in the State where it was committed.

### **Lack of vigilance with regard to financial transactions and right of disclosure (Article 305<sup>ter</sup>)**

1. Any person who, in the course of his duties, accepts assets belonging to third parties, keeps them on deposit or assists in investing or transferring them without verifying the identity of the economic beneficiary with the diligence required under the circumstances shall be liable to imprisonment for a maximum of one year, detention or a fine.

2. The persons referred to in paragraph 1 are entitled to disclose to the Swiss prosecuting authorities and the federal authorities designated by law the evidence on which the suspicion that the assets were of criminal origin is based.

### **Fraud (Article 146, para. 1)**

Any person who, with the intention of unlawfully enriching himself or a third party, deceitfully misleads a person by fallacious assertions or by concealing true facts or deceitfully confirms that person in his error and thereby induces the victim to decide to commit acts prejudicial to his pecuniary interests or those of a third party shall be liable to reclusion for a maximum term of five years or imprisonment.

### **False information about commercial enterprises (Article 152)**

Any person who, as founder, owner, partner with unlimited liability, manager, member of the management body, board of directors or audit body or liquidator of a commercial company, cooperative or any other enterprise operated in commercial form, provides or causes the provision, in disclosures to the public or in reports or proposals intended for all the shareholders of a commercial company or cooperative or all the participants of another enterprise operated in commercial form, of false or incomplete information of considerable importance such as to induce another person to decide to dispose of his assets in a way that prejudices his pecuniary interests shall be liable to imprisonment or a fine.

### **Forged documents (Article 251)**

1. Any person who, with the intention of adversely affecting the pecuniary interests or rights of another person or of procuring an unlawful advantage for himself or a third party, forges or falsifies a document, misuses the real signature or personal mark of another person to make a false document or falsely states a fact of legal import or causes such fact to be stated in a document, or who uses such a document to mislead another person shall be liable to a maximum term of five years' imprisonment.
2. In inconsequential cases, the courts may order imprisonment or a fine.

### **Federal and cantonal jurisdiction (Article 340<sup>bis</sup>)**

1. Offences under Articles 260<sup>ter</sup>, 260<sup>quinquies</sup>, 305<sup>bis</sup>, 305<sup>ter</sup> and 322<sup>ter</sup> to 322<sup>septies</sup> and crimes committed by a criminal organisation within the meaning of Article 260<sup>ter</sup> are also subject to federal jurisdiction: a) if the punishable acts have been predominantly committed in another country; b) if the punishable acts have been committed in several cantons without any one of them being clearly predominant.
2. For offences under the second and eleventh titles, the Office of the Attorney General of Switzerland may open an investigation: a) if the conditions set forth at paragraph 1 are met; b) and if no cantonal prosecuting authority has initiated proceedings or the competent cantonal prosecuting authority asks the Office of the Attorney General of Switzerland to take over proceedings.
3. The opening of the investigation referred to at paragraph 2 establishes federal jurisdiction.

## **2. Tax laws**

The principle that "hidden commissions within the meaning of Swiss criminal law" are not tax-deductible has been inserted into both the federal law on direct federal tax (LIFD), for tax collected for the Confederation, and the federal law on harmonisation of the direct taxes of cantons and communes (LHID), a framework law setting out the principles of tax liability applicable to cantons and the rules of procedure and criminal tax law. Article 27.3 LIFD and Article 10.1bis LHID both read as follows: "Hidden commissions within the meaning of Swiss criminal law paid to Swiss or foreign public officials are not tax-deductible". Article 59.2 LIFD and Article 25.1bis LHID both read as follows: "Hidden commissions within the meaning of Swiss criminal law paid to Swiss or foreign public officials are not charges justified by commercial practice."

## **3. Auditors' duty to notify breaches of the law**

### **Mandatory notification (Article 729b of the Code of Obligations)**

1. If, in the conduct of its audit, the audit body finds breaches of the law or by-laws, it shall advise the board of directors and, in serious cases, the shareholders' meeting of the fact in writing.
2. In the event of clearly excessive indebtedness, it shall advise the courts if the board of directors fails to do so.

### ANNEX 3

#### *Convictions since 1984 for breaches of the Swiss Criminal Code relating to bribery of Swiss and foreign public officials, money laundering and related offences*

Articles of the Criminal Code <b>Principal offences</b>	Year of conviction																			
	1984	1985	1986	1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003
322sept. Active bribery of foreign public officials*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	0	1		
288 Active bribery of Swiss public officials (abrogated: 22.12.1999)	12	9	6	16	11	6	5	7	7	7	10	13	13	16	23	12	8	7		
322ter Active bribery of Swiss public officials	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	0	0		
322 Acceptance or soliciting of bribes by Swiss public officials	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	0	0	
305bis Money laundering**	**	**	**	**	**	**	0	2	9	18	45	50	65	62	111	123	137	116		
305ter Lack of vigilance with regard to financial transactions and right of disclosure	**	**	**	**	**	**	0	0	0	0	0	0	2	1	3	1	1	2		
<b>Related offences</b>																				
251 Forged documents	1061	1036	1099	1147	1094	1129	1120	1216	1315	1469	1551	1341	1354	1416	1235	1314	1214	1225		
146 Fraud	2227	2149	2272	2199	2037	1941	1871	2006	2041	2172	2199	1727	1843	1783	1536	1585	1510	1327		
152 False information about commercial enterprises	16	2	8	7	6	6	7	4	4	7	2	0	4	5	4	2	1	1		

\* date of entry into force: 1.5.2000

\*\* date of entry into force: 1.8.1990

Source: Swiss Federal Statistical Office, criminal conviction statistics



## ANNEX 4

### *Institutions encountered during the on-site visit from 10 to 14 May 2004*

#### *Public and public service institutions*

Federal departments:

<b>Federal Department of Foreign Affairs</b>	Political Division V – Economic and Financial Affairs	Economic Affairs Section
	Political Development and Multilateral Cooperation Division	Governance Section Financial Planning and Control
	Directorate of International Law	
<b>Federal Department of Defence, Civil Protection and Sports</b>	armasuisse	Legal Affairs, Commerce, Transport, Customs Department
<b>Federal Department of Economic Affairs</b>	State Secretariat for Economic Affairs	World Trade Division Economic Development Cooperation Service Centre Working Conditions Service Centre (Labour Relations Unit) Management Control Unit ERG Export Finance Unit International Investment and Multinational Corporations Unit Export Promotion Unit
<b>Federal Department of Finance</b>	Federal Tax Administration	Principal Division of Direct Federal Tax, Withholding Tax and Stamp Duty Special Tax Investigations Division
	Federal Customs Administration	Criminal Affairs Division
	Federal Finance Administration	International Financial Issues and Monetary Policy Division
	Money Laundering Control Authority	
	Office of the Federal Councillor for Finance	
	Federal Audit Office	
	Competence Centre for Federal Public Procurement (CCPP)	
	Federal Office of Private Insurance	
	Federal Office for Buildings and Logistics	Coordinating Secretariat for Federal Building and Property Departments
	Secretariat of the Federal Banking Commission	

<b>Federal Department of Justice and Police</b>	Swiss Federal Gaming Board	
	Private Law Principal Division	Draft Legislation Division
	Federal Office of Justice	Federal Office of the Companies Register, Company Law and Draft Legislation Criminal Law Section Mutual Legal Assistance Section International Criminal Law Section
	Federal Office of Police	Federal Criminal Police, Specific Offences Investigation Unit Money Laundering Reporting Office (MROS)
	Criminal Procedure Department	
<b>Office of the Attorney General of Switzerland</b>		
<b>Office of Federal Examining Magistrates</b>		
<b>Federal Criminal Court</b>		

Cantons:

<b>Intercantonal Public Procurement Authority</b>	Swiss Conference of Cantonal Directors of Public Works, Regional Development and Environmental Protection	
<b>Canton of Basel-Town</b>	Personnel Office	Legal Affairs Department
<b>Canton of Bern</b>	Finance Department	Tax Administration
	Bern Cantonal Police	Criminal Division, Special Investigations Section 2
<b>Canton of Geneva</b>	Court of Justice	
	Finance Department	Cantonal Tax Administration, Tax Inspection Department and Verification Department
	Development, Equipment and Housing Department	
	Justice Department	Public Prosecution Service Office of the Investigating Magistrate
<b>Canton of Ticino</b>	Ticino Cantonal Police	
	Justice Department	Public Prosecutor's Office
<b>Canton of Vaud</b>	Infrastructure Department (DINF)	General Secretariat
<b>Canton of Zurich</b>	Justice Department	District Attorney's Office

Other public service institutions:

Export Risk Guarantee Agency  
Investment Risk Guarantee Agency

**Law firms:**

Schellenberg Wittmer, Geneva and Zurich  
Sganzini Bernasconi Peter & Gaggini

**Professional organisations:**

*Association romande des experts diplômés en finance et controlling* – Association of qualified experts in finance and controlling of the french-speaking Switzerland  
*Association romande des intermédiaires financiers*  
Association suisse des arts et métiers – Swiss Association of Arts and Crafts  
*Association suisse d’audit interne* – Swiss Institute of Internal Auditing  
*Association suisse des banquiers* – Swiss Bankers Association  
*Association suisse de Droit Fiscal* – Swiss Tax Law Association  
*Association suisse des gérants de fortune* – Swiss Association of Asset Managers  
Chambre fiduciaire suisse – Swiss Institute of Certified Accountants and Tax Consultants  
economiesuisse (Swiss business federation)  
OSEC Business Network Switzerland  
Swiss Organisation for Facilitating Investments (SOFI)

**Private sector:**

AseaBrownBoveri AG (ABB)  
Credit Suisse  
KPMG Fides Peat  
Novartis  
PICTET & Cie  
PriceWaterhouseCoopers  
RUAG  
SIKA  
Société Générale de Surveillance (SGS)  
Union Bank of Switzerland (UBS)  
Visura

**Trade unions:**

Association suisse des employés de banque – Swiss Association of Bank Employees  
Union syndicale suisse – Swiss Trade Union Association

**Civil society:**

*Action Place Financière Suisse* - Action “Swiss Financial Centre” (NGO)  
Basel Institute of Governance  
*La Liberté* (newspaper)  
*Pain pour le prochain* (charity)  
Transparency International Switzerland

## ANNEX 5

### *Composition of the examining team*

#### *Belgium*

**Mrs Michelle MONS DELLE ROCHE**  
Crown Prosecutor  
Marche-en-Famenne

**Mr. Jean-Marie LEQUESNE**  
Councillor  
Federal Police Criminal Police  
DJF-ECOFIN Department

**Mr. Pierre TIMMERMANS**  
Inspector  
Administration of Taxation  
Ministry of Finance

#### *Hungary*

**Mrs Etelka BECSY**  
Deputy Director  
Finance Ministry  
Central Harmonization Unit of PIFC/Financial  
Controls Development Department

**Mr. József VILLANYI**  
Councillor  
Justice Ministry

#### *OECD Secretariat*

**Mr. Frédéric WEHRLE**  
Evaluation Coordinator for Switzerland  
Principal Administrator  
Anti-Corruption Division  
Directorate for Financial and Enterprise Affairs

**Mr. David GAUKRODGER**  
Principal Administrator  
Anti-Corruption Division  
Directorate for Financial and Enterprise Affairs

**Mrs Patricia McKINSTRY**  
Administrator  
Anti-Corruption Division  
Directorate for Financial and Enterprise Affairs

**Mrs Gretta FENNER** (observer)  
Administrator, non-member projects  
Anti-Corruption Division  
Directorate for Financial and Enterprise Affairs