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Third Evaluation Round

Third *Interim* Compliance Report on Switzerland

“Incriminations (ETS 173 and 191, GPC 2)”

“Transparency of Party Funding”

Adopted by GRECO
at its 72nd Plenary Meeting
(Strasbourg, 27 June – 1 July 2016)

I. INTRODUCTION

1. The [Third Round Evaluation Report](#) on Switzerland was adopted at GRECO's 52nd Plenary Meeting (21 October 2011) and was made public on 2 December 2011, following authorisation by Switzerland (Greco Eval III Rep (2011) 4E, [Theme I](#) and [Theme II](#)).
2. As required by GRECO's Rules of Procedure, the Swiss authorities submitted a Situation Report on measures taken to implement the recommendations.
3. In the [Compliance Report](#) adopted at its 61st plenary meeting (14-18 October 2013), GRECO concluded that Switzerland had satisfactorily implemented three of the eleven recommendations contained in the Third Round Evaluation Report. In view of this outcome, it qualified the very low level of compliance with the recommendations so far as "globally unsatisfactory" within the meaning of Rule 31, paragraph 8.3 of its Rules of Procedure. GRECO therefore decided to apply Rule 32 concerning members found not to be in compliance with the recommendations contained in the mutual evaluation report, and asked the head of the Swiss delegation to provide a report on progress made in implementing the pending recommendations (i.e. recommendations i and iii regarding Theme I, and recommendations i to vi regarding Theme II) at the latest by 30 April 2014, pursuant to paragraph 2(i) of that rule.
4. In the [Interim Compliance Report](#) and the [Second Interim Compliance Report](#) adopted respectively at its 64th and 68th plenary meetings (15-19 June 2014 and 2015), GRECO again qualified Switzerland's level of compliance with the recommendations as "globally unsatisfactory" since the total number of recommendations outstanding remained unchanged. GRECO therefore asked the head of the Swiss delegation to provide a report on the progress made in implementing the pending recommendations (i.e. recommendations i and iii under Theme I and recommendations i to vi under Theme II) by 31 March 2016 at the latest. This report was received on 31 March 2016 and served as a basis for the Third Interim Compliance Report.
5. GRECO selected the Republic of Moldova and France to appoint rapporteurs for the compliance procedure. The rapporteurs appointed were Ms Cornelia VICLEANSCHI, former prosecutor, Head of General Section, Office of the General Prosecutor of Moldova, on behalf of the Republic of Moldova and Ms Agnès MAITREPIERRE, *Chargée de mission* to the Director of Legal Affairs, Ministry of Foreign Affairs, on behalf of France. They were assisted by GRECO's secretariat in drawing up the Compliance Report.

II. ANALYSIS

Theme I: Incriminations

6. It can be noted that, in its Evaluation Report, GRECO addressed 5 recommendations to Switzerland concerning Theme I. The Compliance Report showed that three of these recommendations – recommendations ii, iv and v – had been implemented satisfactorily. The two Interim Compliance Reports concluded that recommendations i and iii remained partly implemented. Compliance with these recommendations is dealt with below.

Recommendations i and iii.

7. GRECO recommended:

- to ensure that the offences of granting and receiving advantages in articles 322^{quinquies} and 322^{sexies} of the criminal code cover, unambiguously, cases in which the advantage is intended for a third party (recommendation i) and
- to abolish the requirement for a prior complaint before prosecutions are brought for bribery in the private sector (recommendation iii).

8. GRECO recalls that it considered these two recommendations as partly implemented in the previous reports. On 30 April 2014 the Swiss government had adopted a draft law and the accompanying explanatory memorandum, for submission to Parliament. GRECO considered that the wording of the draft legislation took appropriate account of recommendations i and iii, removing the ambiguity in respect of cases where the advantage is intended to benefit a third party and abolishing the requirement that a complaint must be laid before a prosecution can be brought for bribery in the private sector. In the Second Interim Compliance Report, GRECO regretted, however, that, when examining the text, the Council of States replaced the requirement of a prior complaint with the requirement that private sector bribery not be prosecuted *ex officio* when no public interest was affected or threatened, as this notion was open to interpretation and potentially as restrictive as the former requirement.

9. The Swiss authorities state that Parliament adopted a law amending the criminal-law provisions criminalising corruption on 25 September 2015¹. No referendum having been requested, the amending law has come into force on 1 July 2016. The revision meets the two outstanding recommendations.

10. Firstly, it broadens the scope of Articles 322^{quinquies} and 322^{sexies} of the Criminal Code, which criminalise respectively the granting and acceptance of an advantage, by explicitly covering cases in which the undue advantage is intended for a third party.

11. Secondly, the revision introduces *ex officio* prosecution for the offence of private sector bribery, which hitherto was prosecuted only upon prior complaint. Nevertheless, Parliament has maintained a small exception for minor cases, which are still only prosecuted upon prior complaint. As compared with the version examined by GRECO in its Second Interim Compliance Report, the exception was reworded during the parliamentary debate in order to ensure that it was sufficiently narrow and consistent with the systematics of Swiss criminal law. According to the explanations provided during the parliamentary deliberations², the following cumulative criteria apply in defining minor cases:

- the sum at issue is not large, i.e. the undue advantage amounts, at most, to a few thousand francs. This sum is comparable to the limit used for the offence of making

¹ The law was published in the *Feuille fédérale* (FF 2015 6551): <https://www.admin.ch/opc/fr/federal-gazette/2015/6551.pdf>

² See the written reasons for the motion by Daniel Fässler

(<http://www.parlament.ch/sites/doc/CuriaFolgeseite/2014/20140035/N2%2001,%20Fässler%20Daniel%20DF.pdf> consultable at http://www.parlament.ch/ff/suche/pages/ratsunterlagen.aspx?gesch_nr=20140035), referred to in the public plenary debate (National Council), in particular by Karl Vogler, (http://www.parlament.ch/ab/frameset/ff/n/4920/474367/f_n_4920_474367_474425.htm).

counterfeit money (Article 240, para. 2 of the Criminal Code, which refers to “particularly minor cases”);

- the health and safety of third parties are not affected by the act;
- it is not a case of recidivism, a repeat offence or an offence committed by a group;
- no forgery of documents was committed in connection with the corruption offence.

12. It should also be noted that these criteria have to be interpreted in the light of the principle of legality applying in Switzerland (Article 7, para. 1 of the Code of Criminal Procedure), which requires the authorities to prosecute offences which come to their knowledge or where there is evidence for presuming that offences have been committed (subject to a few restrictive exceptions provided for in Article 8 of the Code of Criminal Procedure).
13. GRECO welcomes the adoption and entry into force of the law of 25 September 2015 amending the criminal-law provisions criminalising corruption. Where recommendation i is concerned, Articles 322^{quinquies} and 322^{sexies} of the Criminal Code as amended refer explicitly to cases in which the undue advantage is intended for a third party, in line with recommendation i.
14. As regards recommendation iii, GRECO is satisfied that the principle of *ex officio* prosecution of private sector bribery has been recognised and that the public interest proviso introduced by the Council of States has been lifted. GRECO notes that minor cases remain subject to the requirement of a prior complaint. However, the exceptions are appropriately regulated by the cumulative objective criteria set by the Swiss authorities. Although it may seem surprising that a sum of a few thousand francs is deemed not large, it should be remembered that this needs to be judged in the light of the economic situation in Switzerland, where the average wage is much higher than in many member states.
15. GRECO concludes that recommendations i and iii have been satisfactorily implemented.

Theme II: Transparency of party funding

16. It can be noted that, in its Evaluation Report, GRECO addressed 6 recommendations to Switzerland concerning Theme II. In the Compliance Report and the two Interim Compliance Reports, GRECO considered that none of these recommendations, discussed below, had been implemented.

Recommendations i to vi.

17. *GRECO recommended:*
 - *(i) to introduce accounting rules for political parties and election campaigns that provide for full and appropriate accounts to be kept; (ii) to ensure that income, expenditure and the various elements of assets and liabilities are accounted for in detail and in full and presented in a coherent format; (iii) to explore ways of consolidating accounts to include parties' cantonal and local branches and bodies directly or indirectly linked to them or otherwise under their control; (iv) to ensure that adequate financial information is readily available to the public in good time; (v) where appropriate, to invite the cantons to adapt their own regulations in line with this recommendation (recommendation i);*
 - *(i) to introduce a general obligation for political parties and candidates to elections to provide information on all donations received, including donations in kind, above a certain size; (ii) to*

introduce a general ban on donations from persons or bodies that fail to reveal their identity to the political party or candidate concerned; (iii) to invite cantons that do not yet have such measures to adopt them (recommendation ii);

- *(i) to seek ways of increasing the transparency of the financing of political parties and election campaigns by third parties; (ii) to invite also the cantonal authorities to consider these matters (recommendation iii);*
 - *(i) to ensure that, as far as possible, independent audits are carried out on political parties subject to the obligation to maintain accounts and on election campaigns accounts; and (ii) to invite cantons to do the same (recommendation iv);*
 - *(i) to ensure the effective and independent supervision of the financing of political parties, and election campaigns, in accordance with Article 14 of Council of Europe Recommendation Rec(2003)4 on common rules against corruption in the funding of political parties and election campaigns; and (ii) to invite cantons to do the same (recommendation v);*
 - *that the future rules on the financing of political parties and election campaigns be accompanied by effective, proportionate and dissuasive sanctions (recommendation vi).*
18. As in the case of the previous reports, the information provided by the Swiss authorities is general in nature and does not specifically concern the individual recommendations. In the absence of anything new to report at cantonal level, the authorities describe the new developments that have occurred at federal level since the Second Interim Compliance Report.
19. The authorities reiterate that, on 12 November 2014, after holding talks with the leaders of the government parties and the chairs of the parliamentary groups, the Swiss government decided not to legislate in this field. It considered that the particularities of the Swiss political system were scarcely reconcilable with a law on party funding and election campaigns. The system of direct democracy, with its frequent popular votes, meant that the parties were far from being the only political players in Switzerland. At the same time, the cantons enjoyed a broad degree of autonomy. It would therefore go against the principles of federalism to impose uniform national legislation on them in respect of party funding. In addition, in Switzerland politics and party funding were perceived as a largely private matter, rather than being a State responsibility. Because of the system of part-time politicians, the parties' financial needs were far smaller in Switzerland than in other countries.
20. The Swiss government's position has not changed. In its reply of 20 May 2015 to parliamentary question 15.3331 "With an eye to the 2015 federal elections, what is the position with regard to implementation of the recommendations of the OSCE-ODIHR election assessment mission?", the Federal Council pointed out, inter alia, that the question of the legal obligation for parties and candidates to ensure transparency with regard to the funding of election campaigns was being addressed "in the context of the recommendations of the Council of Europe's Group of States against Corruption (GRECO). GRECO initiated a non-compliance procedure against Switzerland in November 2013 (see, in this connection, the reply by the Federal Council to parliamentary question 14.3633 (Masshardt), "Transparency of party funding. What is the Federal Council doing to implement GRECO's recommendations?"). On 12 November 2014, the Federal Council decided not to regulate party funding"³.

³ <https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaefft?AffairId=20153331>

21. No parliamentary postulate or motion relating to party and election campaign funding has been tabled.
22. The Swiss media focused particular attention on the budgets of the parties and candidates contesting the federal elections in November 2015. Moreover, a popular initiative of constitutional level was launched⁴ with the support of different political parties and organisations⁵; the collection of the necessary signatures started on 26 April 2016. If the 100,000 signatures are obtained within a period of 18 months, the Swiss people will be called on to vote in 2020 or 2021. The text of the initiative foresees in particular an obligation for the political parties represented in Parliament to disclose to the Federal Chancellery their balance sheet, profit and loss account as well as donations above 10,000 francs per person and per year. Regarding federal election and federal referendum campaigns, anyone spending more than 100,000 francs would be obliged to disclose the campaign's total budget, capital and donations above 10,000 francs. The Federal Chancellery would be tasked with publishing the information received. The initiative furthermore prohibits anonymous cash or in-kind donations and foresees sanctions in case of violation of the above-mentioned obligations.
23. GRECO notes with regret that the federal government is maintaining its position of not legislating on the transparency of party and election campaign funding. GRECO also notes the lack of any new developments at parliamentary and cantonal level. However, the popular initiative which was launched and the continuing interest shown by the press in this matter are positive elements. In the current absence of a political majority in favour of introducing rules in this area, GRECO can only hope that the lively public debate on this issue will lead to developments in the situation and put an end to the Swiss exception regarding the transparency of party funding.
24. GRECO concludes that recommendations i-vi remain unimplemented.

III. CONCLUSIONS

25. **In the light of the foregoing, GRECO concludes that Switzerland has made tangible progress as regards the overall implementation of the recommendations considered in the Third Round Compliance Report as not having been acted upon, as five recommendations out of eleven have now been satisfactorily implemented.**
26. With respect to Theme I – Incriminations, recommendations i and iii have been satisfactorily implemented. As regards Theme II – Transparency of party funding, all the recommendations (i-vi) remain unimplemented.
27. With respect to incriminations, GRECO welcomes the adoption and entry into force of the law of 25 September 2015 amending the criminal-law provisions criminalising corruption, which supplements the measures taken to implement GRECO's recommendations under this theme. Cases where an undue advantage intended for a third party is granted or received are now explicitly criminalised and the requirement of a prior complaint before prosecutions can be brought for private sector bribery has been abolished, except in minor cases, which are regulated by a set of cumulative objective criteria. GRECO recalls that, in its Compliance Report adopted in 2013, it took note of the fact that Switzerland had, at its request, considered the desirability of extending the offence of

⁴ <https://www.admin.ch/opc/fr/federal-gazette/2016/3447.pdf>

⁵ Parti Socialiste Suisse (PSS), Les Verts Suisse, Parti Bourgeois Démocratique Suisse (PBD), Parti Evangélique Suisse (PEV), Parti Pirate Suisse, Jeunes socialistes Suisse (JS Suisse), Jeunes Verts Suisse, Jeunes PBD Suisse, jeune parti évangélique (jpev), Opendata.ch, Session des jeunes.

bribery of foreign and international public officials, judges and officials of international courts and foreign arbitrators and jurors to the obligatory acts of these agents and of criminalising trading in influence and abolishing the dual criminality requirement, but had wished to maintain its reservations and declarations on the relevant provisions of the Criminal Law Convention on Corruption. All GRECO's recommendations on the theme of incriminations have now been implemented satisfactorily, thus bringing the compliance procedure on that theme to an end.

28. As regards the transparency of party funding, GRECO regrets that the federal government is maintaining its position of not legislating on the transparency of party and election campaign funding. It recalls that a GRECO delegation was received by the Federal Council in April 2013, but that this meeting did not lead to any positive development in the situation. In the current absence of a political majority in favour of legislation in this area, GRECO strongly hopes that the lively public debate on this issue will lead to developments in the situation and put an end to the Swiss exception regarding the transparency of party funding.
29. In the light of the foregoing, GRECO concludes that the present very low level of compliance with the recommendations remains "globally unsatisfactory" within the meaning of Rule 31, paragraph 8.3 of its Rules of Procedure.
30. Pursuant to paragraph 2(i) of Article 32 of its Rules of Procedure, GRECO asks the Head of the Swiss delegation to provide a report on progress in implementing the outstanding recommendations (i.e. recommendations i to vi of Theme II) by 30 April 2017.
31. Furthermore, in accordance with Rule 32, paragraph 2 (ii) c), GRECO invites the Secretary General of the Council of Europe to send a letter to the Minister for Foreign Affairs of Switzerland drawing his/her attention to non-compliance with the relevant recommendations and to the need to make a determined effort to achieve tangible progress as soon as possible.
32. Lastly, GRECO invites the Swiss authorities to authorise publication of this report as soon as possible and to translate it into the other official languages and make these translations public.