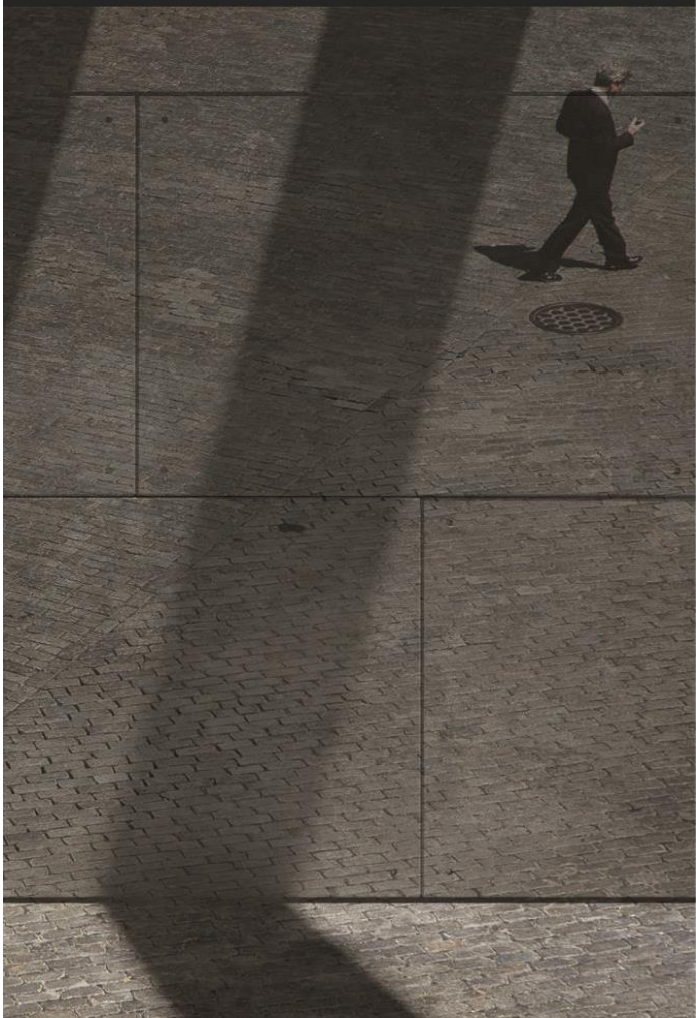


IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION



PHASE 4 TWO-YEAR FOLLOW-UP REPORT **Switzerland**

This report, submitted by Switzerland, provides information on the progress made by Switzerland in implementing the recommendations of its Phase 4 report. The OECD Working Group on Bribery's summary of and conclusions to the report were adopted on 16 October 2020.

The Phase 4 evaluated and made recommendations on Switzerland's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions. It was adopted by the OECD Working Group on Bribery on 15 March 2018.

This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

Switzerland

Phase 4 – Two-Year Written Follow-Up Report

Summary of main findings¹

1. In October 2020, Switzerland presented its two-year written follow-up report to the OECD Working Group on Bribery (Working Group or WGB), outlining the steps taken to implement the recommendations received during the Phase 4 evaluation conducted in March 2018. In light of the information provided, the Working Group concludes that Switzerland has fully implemented 11 recommendations, partially implemented 18 recommendations and not implemented 17 recommendations. The Working Group considers that Switzerland has not deployed sufficient efforts to address Phase 4 recommendations. It regrets that Switzerland has refrained from launching several important reforms called for by the Working Group (in relation to the maximum amount of fines for legal persons, whistleblower protection, the conditions governing appeals by interested persons in the framework of mutual legal assistance, or accounting standards). It also regrets that the authorities have not taken steps to implement several recommendations inviting them to clarify a concept (such as the notion of “defective organisation” whereby a company may be held liable) or to better organise a practice (such as self-reporting and the application of mitigating factors when determining sanctions) and which are conducive to the implementation of the Convention in Switzerland. On the other hand, the Working Group notes with satisfaction that Switzerland has increased resources allocated to the Money Laundering Reporting Office (MROS), which plays an important role in detecting foreign bribery. The WGB also welcomes the adoption of the revised Federal Law on Public Procurement and the efforts made by the State Secretariat for Economic Affairs (SECO) in raising awareness among companies on the issue of bribery of foreign public officials.

2. The enforcement of the foreign bribery offence in Switzerland has continued since Phase 4, even in the context of the Covid-19 pandemic², and enforcement is at the following stage at the time of this report:

- Seven convictions for acts of foreign bribery (four of which through summary punishment orders and three judgements by the Federal Criminal Court (FCC) in the framework of a

¹ The evaluation team for this Phase 4 two-year written follow-up evaluation of Switzerland was composed of lead examiners from Austria (**Christian Manquet**, Ministry of Justice and **Silvia Thaller**, Public Prosecutor’s Office) and Belgium (**Philippe De Koster**, President of the Financial Intelligence Processing Unit and **Hugues Tasiaux**, Head of Service, Central Office for the Repression of Corruption (Federal Police) as well as members of the OECD Anti-Corruption Division (**Catherine Marty**, Coordinator of this evaluation and Legal Analyst, and **Solène Philippe**, **Noel Merillet** and **Diane Pallez-Guillevic**, Legal Analysts). See Phase 4 Procedures, paras 54-62 on the role of Lead Examiners and the Secretariat in the context of two-year written follow-up reports.

² The Swiss authorities indicate that at the judicial level, the time limits applicable to criminal proceedings were not suspended at the most critical moment of the health crisis. In relation to mutual legal assistance, the same authorities note a generalisation of communication by electronic means between the authorities (Central offices, enforcement authorities, etc.) responsible for processing requests for co-operation. In the field, hearings of witnesses or defendants, as well as (non-urgent) searches have in some cases been postponed. Regarding extradition, it is mainly execution that has been affected. The [press](#) has moreover reported on a case of the statute of limitations expiring in the FIFA complex of cases, mainly as a result of the state of necessity and the health measures taken in spring 2020.

simplified procedure) were imposed on five natural persons and two legal persons. Only four individuals were sanctioned in these cases;

- An indictment was brought by a cantonal Office of the Attorney General against three natural persons in an ordinary proceeding;
- The Office of the Attorney General (OAG) lists 45 ongoing cases in 2019, a number that has been steadily falling since Phase 4 (there were 65 in 2017 and 56 in 2018). Moreover, the number of new investigations is significantly decreasing, from 14 in 2017 to 7 in 2018 and 4 in 2019. No equivalent data is available in respect of the cantons;
- The OAG discontinued cases or found no grounds for prosecution in 26 proceedings (including in the framework of an important complex of cases) in 2017, 13 in 2018 and 13 in 2019.

3. The Working Group notes with satisfaction the seven convictions since Phase 4. Switzerland, through the continued action of the AOG, remains one of the most active countries in enforcing the foreign bribery offence³. However, it notes the high number of discontinued cases (especially given the number of ongoing and completed investigations), which the Swiss authorities indicate is mainly due to the implementation of the principle of non bis in idem, in cooperation with the Brazilian authorities, in the context of the Petrobras complex of cases. It also notes the decrease in the number of newly investigated cases and ongoing cases in the OAG over the same period. It asks Switzerland to increase its efforts to enforce the foreign bribery offence. In the past, the Working Group has commended the decisive enforcement role played by the OAG, and continues to do so. For this reason, the Working Group decided to monitor developments concerning the management of investigations within this institution along with its internal organisation and structural operation⁴. Since Phase 4, the conduct of some OAG investigations has raised questions, especially within the framework of several international cases⁵. While these developments do not influence the functioning of the OAG, the WGB questions the possible repercussions on the prosecution of acts of bribery of foreign public officials and more broadly the potential impact these developments may have had on the continuity of enforcement actions carried out by the OAG and on the institution's reputation.⁶ The OAG's representatives indicated that the institution has remained fully operational, and highlighted the fact that, in recent years, the OAG has significantly reinforced its efforts to combat foreign bribery. It is indeed essential for the WGB that the OAG be fully capable of successfully investigating and prosecuting foreign bribery, and given the importance of the recent developments concerning the OAG, the Working Group has decided to follow up on this issue.

³ In addition this has been confirmed by international NGOs.

⁴ Issues for follow-up 18(h) concerning the "implementation of the reorganisation of investigations within the OAG and any repercussions this has on foreign bribery cases." and 18(i) concerning the "evolution of the internal organisation and structural operation of the OAG in the management of foreign bribery cases".

⁵ Several OAG prosecutors were required to recuse themselves in 2019 from a number of procedures related to the FIFA complex of cases and in the foreign bribery telecommunications case related to Uzbekistan.

⁶ The attorney general himself referred to an "[institutional crisis](#)" within the OAG when the disciplinary investigation against him was opened. Moreover, the Federal Administrative Court, in its ruling on 22 July 2020 in relation to the attorney general's disciplinary proceeding in 2019, notes that "*in his behaviour and statements, the attorney general has damaged the reputation of the Office of the Attorney General of the Confederation and of the lower courts*".

Regarding whistleblower protection:

- ◆ *Recommendation 1(a) – Not Implemented and recommendation 1(b) – Partially Implemented:* The bill designed to give protection to private sector employees who report suspicions of foreign bribery, already under discussion during Phase 4, was rejected by the Swiss Parliament in March 2020. In addition, and in practice, whistleblowers continue to expose themselves to criminal proceedings after reporting cases involving foreign bribery.⁷ The authorities indicate that a parliamentary initiative⁸ on this subject is pending before Parliament but the outcome and the timeframe of these discussions remain uncertain.⁹ The Working Group is seriously concerned by Switzerland’s failure to adopt any concrete measures in this area, measures that it has recommended since Phase 2, in 2005. Concerning whistleblower protection in the public sector, Switzerland does not intend to adopt any new measures designed to strengthen existing protection at the federal level, despite the recommendation of the Working Group, and it has not been established that the legal framework for this protection as it exists at the federal level now applies unreservedly to all cantonal civil servants. The Working Group notes efforts to raise awareness in this area at the federal and cantonal level but considers that they need to be continued. Given the importance of these issues, the WGB is of the opinion that they should be brought to the attention of the Swiss government so that Switzerland urgently and fully implements its obligations to protect whistleblowers in the private sector.

Regarding the detection of foreign bribery:

- ◆ *Recommendation 2(a) – Partially Implemented:* Switzerland has continued its efforts to strengthen its anti-money laundering regime. Nevertheless, one of the two pitfalls highlighted by the Working Group in Phase 4 is in the process of being addressed. Indeed, the WGB commends the amendment of the law on anti-money laundering (AMLA) in September 2020¹⁰ giving MROS the power to request information from a Swiss financial intermediary on the basis of information received from a foreign counterpart, with the understanding that the law will come into force subject to the expiration of the deadline for requesting an optional referendum. However, the AMLA still does not apply to lawyers, notaries, fiduciaries where their roles are restricted to preparing acts that do not involve any financial transactions for their clients (such as acts relating to the creation of companies and legal arrangements).¹¹
- ◆ *Recommendations 2(b) and 2(c) – Implemented:* The figures provided reveal a substantial increase in 2018 and 2019 of reports received by MROS from financial intermediaries. According to the authorities, over one quarter of these communications mention corruption as the predicate offence. This could reflect a better identification of suspected money laundering related to corruption by financial intermediaries. Awareness-raising efforts by MROS and the measures taken by the Swiss Financial Market Authority (FINMA) to increase the number of

⁷ Criminal proceedings for infringement of Art. 273 CC (economic espionage) were initiated by the OAG in November 2018 against one of the persons who helped bring to light the IMDB case.

⁸ Parliamentary initiative “Leutenegger”: “[Whistleblowing. Admettre la licéité d’un acte délictueux commis au nom de la sauvegarde d’intérêts supérieurs](#)”.

⁹ The Swiss authorities specify that as a result of the Covid-19 pandemic, the parliamentary interventions referred to in respect of recommendation 1(a) have not been addressed by Parliament, which has focussed on other items considered to be more urgent.

¹⁰ Article 11a al. 2 of the [federal law on anti-money laundering](#) (AMLA).

¹¹ This issue was partially dealt with in the context of the bill on amending the law on anti-money laundering (B-AMLA), which was submitted to Parliament in September 2019 (it provided that non-financial activities in connection with the creation, management or administration of companies or trusts were to fall within the scope of the obligations of due diligence and reporting). These discussions are still ongoing.

anti-money laundering controls of financial intermediaries in relation to may have played a significant role in this new trend. The Phase 4 report indicated that, in most cases, reports to MROS tend to be made in response to external sources of information, such as the media, and chiefly in the presence of a well-founded suspicion of money laundering. The WGB has no information at its disposal to confirm that this is no longer the case. In order to address the constantly increasing workload, the authorities have indicated that they will be allocating more resources in personnel to MROS in 2020 (by increasing the maximum number of personnel by 30%). Since 1 January 2020, MROS has a more effective system for processing communications. The Working Group welcomes the efforts made to implement these recommendations but intends to continue to follow up on these issues given their importance in detecting foreign bribery in Switzerland.

- ◆ *Recommendation 3 – Not Implemented:* Switzerland has taken, and continues to take, training and awareness-raising measures in the area of combating corruption in the public administration, both at federal and cantonal level. However, the information provided on their content, regularity and the administrations involved does not support the conclusion that they are relevant in terms of the detection and reporting of foreign bribery by federal and cantonal tax officials.
- ◆ *Recommendation 4 – Partially Implemented:* The Working Group regrets that, despite the OAG's efforts, Switzerland has failed to create a clear and transparent framework for self-reporting by companies despite the fact that it is a practice that the authorities continue to encourage. In March 2018, the OAG submitted a bill designed to offer companies that are likely to be prosecuted for corporate criminal liability (Art. 102 CC) the possibility of obtaining a provisional [suspension of the issuing of the indictment](#), for the duration of a probation period. The main purpose of this bill was to encourage companies to self-report and to cooperate completely and without delay in clarifying facts in criminal proceedings brought against them.
- ◆ *Recommendation 5(a) – Implemented:* The Working Group welcomes the adoption of a new Circular (Circular No. 50 entitled "[Prohibiting the deduction of bribes paid to a public official](#)"), which entered into force on 13 July 2020 and replaced Circular No. 16 that had been obsolete since 2011. In accordance with the Working Group's recommendation, it refers to the reporting obligation for tax officials and incorporates recent changes in case law concerning the definition of foreign public officials.
- ◆ *Recommendations 5(b) and 5(c) – Not Implemented:* Since the adoption of the Phase 4 report, the authorities have not taken any appropriate or adequate measures to address the issues at stake, specifically with regard to encouraging the cantons to adopt an obligation for the tax authorities to report foreign bribery. In addition, no new cantons seem to have adopted such an obligation. Lastly, there is no information on the training and awareness-raising activities carried out by the cantons and their relevance cannot be assessed.

Regarding enforcement of the foreign bribery offence:

- ◆ *Recommendations 6 and 8(c) – Partially Implemented:* The WGB welcomes the number and quality of the training and awareness-raising activities for judges and prosecutors. However, it has not been established that these initiatives, for most of them, precisely cover the WGB's specific focus areas and contribute to the enforcement of the foreign bribery offence in accordance with the Convention, including with regard to the autonomous definition of foreign public official, the existence of an offence irrespective of its outcome, and the use of mitigating factors.

- ◆ *Recommendation 7(a) – Partially Implemented:* Even if prosecution of the foreign bribery offence falls primarily under the jurisdiction of the Confederation and therefore the OAG¹², the cantonal Offices of the Attorneys General remain competent under certain conditions. Moreover, one of the charges brought since Phase 4 was done so by a cantonal Office of the Attorney General. In these conditions, the WGB notes that no measures have been taken with a view to clearly introduce coherent criminal strategies for the investigation and prosecution of foreign bribery. However it welcomes the more systematic exchange of information between the OAG and the Office of the Attorney General of the canton of Geneva but regrets that this is not intended to lead to a more coherent legal practice in relation to the prosecution of acts of foreign bribery.
- ◆ *Recommendation 7(b) – Partially Implemented:* The OAG states that its practice of prosecuting legal persons with a connection to the Swiss Confederation, including domiciliary companies, remains unchanged. The WGB regrets this state of affairs but takes note of the OAG’s decision in 2019 to sentence Gunvor, a Swiss company in a high-risk sector (oil trading), on the basis of credible allegations.
- ◆ *Recommendation 7(c) – Implemented:* The OAG confirms its strategy of using summary punishment orders as an efficient tool for enforcing the foreign bribery offence against both legal and natural persons. Four of the six cases concluded since Phase 4 have used summary punishment orders. While the WGB acknowledges that this procedure enables a relatively rapid resolution of foreign bribery cases that are by nature complex, costly and at risk of being time-barred, it continues to believe that this form of procedure needs to present sufficient guarantees and allow effective, proportionate and dissuasive sentences to be handed down (cf. the conclusions on recommendation 9(b)). The WGB will follow up on this last point, especially as case law and practice develop.
- ◆ *Recommendation 7(d) – Partially Implemented:* Switzerland has taken only very limited measures and on an exceptional basis¹³ to publish, promptly and in conformity with the applicable procedural rules, certain elements of these summary punishment orders including the legal basis for the choice of procedure, the facts of the case, the natural and legal persons sanctioned (anonymised if necessary), and the sanctions imposed.
- ◆ *Recommendation 7(e) – Implemented:* the WGB welcomes the adoption of the Federal Law amending the provision on reparation. It reduces its scope of application¹⁴ and makes use thereof in foreign bribery cases less likely but still possible. The WGB notes moreover that since Phase 4 there have been no instances of an Office of the Attorney General using this procedure to judge a foreign bribery case. This is encouraging, although it is necessary that this practice is ensured over time. Accordingly, the WGB is of the view that it should follow up on this issue.
- ◆ *Recommendation 7(f) – Implemented:* Switzerland considered adopting an alternative procedure to prosecution within the framework of a draft proposal to amend the Criminal

¹² And a ruling of the Appellate Division of the Federal Criminal Court (FCC) issued on 2 April 2019 clarified the *ratione materiae* concerning the jurisdiction of the OAG in the area of foreign bribery, notably in complex cases requiring “specific logistics or jurisdiction” and inducing a predominance of “acts involving substantial amounts and mainly occurring abroad”.

¹³ Since Phase 4, only the conviction of the company Gunvor has led to the publication of a [press release](#), which was moreover relatively detailed in terms of the facts, the persons involved and the question of the company’s defective organisation.

¹⁴ The maximum sentence enabling recourse to Art. 53 CC was reduced (from two years to one year) and an additional condition – the admission of the facts by the offender – was introduced.

Procedure Code. In August 2019, however, the Federal Council refused to consider further the draft bill proposed by the OAG, which would have been applicable to the prosecution of legal persons.¹⁵

- ◆ *Recommendation 7(g) – Partially Implemented:* Only the OAG (and not the cantons) is able to provide the number of foreign bribery cases which were discontinued or for which there were no grounds for prosecution.
- ◆ *Recommendation 8(a) – Partially Implemented and recommendation 8(b) – Not Implemented:* The review of the resources available to cantonal law enforcement authorities in order to effectively combat the bribery of foreign public officials was conducted on the occasion of this WGB review but Switzerland does not intend to review further these resources on a regular basis. According to the authorities, there was not much support for this kind of exercise in the cantons. Moreover, the authorities indicate that most cantons (including the two cantons which are traditionally the most involved in prosecuting foreign bribery) consider that they have sufficient capacities and resources, in contrast with the situation described in Phase 4. No information is available on the resources available for managing seized assets.
- ◆ *Recommendation 8(d) – Partially Implemented:* The information available does not support the conclusion that the police forces have more appropriate training in combating financial crime than they did in Phase 4. The WGB nevertheless welcomes the initiatives planned by the Federal Department of Justice and Police (DFJP) and Institute for Economic Crime Investigation (ILCE) within the framework of the Anti-corruption Strategy 2020-2023, in particular with respect to the training of relevant staff, including at the cantonal level.

Regarding sanctions and confiscation measures applicable to the offence of foreign bribery:

- ◆ *Recommendation 9(a) – Not Implemented:* At the time of this report, there were no legislative proposals providing for an increase in the statutory maximum fine for legal persons under Article 102 of the Criminal Code (CC). In March 2019, the Federal Council was nevertheless tasked with proposing solutions for introducing into Swiss law a general administrative monetary sanction regime in order to harmonise the various sanction regimes that are applicable to legal persons. The Working Group calls for this reform to take account of the present recommendation. It should be remembered that the Working Group agreed that the fact that the law set a limit of CHF 5 million (approximately EUR 4.7 million) on these fines was a factor which was likely to hinder the satisfactory implementation of corporate liability in Switzerland. Given the importance of this issue, the WGB is also of the opinion that it should be brought to the attention of the Swiss government.
- ◆ *Recommendation 9(b) – Partially Implemented:* The sanctions imposed against natural persons since 2018 do not allow to call into question the reservations expressed by the Working Group in the Phase 4 report, especially regarding the use of suspended sentences. Indeed, the three convictions since the Phase 4 report resulting in sanctions against natural persons have all resulted in suspended sentences. Concerning legal persons, it is also hard to draw a definitive conclusion as to any change in the effective, proportionate and dissuasive nature of the sanctions imposed based on the two sole cases concluded since the adoption of the Phase 4 report. The WGB nevertheless notes that the amounts of the fines applied in the aforementioned cases are (with one exception) higher than the fines imposed in the foreign

¹⁵ The Federal Council put forward a number of arguments including the absence of admission of guilt and the absence of judicial control.

bribery cases concluded at the time of Phase 4, even if they still fail to reflect the seriousness of the offences and the sums involved.¹⁶

- ◆ *Recommendation 9(c) – Partially Implemented:* During Phase 4, the Working Group had noted that the most common penalties applicable to natural persons for the active bribery of foreign officials take the form of day-fines (frequently suspended), with only a limited use made of the other types of available sanctions, including custodial sanction. Since Phase 4, two of the three sanctions imposed have involved a (suspended) custodial sanction; the third resulted in a (suspended) monetary sanction. The number of sanctions imposed since the adoption of the Phase 4 report is too low to identify a clear and significant change in practice at this stage and to conclude that the recommendation has been fully implemented.
- ◆ *Recommendation 9(d) – Implemented:* The reference to solicitation, “sincere remorse” and “effective regret” appears in some of the six convictions imposed since the adoption of the Phase 4 report. However, the Swiss authorities indicate that the use of these elements is in line with the Convention. The Working Group will continue to follow up the use of these elements in the determination of sentences in by the Swiss authorities.
- ◆ *Recommendation 9(e) – Implemented:* At the time of Phase 4, Switzerland did not have additional civil or administrative sanctions in respect of legal persons such as those provided for in Article 3(4) of the Convention. Since then, Switzerland has adopted the revised Federal Law on Public Procurement and the Ordinance relating thereto which, when they enter into force in 2021, will govern inter alia cases of the exclusion of proceedings and the revocation of the award of contract, especially in cases of infringement of anti-bribery provisions. The Working Group welcomes these initiatives and decides that it will carry out an detailed analysis of these new provisions in a forthcoming in-depth assessment of Switzerland.
- ◆ *Recommendation 9(f) – Implemented:* The Federal Law on the Tax Treatment of Financial Sanctions was approved by the Federal Chambers on 19 June 2020. The text will enter into force on 1 January 2021. The Law expressly provides that criminal administrative fines and sanctions are not tax deductible. These developments are to be commended.
- ◆ *Recommendation 9(g) – Not Implemented:* Switzerland makes very extensive use of confiscatory measures in the sentences of natural and legal persons found guilty of foreign bribery. These measures, which are not considered as a criminal sanctions, are tax deductible. During Phase 4, the WGB had therefore recommended that the authorities take into account this favourable tax treatment (to which convicted persons are entitled) when determining sanctions so as not to undermine their dissuasive effect. There is no information available to prove any change in the practices of the prosecuting authorities that could implement this recommendation.
- ◆ *Recommendation 10(a) – Partially Implemented and recommendation 10(b) – Not Implemented:* The OAG has provided its prosecutors with several IT tools facilitating relevant case law research which is systematically carried out in each case. However, it has not conducted a systematic analysis of Swiss case law on the application of mitigating factors, specifically those relating to solicitation and the alleged necessity of the corrupt payment. In addition, it is not established that the OAG’s planned comparative analysis of sentences in international economic crime will cover this topic. The WGB nevertheless calls for it to do so. Moreover, it regrets that no guidelines for criminal policy on administering sanctions have been adopted considering that they would be able to provide clarifications to prosecutors. The WGB reiterates the importance of tools of this kind for the interpretation of a certain number

¹⁶ In one of the two cases, a fine of CHF 2 million (EUR 1.89 million) was imposed for acts of corruption involving up to EUR 18 million. In the other case, a company was sentenced to pay CHF 4 million (EUR 3.7 million). At the time of Phase 4, only one company had received a fine in excess of CHF 2 million.

of legal provisions in order to harmonise their application and ensure their compliance with international law. They would also contribute to the OAG's general objectives in terms of the uniformity of legal interpretation and legality, without calling into question either the provisions of the Criminal Code or the principle of the individual nature of sentences.

- ◆ *Recommendation 11(a) – Partially Implemented and recommendation 11(b) – Not Implemented:* Switzerland has continued to publish information on the seizure and confiscation of assets in foreign bribery cases on an ad-hoc basis, especially when these cases are mediatized. However, these unsystematic publications do not provide sufficient transparency on the seizure and confiscation of assets, at either the federal or cantonal level. Lastly, the authorities do not clearly indicate whether the statistics on assets seized, confiscated and returned are collected by the competent authorities in a more detailed and systematic manner than in Phase 4.

Regarding international co-operation:

- ◆ *Recommendation 12(a) – Partially Implemented:* The WGB commends the adoption by Switzerland in September 2020 of the reform of the Federal Law on International Mutual Assistance in Criminal Matters (IMAC)¹⁷ that was under discussion at the time of Phase 4, and which was designed to formalise proactive mutual legal assistance.¹⁸ However, this reform will enter into force subject to the expiration of the deadline for requesting an optional referendum. The formulation of these provisions raises concerns of a significant limitation of the scope of application of advanced transmission of information and evidence, and of the conditions governing the use thereof by joint investigation teams, which is a source of concern for the WGB. However, the authorities indicate that these provisions will cover foreign bribery. Lastly, the Working Group had expressed reservations in Phase 4 as to the extent of the rights of the parties in a procedure of mutual legal assistance which enables interested persons to take part in the proceedings and have access to the case files in certain circumstances, and offers them a right of appeal against the decisions of the executing authority. However, the adopted law did not provide for a review of the conditions for these appeals, despite the WGB recommending it do so. Given their importance, the WGB is of the opinion that these matters should be brought to the attention of the Swiss government.
- ◆ *Recommendations 12(b) and 12(c) – Not Implemented:* The Federal Office of Justice (FOJ), which is the central authority responsible for mutual legal assistance in Switzerland, has not changed its system for collecting statistics since Phase 4. At the time of this report, this system is still unable to automatically generate numerical data on (i) requests for mutual legal assistance concerning corruption that are rejected, and (ii) requests for mutual legal assistance concerning money laundering predicated on bribery of a foreign official. With regard to the last point, the WGB also notes that cantons are still not collecting such data and consequently these cannot be centralised by the FOJ.

Regarding corporate liability:

- ◆ *Recommendation 13 – Partially Implemented:* The standard on “defective organisation” whereby a legal person may be held liable was clarified in a press release published in the framework of the Gunvor case. Moreover, the OAG specifies the substance thereof in the summary punishment orders against companies convicted of foreign bribery but these orders are not published. The WGB notes the efforts made in one of the cases adjudicated since Phase

¹⁷ [Law amending the federal law on international mutual legal assistance in criminal matters \(IMAC\)](#), adopted on 25 September 2020.

¹⁸ Proactive mutual legal assistance recommends the advance transmission of information and evidence before closing a request for mutual assistance as well as the creation of joint investigation teams.

4 but regrets that Switzerland refuses to clarify this standard in a more systematic, clear and coherent manner, thus depriving the private sector of useful information for putting in place measures to prevent foreign bribery such as internal controls, ethics and compliance systems.

Regarding awareness-raising among companies on the issues and prevention of bribery of foreign public officials:

- ◆ *Recommendation 14 – Partially Implemented:* Since Phase 4, it appears that efforts have been made to raise the awareness of SMEs on the issues and prevention of bribery of foreign officials. Several conferences organised in 2018 and in particular 2019 were aimed at SMEs, especially exporting SMEs. The topics covered mainly concerned anti-bribery compliance, without a specific focus on the issue of preventing and detecting foreign bribery. Moreover, the WGB regrets that Switzerland has failed to put in place any other channels for raising the awareness of SMEs apart from conferences (such as targeted publications or other dedicated means of communication).

Regarding accounting standards:

- ◆ *Recommendations 15(a) and 15(b) – Not Implemented:* Switzerland has taken no new measures to clarify that external auditors are required to report suspected acts of foreign bribery to management and, where appropriate, to the company's oversight bodies. Moreover, the authorities do not intend to require external auditors to report suspected acts of bribery of foreign public officials to competent authorities such as law enforcement authorities. The authorities dispute the analyses of the Working Group adopted in the Phase 4 report and the WGB is concerned that Switzerland is not planning to take any action to respond to the recommendations which have been pending since Phase 3.
- ◆ *Recommendation 15(c) – Not Implemented:* Based on the information available, the training and awareness-raising activities for external auditors organised by the authorities and professional organisations focused in an ad hoc manner on bribery related issues. However, it is not clearly established that the specific issue of the bribery of foreign public officials was covered. The same applies to the publications by the relevant professional associations.

Regarding taxation standards:

- ◆ *Recommendations 16(a) and 16(b) – Not Implemented:* The information provided does not cover the specific issue of training cantonal tax officials on the non-deductibility of bribes paid to foreign public officials. In addition, the manner in which the tax authorities enforce this non-tax deductibility has not changed since Phase 4, and the authorities have no intention of reviewing their practice as the WGB invited them to do. Furthermore, it is not established that the tax authorities are systematically re-assessing the fiscal situation of Swiss companies that are convicted of foreign bribery.
- ◆ *Recommendation 16(c) – Not Implemented:* No new system of information exchange allowing tax authorities to be informed of convictions pronounced by the Swiss courts and Offices of the Attorney General in cases of foreign bribery has been introduced since Phase 4 (inter alia, the single point of contact between the Federal Tax Administration's division of criminal cases and investigations (DAPE) and the OAG existed prior to Phase 4).

Regarding public advantages and official development assistance:

- ◆ *Recommendations 17(a) and 17(b) – Implemented:* Switzerland adopted the revised Federal Law on Public Procurement in June 2019 and the revised Ordinance on Public Procurement (OMP) in February 2020. These provisions are set to enter into force on 1 January 2021. As a result, Swiss procurement law will soon contain provisions enabling in particular exclusion

from public procurement in the event of violation of anti-bribery provisions, under various conditions. These measures are expected to mark a real breakthrough. The same reform introduces the possibility of excluding a tenderer from a procurement procedure if it appears on an international financial institution's sanctions list. The OMP will also allow the authorities responsible for carrying out public procurement, should they so choose, to ask tenderers to provide evidence of compliance with the rules of conduct relating to corruption. These reforms are to be commended. The WGB nevertheless reserves the right to assess them in detail in a forthcoming in-depth assessment of Switzerland in order to examine the conditions thereof and compliance with the relevant OECD Recommendations.

Dissemination of the Phase 4 report:

4. Switzerland indicated that the French and English versions of the Phase 4 Report were posted on the website of the SECO when the Report was published in spring 2018. The publication was accompanied by an explanation of the WGB's assessment procedure. A press release was also published in the three national languages (German, French, Italian) and in English. Moreover, the evaluation report was sent to the governments of the 26 cantons and half-cantons via the Conference of Cantonal Governments as well as to all the relevant authorities. Lastly, a session of the Interdepartmental Working Group on Combating Corruption (IDWG) in September 2018 was devoted to presenting and discussing the outcomes of the Phase 4 evaluation.

Conclusions of the Working Group on Bribery:

5. Based on these findings, the Working Group concludes that recommendations 2(b), 2(c), 5(a), 7(c), 7(e), 7(f), 9(d), 9(e), 9(f), 17(a) and 17(b) have been fully implemented; recommendations 1(b), 2(a), 4, 6, 7(a), 7(b), 7(d), 7(g), 8(a), 8(c), 8(d), 9(b), 9(c), 10(a), 11(a), 12(a), 13 and 14 have been partially implemented; and recommendations 1(a), 3, 5(b), 5(c), 8(b), 9(a), 9(g), 10(b), 11(b), 12(b), 12(c), 15(a), 15(b), 15(c), 16(a), 16(b) and 16(c) have not been implemented. The Working Group agrees to continue to follow the implementation of recommendations 2(b), 2(c), 7(c) and 7(e) and 9(d). It notes that Switzerland has not implemented some key recommendations (recs. 1(a), 9(a) and 12(a)) and is of the opinion that these issues should be brought to the attention of the Swiss government (a letter will be sent to the Minister for Justice once this report has been adopted). In addition, the Working Group has decided that Switzerland will prepare a written report in one year (October 2021) which will focus on recommendations 1(a), 1(b), 2(a), 9(a), 9(b) and 12(a) as well as on the efforts to enforce the foreign bribery offence (including newly investigated cases, ongoing cases, completed cases and cases that were discontinued or not investigated). Finally, Switzerland will report back on the management of investigations within the OAG as well as on its internal organisation and structural operation. At the time of this report, Switzerland may ask for any recommendation to be re-assessed as foreseen under para. 60 of the Phase 4 procedures. Finally, the Working Group will continue to pay attention to follow-up issues 18(a-g) and 18(j-m) as case law and practice develop.

*Annex: Written Follow-Up Report by Switzerland***WRITTEN FOLLOW-UP TO PHASE 4 EVALUATION OF SWITZERLAND*****Instructions***

This document seeks to obtain information on the progress each participating country has made in implementing the recommendations of its Phase 4 evaluation report. Switzerland is asked to answer all recommendations as completely as possible. Further details concerning the written follow-up process are available in the [Phase 4 Monitoring Guide](#) (para. 52-60).

Responses to questions should reflect the current situation in your country, not any future or desired situation or a situation based on conditions which have not yet been met. For each recommendation, separate space has been allocated for describing future situations or policy intentions.

Please submit completed answers to the Secretariat on or before 16 March 2020/31 July 2020¹⁹.

Name of country: SWITZERLAND

Date of approval of Phase 4 evaluation report: 27 March 2018

Dates of information: 16 March 2020 and 31 July 2020

¹⁹ In April 2020, in order to take into account the exceptional circumstances related to the Covid-19 crisis, the Working Group decided to postpone the discussion on the written follow-up report of Switzerland from June to October 2020. As a consequence of this postponement, Switzerland was given the opportunity to update the follow-up report.

Part I: RECOMMENDATIONS FOR ACTION

Recommendations for ensuring effective prevention and detection of foreign bribery

Text of recommendation 1(a):

1. Regarding whistleblower protection, the Working Group recommends that Switzerland:
 - (a) adopt promptly an appropriate regulatory framework to compensate and protect private sector employees who report suspicions of foreign bribery from any discriminatory or disciplinary action [2009 Recommendation IX(iii), Phase 3 Recommendation 11]

Action taken as of the date of the follow-up report to implement this recommendation:

The Federal Council's draft amendment of the law governing employment contracts which was submitted to Parliament in September 2018 was eventually rejected by Parliament on 5 March 2020. It is therefore definitively discarded. As a reminder, the purpose of the bill was to clarify the conditions under which a private sector employee could report irregularities of which he/she became aware in the course of his/her professional activities. It was also designed to allow the employee to receive compensation if they were dismissed as a result of their whistleblowing.

Left and right alike criticised the bill for being overly complicated. The Members of Parliament also considered that it did not really improve whistleblower protection, and on the contrary created legal uncertainty as to the current situation, which is based on case-law. They considered that an ordinary worker would quite simply be unable to establish in advance whether or not his/her whistleblowing would be legal. During the deliberations, some Members of Parliament announced that the rejection of the bill would trigger an avalanche of Parliamentary interventions. National Councillor Markwalder even reminded that the Leutenegger Parliamentary Initiative²⁰ was still pending – it has been extended again until 31 January 2020 – and that it could be reactivated in the near future. This initiative requests an amendment to the Swiss Criminal Code (CC) in order to acknowledge the lawfulness of a criminal offence when it is committed in order to safeguard higher interests and when it remains within the bounds of proportionality, in this case whistleblowing.

In a wider context with no direct impact on this bill, it should also be noted that in February 2020 the National Council (NC, lower chamber) acted on the Rutz Parliamentary Initiative²¹, resolving that, “the culture of confession does not support the idea of punishing only the person who made a mistake at the end of the chain”. It therefore proposed amending CC so as to put an end to the State prosecuting those who provide information as part of a “Just Culture”.

These Parliamentary Initiatives will probably be addressed during forthcoming Parliamentary sessions. As a result, political discussions on whistleblower protection are far from over.

In 2019, the federal offices represented in the Interdepartmental Working Group on Combating Corruption (IDWG)²² developed, in consultation with the private sector and civil society, a draft Federal Council's Anti-corruption Strategy for 2020-24 (hereinafter the Strategy). This draft will be submitted for consultation to the offices and the Federal Council in the fall. The content and formulation of the Strategy may therefore still change. The chapter on Detection and Law enforcement in the Strategy addresses the issue of whistleblower protection. Regarding whistleblower protection in the private sector, the Strategy proposes the following measures:

- That the Confederation impose a contractual commitment on its contractors (businesses, non-governmental organisations, etc.) to designate a reporting office for whistleblowing and protect whistleblowers. For its part, the Confederation guarantees that entrepreneurs will not be

²⁰ Leutenegger Parliamentary Initiative 12.419, “*Whistleblowing. Admettre la licéité d'un acte délictueux commis au nom de la sauvegarde d'intérêts supérieurs*”, <https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20120419>.

²¹ Rutz Parliamentary Initiative 19.478, “*Instaurer la culture de l'aveu pour améliorer la sécurité collective*”, <https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20190478>.

²² <https://www.eda.admin.ch/eda/en/fdfa/foreign-policy/financial-centre-economy/corruption/working-group-combating-corruption.html>

discriminated against if they give the Swiss Federal Audit Office (SFAO) information on corruption at the federal level.

- That the federal administration and businesses affiliated to the Confederation be open to employing individuals who acted legitimately as whistleblowers.

Text of recommendation 1(b):

1. Regarding whistleblower protection, the Working Group recommends that Switzerland:

(b) for the public sector, strengthen existing protection for whistleblowers at the federal level; undertake awareness raising activities; and broaden the legal framework for protection to ensure that it is applied without reserve to all cantonal officials (including against reprisals or conduct such as intimidation, bullying or harassment) [2009 Recommendation IX(iii)].

Action taken as of the date of the follow-up report to implement this recommendation:

At the federal level: In accordance with Article 22a of the Federal Personnel Law (LPers)²³, employees are obliged to report to the criminal prosecution authorities, to their line managers or to the SFAO all automatically prosecuted crimes and offences that they discovered in the course of their work or which have been brought to their attention. They are also authorised to report other irregularities to the SFAO. Employees who report irregularities in the workplace expose themselves to risks ranging from punishment and harassment to dismissal. In order to protect employees who report irregularities, the legislator therefore integrated two guarantees into Article 22a, paragraph 5, of LPers. On the one hand, it established that employees who provide a bona fide report or account, or who have testified as witnesses must not be discriminated against in their professional position as a result thereof. On the other hand, employees can also contact the SFAO anonymously, and are thereby not obliged to reveal their identity (via the reporting office for whistleblowing). In the event that a dismissal for whistleblowing were to occur, federal employees are legally entitled to continue working (Art. 34c, para. 1, LPers), a right which they can convert into a claim for compensation. The legal regulations are therefore comprehensive and do not currently require any “modification”.

At the cantonal level: Switzerland is a Federal State which entrusts a wide range of powers to its entities i.e. the 26 cantons and half-cantons, and the 2,205 municipalities²⁴. Accordingly, public service at the cantonal level is governed by an appropriate law in each of the 26 cantons and half-cantons. In 17 of them (Argovia (AG), Basle-Country (BL), Basle-City (BS), Berne (BE), Fribourg (FR), Geneva (GE), Glarus (GL), Jura (JU), Neuchâtel (NE), Nidwalden (NW), Saint Gall (SG), Schaffhausen (SH), Ticino (TI), Thurgovia (TG), Valais (VS), Zug (ZG), Zurich (ZH), the cantonal law on administrative staff, or on the Code of Civil Procedure (BL) or on CC, or even the Cantonal Constitution (GE)²⁵ refers to a duty to disclose illicit or irregular acts, or even serious suspicions thereof. Awareness raising measures (internal directives, fact sheets, code of conduct and/or training) have been undertaken or strengthened in 4 cantons (Appenzell Outer Rhodes (AR), BE, SH, ZH). Reporting offices for disclosures have been set up in 10 cantons (AG, BE, BS, GE, GL, NE, SG, TG, ZG, ZH), in the form of offices in the cantonal administration (GE, SG, TG), with the cantonal Office of the Attorney General (NE), externally but

²³ <https://www.admin.ch/opc/fr/classified-compilation/20000738/index.html>

²⁴ On 13 January 2020, See: <https://www.bfs.admin.ch/bfs/en/home/basics/swiss-official-commune-register.assetdetail.11467406.html>

²⁵ https://www.ge.ch/legislation/rsg/f/s/rsg_e4_10.html et https://www.ge.ch/legislation/rsg/f/s/rsg_a2_00.html (art. 26)

designed for staff in the cantonal administration (GL), and in the form of an office of the Ombudsperson, which is the point of contact for staff in the cantonal administration for anti-corruption matters (BS, ZG, ZH). In VS, a mediation service has been put in place for health-care related complaints by the public, and an extension of its powers will be examined based on the initial assessments. In AR, the possibility of a similar ppp office, which would be independent of the administration, is being studied and will be proposed as part of the next revision of the Constitution. Finally, it should be noted that similar provisions are in place in the country's largest cities, with legal standards in place in Zurich, Basel, Berne, Winterthur and Lucerne that encourage the reporting of unlawful or irregular acts, and in some cases there are even reporting offices for gathering disclosures.

The protection of informants is guaranteed in the 10 aforementioned cantons which have reporting offices for disclosures, as well as in BE, where the Personnel Law provides for the prohibition of any prejudice against anyone reporting irregularities, enforceable by a compensation mechanism. In the canton of VD, the State Council will present in 2020 a bill amending the Law on Personnel in the State of Vaud designed to guarantee State employees appropriate protection against any form of retaliation. In AG, new provisions in the Federal Law complementing the Civil Code are expected so that legislation can be adopted, while in Appenzell Inner Rhodes (AI), a regulatory framework for whistleblower protection can be envisaged, assuming that its feasibility can be confirmed and that there are no problems in terms of delineation. Lastly, in JU discussions are under way regarding the opportunity of integrating greater protection for whistleblowers into Jura's legislation governing State employees.

In terms of raising awareness, every new member of the Federal Administration receives upon taking up their appointment a copy of the Prevention of corruption and whistleblowing²⁶ leaflet published by the Federal Office of Personnel (FOPER), which is also publically available on the website of the Federal Administration. Each office is responsible for raising its employees' awareness on this issue and inform them in particular of the existence of the external secure platform²⁷ managed by the SFAO and where information can be submitted anonymously. The impact of this platform is being felt, as can be seen in the constant increase in the number of reports received, which increased from 60 in 2016 to 160 in 2018²⁸.

Managers and staff working in human resources are given specific training on whistleblowing by the SFAO as part of broader training on staff rights. Lastly, it should be remembered that the e-learning training module on Preventing corruption is mandatory for all line managers as of salary class 12 and for all employees as of salary class 24.

In terms of whistleblower protection, the Detection and Law enforcement chapter in the Federal Council's Anti-corruption Strategy reiterates that many companies and Federal offices have set up internal reporting offices and that the SFAO manages the Federal Administration's office, which also accepts anonymous statements. In addition, the Confederation offers its employees protection against reprisals. To this end, and in respect of the public sector, the following measures are proposed:

- That within the framework of existing management classes, a Speak-Up culture based on the open and constructive handling of grievances and conflicts be nurtured and encouraged in a targeted manner.
- That the Confederation inform all employees, as soon as they take up their appointment, of existing denunciation procedures and protection against discrimination in the event of related denunciation.

²⁶ https://www.eda.admin.ch/dam/eda/fr/documents/aussenpolitik/finanzplatz-wirtschaft/Korruptionspraevention_Flyer_FR.pdf

²⁷ www.whistleblowing.admin.ch

²⁸ <https://www.efk.admin.ch/en/whistleblowing-e.html>

In addition, the Strategy acknowledges that the **cantons and municipalities** are faced with similar challenges as the Confederation in terms of preventing corruption, that they are developing solutions independently, and that they are interested in exchanging experience. To this end, the IDWG, in collaboration with the Conference of Cantonal Governments (CdC), created the Confederation-Canton information network on corruption in 2018. In this context, a meeting on the subject of “whistleblower protection” was organised on 4 June 2019. The participants, including representatives from the cantons present, were therefore able to assess the situation on whistleblower protection at the international level, in the Federal Administration, in the private sector, and in the various cantons.

If no action has been taken to implement this recommendation, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

The Federal Office of Personnel (FOPER) does not consider that it is necessary to amend Art. 22a of LPers as there are sufficient existing measures in the rights of federal personnel protecting the victims of reprisals. In 2016, FOPER issued guidelines for preventing and managing mobbing in the Federal Administration (document appended). In the event of mobbing, especially of a whistleblower, the victim can demand that the competent authority issue a decision ordering the termination of the mobbing, or that it establishes the existence or non-existence thereof. It is therefore the responsibility of the management of the administrative unit to take the measures necessary for establishing the facts and encouraging the settlement of the case. If necessary, the competent authority opens a disciplinary investigation and imposes disciplinary measures against the persons perpetrating an act of mobbing. The disciplinary procedure is governed by Articles 98 to 100 of the Federal Personnel Ordinance (OPers)²⁹. If the employer does not take the measures required to prevent and put an end to the mobbing, it is in breach of its duty of assistance and consequently the employee can claim damages for non-material harm.

An employee who is a victim of mobbing can also contact a neutral mediation body that is not dependent on the administration’s hierarchy. The services of the Mediation Service are available free of charge to all employees, and all interviews are confidential. The Mediation Service also intervenes in cases of conflicts between colleagues or with management; its role is governed by Article 20a OPers.

Text of recommendation 2(a):

2. Regarding the detection of foreign bribery through anti-money laundering mechanisms, the Working Group recommends that Switzerland:

(a) continue with efforts to amend the Law on Anti-Money Laundering (AMLA) and grant powers to the MROS to approach a financial intermediary on the basis of a request received from, or information spontaneously supplied by, a foreign counterpart, in all circumstances.

Action taken as of the date of the follow-up report to implement this recommendation:

The Money Laundering Reporting Office (MROS) can now request information necessary to analyse a suspicious activity report (SAR) from a financial intermediary that did not make the report. However,

²⁹ <https://www.admin.ch/opc/fr/classified-compilation/20011178/index.html>

this is only possible when the relation about which information is requested is known from another SAR (Art. 11a para. 2 of the Federal Law on Combating Money Laundering and Terrorist Financing (Law on Anti-Money Laundering - AMLA)³⁰,³¹

In the absence of such SAR, the MROS may not use information from a foreign counterpart. In order to address this shortcoming, in September 2018, the Federal Council opened a consultation process for extending the competence of the MROS (Article 11a para. 2bis of revised AMLA) and submitted the message to Parliament in June 2019. The bill was debated in a meeting of the Legal Affairs Committee of the Council of States (CS, upper chamber) on 16 January 2020. The Committee did not ask for any amendments to the Articles concerning exchanges of information between Financial Intelligence Units. The bill was adopted by the Parliament on 25 September 2020. Since the referendum deadline expires on 14 January 2021, Art. 11a para. 2bis of revised AMLA should probably enter into force during the first semester of 2021. For more details, see response to Recommendation 12(a) below.

Text of recommendation 2(b):

2. Regarding the detection of foreign bribery through anti-money laundering mechanisms, the Working Group recommends that Switzerland:

(b) take all appropriate measures to encourage financial intermediaries to enhance the reporting of suspicious transactions, as the law allows, even when there are no external triggers prompting them to do so.

Action taken as of the date of the follow-up report to implement this recommendation:

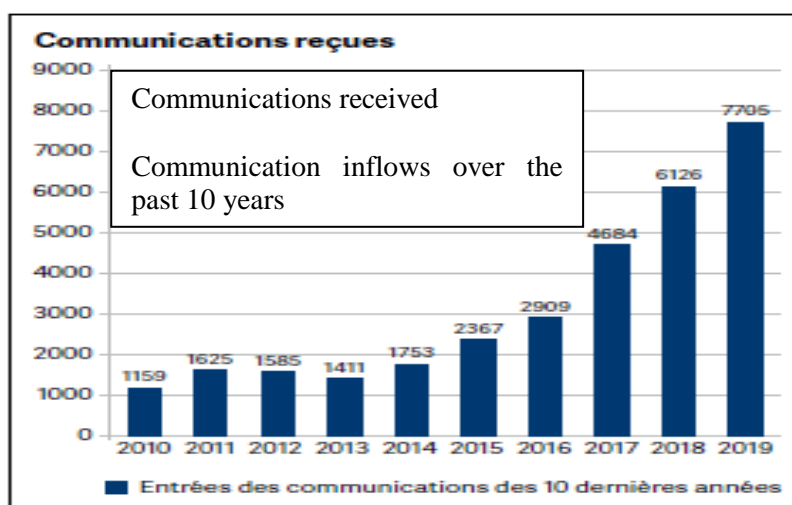
Generally speaking, and since the FATF Mutual Evaluation Report of Switzerland in 2016, SARs to the MROS by Swiss financial intermediaries have more than doubled as shown in Figure 1 below.

Figure 1³²: Increase in the number of SARs made to the MROS

³⁰ <https://www.admin.ch/opc/fr/classified-compilation/19970427/index.html>

³¹ See [Message no 18.071 du Federal Council du 14.09.2018 relatif à l'arrêté fédéral portant approbation et mise en œuvre de la Convention du Conseil de l'Europe pour la prévention du terrorisme et de son Protocole additionnel et concernant le renforcement des normes pénales contre le terrorisme et le crime organisé \(https://www.admin.ch/opc/fr/federal-gazette/2018/6469.pdf\)](https://www.admin.ch/opc/fr/federal-gazette/2018/6469.pdf)

³² See MROS, 2018 Annual Report, April 2019, p. 9: <https://www.fedpol.admin.ch/fedpol/en/home/kriminalitaet/geldwaescherei/jb.html> (23.01.2020).



In terms of corruption in particular, in April 2019 Switzerland published a risk analysis on corruption as a predicate offence to money laundering³³ which revealed a clear increase in SARs related to this predicate offence. In 2017, over 23% of the SARs received by the Reporting office concerned suspicions of money laundering associated with instances of corruption, whereas between 2008 and 2010 they represented under 10%. This growth reflects both better identification of suspected money laundering related to corruption by financial intermediaries, as well as the measures related thereto undertaken by the Swiss Financial Market Authority (FINMA) and the criminal justice authorities. In addition, the increase in SARs is also the result of awareness raising among financial intermediaries of the risks of money laundering linked to corruption by FINMA and the MROS. As a result, both have made progress in identifying suspicious business relations which could be used to launder funds derived from corruption, and report their suspicions more frequently to the Swiss Reporting office.

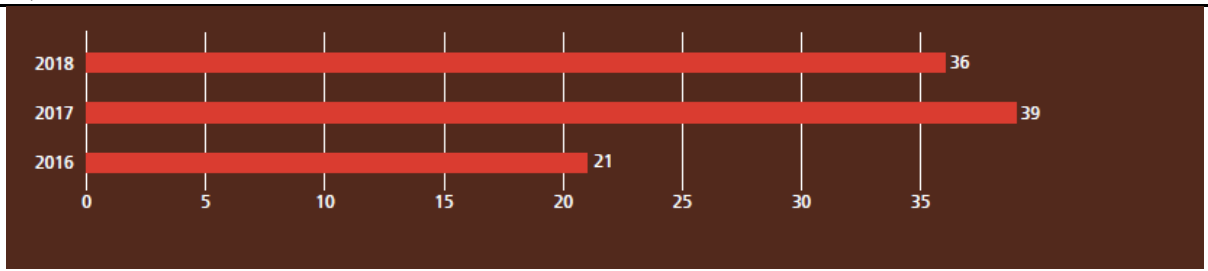
As Figure 2 below shows, since 2016 FINMA has increased its monitoring and investigations of the implementation of reports to the MROS.

Figure 2³⁴: On-site inspections concerning the prevention of money laundering in 2016-2018

Each year, FINMA carries out over 30 field inspections related to the prevention of money laundering. These field inspections include relatively long “supervisory reviews” and more ad hoc “deep dive” interventions:

³³ Corruption as a predicate offence to money laundering – Report by the Interdepartmental Co-ordinating Group on Combating Money Laundering and the Financing of Terrorism (CGMF), April 2019
<https://www.fedpol.admin.ch/dam/data/fedpol/kriminalitaet/geldwaescherei/nra-berichte/nra-bericht-april-2019-f.pdf>.

³⁴ Swiss Financial Market Supervisory Authority (FINMA), 2018 Annual Report, p. 80, See:
<https://www.finma.ch/en/documentation/finma-publications/annual-reports--and-financial-statements/>

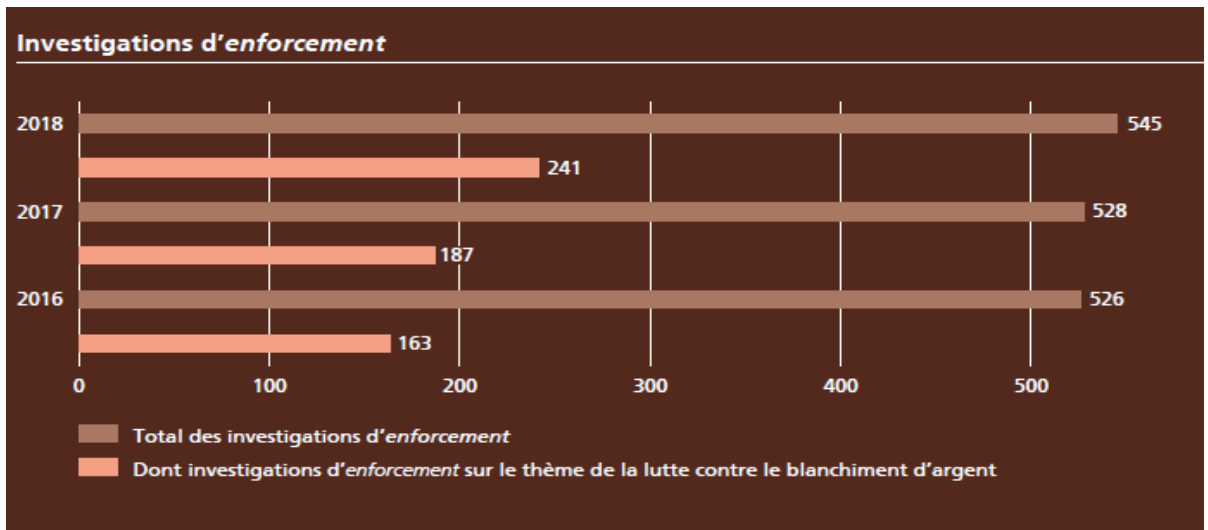


Moreover, a significant proportion of the investigations carried out by FINMA’s *Enforcement* division concern breaches of violations of anti-money laundering law, as Figure 3 below shows.

Figure 3³⁵: Enforcement investigations in 2016-2018, indicating the number of anti-money laundering investigations

Enforcement investigations:

- Total enforcement investigations (first row for each year)
- Of which enforcement investigations related to anti-money laundering (second row for each year)



Lastly, there was a significant increase in the number of enforcement procedures launched over the period in question.

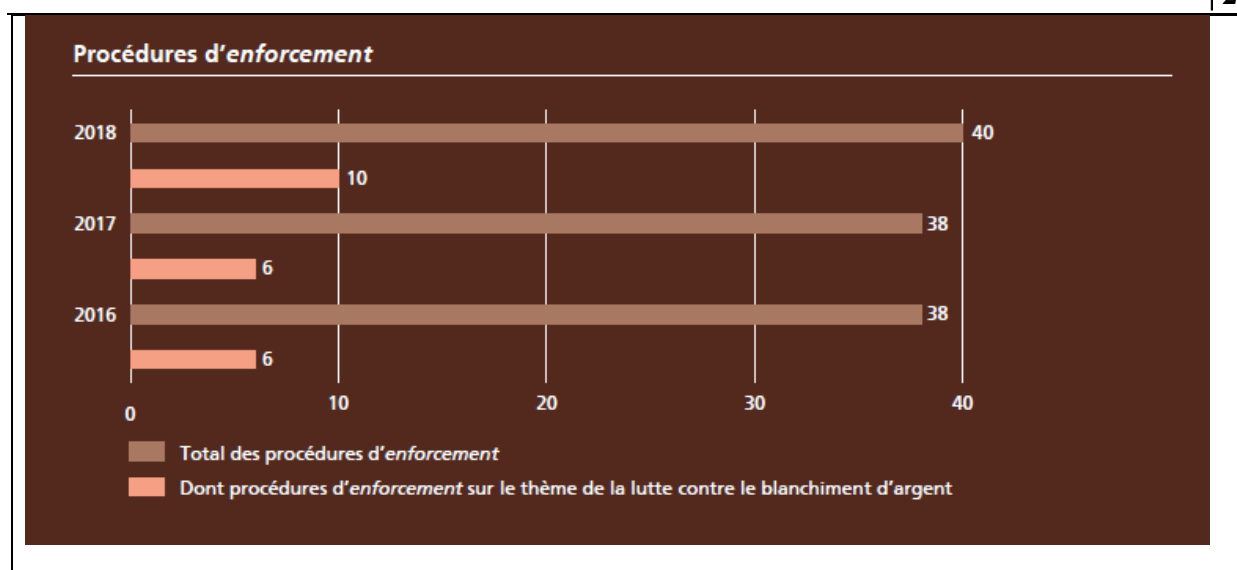
Figure 4³⁶: Enforcement procedures in 2016-2018, indicating the number of anti-money laundering procedures

Enforcement procedures

- Total enforcement procedures (first row for each year)
- Of which enforcement procedures related to anti-money laundering (second row for each year)

³⁵ Swiss Financial Market Authority (FINMA), idem

³⁶ Swiss Financial Market Authority (FINMA), idem



Text of recommendation 2(c):

2. Regarding the detection of foreign bribery through anti-money laundering mechanisms, the Working Group recommends that Switzerland:

(c) provide the MROS with the resources (including staff) it needs to perform its remit fully and be even more effective in combating foreign bribery.

Action taken as of the date of the follow-up report to implement this recommendation:

In 2019, the Federal Council increased the maximum number of resources at the MROS by 30% (12 additional FTE positions). These new employees took up their positions between 1 February and 1 August 2020.

Text of recommendation 3:

3. Regarding awareness of the offence of foreign bribery amongst personnel of federal and cantonal administrations, the Working Group recommends that Switzerland (i) continue the work of raising awareness amongst those personnel who are in a position to help with the detection and reporting of bribery of foreign public officials, and (ii) consider all other means whereby the authorities in question might be encouraged to act [2009 Recommendation III(i), VII and IX(ii); Phase 3 Recommendation 10(c)].

Action taken as of the date of the follow-up report to implement this recommendation:

Given the competence of the tax authorities to detect facts that could raise suspicions of acts of corruption, the Federal Tax Administration (FTA) regularly organises training for both **federal** and **cantonal** tax officials in order to raise their awareness of these issues and increase their knowledge thereof by presenting real cases. An extensive biennial training course (2018, 2020 etc.) regularly covers this aspect, among others, and is attended by hundreds of federal and cantonal tax officials. In addition, this issue is also covered in the lifelong training of tax officials, introduced and provided by the Swiss Tax Conference (CSI). The work on revising Circulars No. 9 and 16 (cf. the response to recommendation 5(a) below) provided further opportunities to raise the awareness of the federal and cantonal tax

administrations of this issue. Lastly, the FTA is actively involved in the work of the IDWG. As a result, numerous sessions and training courses promote awareness of this issue at tax level.

The Federal Administration, through the IDWG, continued its co-ordination and awareness-raising activities within public administrations on the issue of corruption, and in particular foreign bribery. It regularly organises theme-based workshops, in which it involves independent experts, and representatives of **cantons**, cities, companies and civil society. The following workshops were organised during the period under assessment:

- 29 May 2018: Corruption in the infrastructure sector.
- 17 September 2018: Presentation of the outcomes of the Phase 4 evaluation of Switzerland by the OECD Working Group.
- 4 February 2019: Compliance in the Federal Administration.
- 21 October 2019: Corruption in the healthcare sector.

Within the framework of the Confederation-Canton information network on corruption created in 2018, the IDWG carried out measures to raise awareness amongst the staff of **cantonal administrations** on the obligation to inform. Similar measures have been taken directly by the **cantons**, in particular the 17 cantons having introduced a duty to report for their staff. Lastly, several cantons refer to the measures taken by the FTA and the CSI and described above, as well as to the dialogue established by the IDWG.

The first objective of Chapter A. “Prevention” of the Federal Council’s Anti-corruption Strategy concerns raising awareness and is designed to ensure that private interests do not impede the performance of the public duties of the Confederation’s public officials and employees. To a great extent, federal employees identify with the federal government as an employer, and with their duties. Nevertheless, there are individual cases wherein private interests (e.g. friendly relations, second jobs, private sector investments) may exercise an undue influence on administrative actions and enter into conflict with public interest. The Federal Council set the main tasks for staff in OPers and issued a Code of conduct for the Federal Administration. In addition, the following measures have been proposed:

- That heads of department and senior management set the example and regularly remind their employees of their duties in accordance with LPers and the Federal Administration’s Code of conduct.
- That directors ensure that their employees are always aware of the legal basis for performing their duties and are aware of the public interest.
- That all second jobs should be declared and recorded in employees’ file, and permanently updated.
- That as part of the management cycle (performance evaluation), an annual review of possible conflicts of interest should be undertaken and, where necessary, measures agreed.
- That as part of respective lifelong training courses, the awareness of managers be raised as to preventing corruption.

The first objective of Chapter C. International Dimension of the Strategy concerns the private sector. It emphasises the fact that the bribery of foreign public officials is prohibited under Swiss law. Most Swiss companies with an international presence undertake to apply fair trade practices and to minimise risks of non-compliance, but they may find themselves confronted with demands for bribes in foreign markets. (...) Swiss companies want to be acknowledged worldwide for their integrity, and this reputation is also a collective asset that merits safeguarding. Nevertheless, Switzerland’s reputation as an honest economy can again be tarnished by the behaviour of some companies and their agents. (...)

In these circumstance, the following measures are proposed:

- That the Confederation inform companies with an international presence of the norms and standards in terms of preventing and fighting corruption, and assists them in the implementation thereof.
- That Switzerland Global Enterprise (S-GE), the body commissioned by the Federal Council to promote exports, offer to check the integrity of the sales agents and potential partners of Swiss companies.
- That the Confederation, where necessary, grant consular protection to companies faced with demands for bribes overseas.
- That Switzerland has agreed to ensure that the ban on foreign bribery be also applied consistently by the home countries of Swiss companies' main competitors.
- That the Federal Council support international efforts to increase transparency in the raw materials sector, including trade in raw materials.
- That Switzerland has agreed to encourage international sporting federations to work together on reforming their governance so as to prevent corruption.

Text of recommendation 4:

4. Regarding self-reporting, the Working Group recommends that the OAG create a clear and transparent framework for self-reporting by companies which sets out the conditions in which it applies and the applicable procedures, including issues such as the nature and degree of co-operation expected from the company; any benefit for co-operation with the law enforcement authorities; and prosecutions of natural persons connected with the self-reporting company [2009 Recommendation Annex I.D.]

Action taken as of the date of the follow-up report to implement this recommendation:

On 23 March 2018, as part of a consultation concerning partial amendments to the Criminal Procedure Code (CrimPC)³⁷, the Office of the Attorney General (OAG) submitted a bill for introducing an Article 318bis to CrimPC, which would offer companies that are likely to be prosecuted for corporate criminal liability (Art. 102 CC³⁸) the possibility of obtaining a provisional suspension of the sending of the indictment for the duration of a probation period³⁹. This bill, which was discussed with the Swiss Bar Association, is designed to encourage companies to self-report or to collaborate completely and without delay in clarifying facts in criminal proceedings brought against them. It is envisaged that the Office of the Attorney General completes its investigation, in accordance with the principles of legality of the prosecution, ex-officio investigation and prompt process. After the conclusion of the investigation and the drafting of the indictment, the Office of the Attorney General could enter into talks with the company and envisage an agreement to suspend bringing charges, provided that the company has duly and fully contributed to establishing the facts, that it accepts them, that it has satisfactorily reimbursed any injured parties, that it is prepared to cover the payment of the fine, of confiscation (including the equivalent claim) and costs. In addition, the company will have to undertake to address its organisational shortcomings in order to prevent further infringements. Lastly, it will have to submit to and finance an independent inspector, appointed by the Office of the Attorney General, who will be tasked with carrying out regular inspections of compliance with the conditions of the agreement, in particular in terms of the alignment of the company's organisation. At the end of a probation period of two to five years as provided for in Art. 44 para. 1 of CC, the indictment will be waived, as will a guilty verdict, if it is established that the company has respected all the terms of the agreement, in particular with regard

³⁷ <https://www.admin.ch/opc/en/classified-compilation/20052319/index.html>

³⁸ <https://www.admin.ch/opc/en/classified-compilation/19370083/index.html>

³⁹ Bill relative to Article 318bis CrimPC and OAG explanatory report (see files appended to the response to recommendation 7.f)

to correcting its organisational shortcomings, reimbursing injured parties and compensating for the size of the fine, its enrichment and legal costs. In such an event, the proceedings will be dropped. On the other hand, if the company does not respect the conditions of the agreement, either during or at the end of the probation period, the indictment will immediately be forwarded to the court. The evidence collected as a result of the collaboration with the company will remain usable in court.

In draft amendments to several provisions of CrimPC, the Federal Council delivered its opinion on this amendment: *“The Federal Council is mindful of the OAG’s view that it is desirable to have tools allowing for the rapid closure of complex cases against companies. However, the proposed rules would create inconsistencies and raise a number of questions. They would only strengthen the already strong position of the Office of the Attorney General without any countervailing powers and without control mechanisms (e.g. judicial authorisation, legal avenues). According to the conception of criminal law, individuals comply with the rules because they risk punishment for infringements. This conception would be undermined if it were possible to “buy” the waiver of criminal prosecution for an offence by paying a fine and promising to behave well in future. This would be particularly problematic in the case of an intentional infringement. Under the current law, any punishment is based on a guilty verdict. Under the OAG’s proposal, however, the company could agree to pay a fine without being found guilty. The OAG’s proposal leaves the door open to agreements on sanctions, ancillary effects, civil claims, etc. between the company and the Office of the Attorney General, without a judge being able to rule on the agreement reached. The rules requested go further than those relating to the simplified procedure. According to the OAG’s proposal, the Office of the Attorney General and the company could agree on civil claims without the private claimant even being involved in the agreement. Finally, the OAG’s proposal makes it a precondition for an agreement that the company fully participates in the investigation. It does not say what would happen to the evidence gathered if charges were ultimately brought. In light of the above, the Federal Council prefers to forego a deferred indictment.”*⁴⁰.

As it stands, this bill is therefore not being pursued. But it had the merit of starting a discussion in Switzerland. It was notably referred to during conferences given by the Attorney General and by a Federal Attorney⁴¹.

Text of recommendation 5(a):

5. Regarding the detection of foreign bribery by the tax authorities, the Working Group recommends that Switzerland:

(a) update the Circular of July 2007 to take account of all legislative changes since its adoption and all relevant foreign bribery case law [2009 Recommendation VIII(i) and 2009 Recommendation on Tax Measures].

Action taken as of the date of the follow-up report to implement this recommendation:

The FTA has updated and adapted not only Circular No. 16 dated 13 July 2007, but also Circular No. 9 dated 22 June 2005. The texts refer to current legal provisions and contain recent case law as well as more detailed explanations of the phenomenon. The two Circulars were updated with the involvement

⁴⁰ Federal Council Dispatch of 28 August 2019, FF 2019 p. 6351 et seq (6375)

⁴¹ The content of the said Conference is appended to the response to recommendation 6 in the file named “*Regards croisés sur la poursuite pénale de l’entreprise*”.

of the competent bodies of the CSI. They entered into force and were published under numbers 49 and 50 respectively on 13 July 2020⁴².

Text of recommendation 5(b):

5. Regarding the detection of foreign bribery by the tax authorities, the Working Group recommends that Switzerland:

(b) at cantons' level, encourage all cantons to introduce a statutory obligation on tax officials to report bribery [2009 Recommendation VIII(i) and 2009 Recommendation on Tax Measures].

Action taken as of the date of the follow-up report to implement this recommendation:

The report that followed the Phase 4 evaluation of Switzerland was sent to the cantons by the CdC in 2018, and included a summary of the recommendations. The subject of whistleblowing was also broached with the cantons via the Confederation-Canton information network on corruption in 2018, and especially during a meeting on 4 June 2019 on the topic of "whistleblower protection". More generally, it should be remembered that a duty to report exists in 17 cantons, implemented by cantonal legislation, and that several cantons are considering the creation of reporting units.

Text of recommendation 5(c):

5. Regarding the detection of foreign bribery by the tax authorities, the Working Group recommends that Switzerland:

(c) ensure that all cantons conduct training and awareness-raising activities for their tax officials on the issues of detecting and reporting foreign bribery [2009 Recommendation VIII(i); 2009 Recommendation on Tax Measures; Phase 3 Recommendation 8(a)].

Action taken as of the date of the follow-up report to implement this recommendation:

It should be remembered that Switzerland is a Federal State which entrusts a wide range of competencies to its entities i.e. the 26 cantons and half-cantons, and the 2,205 municipalities. It is not within the competence of the Federal Council (federal government) to interfere in the training and awareness-raising activities of cantonal (tax) officials. That said, tax officials from cantonal administrations regularly attend training courses organised by the FTA or the CSI. This is useful, on the one hand, for small cantons as their administrations only have limited resources due to their size; it also fosters standardised training throughout all Swiss tax administrations. (These training courses are also referred to in the response to recommendation 3 above).

Recommendations for enforcement of the foreign bribery offence

Text of recommendation 6:

6. Regarding the offence of foreign bribery, the Working Group recommends that Switzerland carry out training and awareness-raising activities for judges and Offices of the Attorneys General in relation to the foreign bribery offence and the Convention, especially with regard to the autonomous definition of a

⁴²<https://www.estv.admin.ch/estv/fr/home/direkte-bundessteuer/direkte-bundessteuer/fachinformationen/kreisschreiben.html>

foreign public official and the existence of an offence irrespective of its outcome [Convention Article 1, Commentaries 4, 7, 14 and 15; 2009 Recommendation V].

Action taken as of the date of the follow-up report to implement this recommendation:

Swiss universities provide comprehensive and high-quality training in all areas of national and international criminal law to future lawyers, and therefore also to judges. In particular, teaching is given on the provisions of Title Nineteen of CC on bribery (art. 322ter et seq of CC). Accordingly, the issue of the bribery of foreign public officials is an integral part of basic legal training.

In addition, Swiss judges are involved in lifelong training. The Foundation for the continuous training of Swiss Judges⁴³ (hereinafter “the Foundation”) is an in-service training organisation specifically focussed on the requirements of the courts. The further education courses offered by the Foundation also cover criminal law (see also the comments on recommendation 8.c). In addition, Swiss judges regularly take part in further education courses on criminal law offered by other bodies, such as the Swiss Criminal Law Society⁴⁴. Lastly, judges can also attend specific conferences on economic crime and corruption, such as the conference on “Money laundering, bribery, bankruptcy offences – is Switzerland ready?” held on 8 November 2019 and organised by the association of Swiss Experts in Economic Crime Investigation⁴⁵.

Mention needs to be made here of the Special council for training and development (hereinafter “the Special Council”) of the Conference of Cantonal Justice and Police Directors (CCDJP)⁴⁶, which was introduced on 4 March 2019. The purpose of the Special Council is to provide guidance and promote co-ordinated continuous professional development at the national level for public and private sector representatives responsible for preventing, detecting, prosecuting, evaluating and handling criminal offences and other forms of abusive behaviour. To do so, the Special Council draws on co-operation with the competent public institutions, private sector representatives and specialised associations and conferences. It evaluates further education courses in the areas of forensics and white-collar crime, including related areas, and checks in particular whether these courses meet the required quality standards in the practice thereof.

The Special Council also ensures that the offers evaluated are tied in to diplomas, qualifications and recognised qualifications. In order to meet the aforementioned objective, it works with universities and other teaching establishments. The Special Council identifies and articulates educational requirements, notably by taking into consideration changes to legislation and the needs of the participants, and then helps the providers with the implementation of the classes. In doing so, it ensures that content is co-ordinated and that the interpretation of legislation is uniform in the different areas of the country. To this end, the Special Council comprises not only representatives of the OAG, the legal profession, forensic psychology, forensic medicine, criminology, the police, the criminal justice system and the Federal Department of Justice and Police (DFJP), but also judges, and at all times takes account of the country’s linguistic and geographic balance.

The Swiss Association of Magistrates of the Judiciary (ASM)⁴⁷ has announced its desire to join the Special Council and has put forward two members for the Executive Committee, which will be elected in Spring 2020. Going forward, the Special Council will undoubtedly constitute an additional, important system for providing high-quality training and development in criminal law, and therefore economic crime and corruption, which would be co-ordinated throughout Switzerland.

⁴³ <http://www.iudex.ch/fr/index.htm>

⁴⁴ <https://skg-ssdp.ch/?lang=fr>

⁴⁵ <https://www.seeci.ch/fr/>

⁴⁶ <https://kkjpd.ch/home-fr.html>

⁴⁷ <http://svr-asm.ch/en/index.htm>

In November 2019, the OAG appointed a new prosecutor responsible for foreign bribery. She has substantial experience in prosecuting foreign bribery and in international co-operation, and will therefore be able to monitor the uniformity of legal interpretation in this area, and the training of prosecutors.

Within the framework of the Master's degree from the Institute for Economic Crime Investigation (ILCE) at HEG-ARC business school⁴⁸ in Neuchâtel, two OAG prosecutors have taught a course since 2018 on "Investigation technique and strategies". This eight-hour class focuses specifically on issues concerning foreign bribery and money laundering. Within the framework of the School of criminal judiciary (ERMP) at the ILCE⁴⁹, an OAG prosecutor contributes to a training course designed to raise the awareness of new prosecutors to the field of ethics. In addition, since 2017, eight assistant prosecutors have undertaken Certificates of Advanced Studies (CAS) at the same school.

In 2018, a prosecutor from the OAG delivered training organised by the Swiss Bar Association on different forms of corruption. Another OAG prosecutor also intervened, alongside a lecturing lawyer, at a conference on the topic of "Comparative views on the criminal prosecution of companies", held on 5 February 2019 by the Law Faculty at the University of Lausanne. In October 2020, the alternate prosecutor general provided training on several areas to many representatives of Swiss companies at the Europainstitut in Basel. The presentation was entitled "Cooperation between companies and law enforcement authorities". It aimed at raising the awareness of companies about various issues, including corruption.

This conference resulted in a publication (appended below at the end of the text). It provided an opportunity to present an overview of the criminal prosecution of companies, notably by examining the topics of the concurrent prosecution of the natural person who acted in the company, of the very real problems of the consolidation or separation of proceedings opened against natural and legal persons, the conditions set for accepting a simplified procedure, and to present the OAG's self-reporting policy.

More generally, the OAG organises four conferences for prosecutors every year. The purpose of these meetings is to exchange information on procedures and training in the course of conferences related to criminal prosecution.



5. Regards croisés
sur la poursuite con

Text of recommendation 7(a):

7. Regarding investigation and prosecution, the Working Group recommends that Switzerland:

(a) take all necessary measures to introduce a consistent criminal policy for the investigation and prosecution of foreign bribery, applicable both to the OAG and the cantonal Offices of the Attorneys General [Convention Article 5; 2009 Recommendation Annex I.D.].

Action taken as of the date of the follow-up report to implement this recommendation:

On 2 April 2019, the Appellate Division of the Federal Criminal Court (FCC) issued a decision on the issue of the *ratione materiae* competence of the OAG in the area of foreign bribery (case in relation to Gabon, dealt with by the Office of the Attorney General of the canton of Geneva, BG2018.28, BG.2018.34-37, see below). After observing that the canton of Geneva had been investigating a case of

⁴⁸ See: <https://www.he-arc.ch/gestion/mas-lce>

⁴⁹ See: <https://www.he-arc.ch/gestion/ermp>

foreign bribery for several months, the OAG, to which a complaint had been submitted, had agreed that the canton of Geneva would resume this phase. The accused appealed against this decision on the determination of jurisdiction, calling for it to be overturned and for the OAG be declared competent. Despite the accused passing away after the appeal was filed, the Appellate Division considered that, “*The Office of the Attorney General may delegate to cantonal authorities the investigation and the judgment, exceptionally the sole judgment, of criminal law cases which fall within federal jurisdiction under Art. 23², with the exception of criminal cases referred to in Art. 23², para. 1, g (Art. 25 para. 1² of CrimPC). In simple cases, the Office of the Attorney General may also delegate to cantonal authorities the investigation and the judgment of criminal cases which fall within federal jurisdiction under Art. 24² (art. 25 para. 2² of CrimPC). The provision does not indicate what constitutes a simple case. These cases should be the exception. Accordingly, when the case does not require a specific competence or specific logistics, especially where the facts seem straightforward, delegation is permissible⁵⁰. In this particular case, given the number of companies and persons involved in Gabon, including high-level politicians, and the contested acts of bribery and money laundering, which are alleged to have mainly taken place abroad and to involve substantial amounts, factors which appear in the content of the complaint dated 7 February 2018 and reports to the MROS (see above point 2.3.1 and 2.3.2), it must be concluded that the case is not simple, which there excludes a delegation to the Office of the Attorney General of the canton of Geneva based on the aforementioned provision” (point 2.4).*

This case law marks a turning point for foreign bribery investigations. It should result in foreign bribery proceedings being much more systematically referred to the OAG, either by the MROS or by the Federal Office of Justice (FOJ), which is responsible for delegating requests for mutual legal assistance in criminal matters. In addition, in the event of a predominance of acts occurring abroad or when several cantons are concerned, the competence of the OAG is established. Some foreign bribery cases do not meet the aforementioned criteria, so that the cantons keep their jurisdiction in this area.

Insofar as there is no hierarchical link between the Federal Office of the Attorney General and the cantonal Offices of the Attorneys General, the OAG cannot develop a prosecution strategy that would be binding on a canton. That is why it organised meetings to exchange information, notably with the prosecutor of the canton of Geneva heading the economic crime division. Also in these circumstances, the OAG and the canton of Geneva have developed the habit of consulting each other before the start of any criminal proceeding for complex international economic crime, in order to avoid a positive conflict of jurisdiction.

The full decision relative to the Gabon case is available hereafter:



20190402_BG_2018_
28_décision GABON

Text of recommendation 7(b):

7. Regarding investigation and prosecution, the Working Group recommends that Switzerland:

(b) ensure that all credible allegations involving legal persons with a connection to the Swiss Confederation, including domiciliary companies, are duly evaluated, with prosecutions and convictions where appropriate [Convention Article 5; 2009 Recommendation Annex I.D.].

Action taken as of the date of the follow-up report to implement this recommendation:

⁵⁰ See: SCHMID/JOSITSCH, Schweizerische Strafprozessordnung, Praxiskommentar, 3rd edition 2017, n° 10 ad art. 25² CrimPC as well as MOREILLON/PAREIN-REYMOND, Code de procédure pénale, Petit commentaire, 2nd edition. 2016, n° 7 ad art. 25² CrimPC; KIPFER, *op. cit.*, n° 7 ad art. 25² CrimPC).

It should be remembered that the OAG has a case-handling body responsible for systematically analysing all reports submitted to it and allocating them for processing to the divisions responsible for the respective areas of the offence. In accordance with its past practice, the OAG continued to ensure that credible allegations involving legal persons with their headquarters in Switzerland were prosecuted in Switzerland.

The legal basis allowing the Swiss criminal prosecution authorities to prosecute legal persons with their headquarters in Switzerland is contained in Article 36 par. 2 of CrimPC, which rules that the authority of the place where the company has its headquarters has the power to prosecute offences committed in the company under Art. 102 of CC. The authority of the place where the company has its headquarters is also competent when the same proceeding for the same situation is also opened against an individual acting on behalf of the company. This norm applies irrespective of the place where the offence was committed or, in the case of material offences, where the result of the offence occurred.

Text of recommendation 7(c):

7. Regarding investigation and prosecution, the Working Group recommends that Switzerland:

(c) use summary punishment orders for natural persons only when such use does not undermine the effective, proportionate and dissuasive nature of sentences handed down in foreign bribery cases [Convention Articles 3 and 5; 2009 Recommendation Annex I.D.].

Action taken as of the date of the follow-up report to implement this recommendation:

The OAG continued to use summary punishment orders for companies. The sentence, a maximum fine of CHF 5 million, makes this a perfectly acceptable instrument when the accused does not oppose a conviction. In particular, it complies with the requirement for prompt process and corresponds to a right of the accused company. Three proceedings were transferred to the FCC between 2018 and 2020 under a simplified procedure⁵¹.

Concerning summary punishment orders for natural persons, one of them concerned an individual already sentenced to ten years in prison by a court in another country. The decision to use a summary punishment order was made because it was decided to waive any sentence (foreign bribery is punishable in Switzerland by a maximum five-year sentence), despite the fact that a sentence was imposed for a corrupt payment which had not been taken into consideration by the foreign authority for an amount totalling EUR 66 175.34. A compensatory claim amounting to CHF 1 140 597.05 was also imposed in the summary punishment order, in addition to the confiscations already imposed abroad. Once again, the summary punishment order turned out to be an appropriate instrument.

Another proceeding led to a judgment by summary punishment order in 2019. It concerned an old proceeding for which the limitation period was in danger of expiring (one part of the facts had already been time-barred). A sentence of 180 fine-days at CHF 600 and a fine of CHF 50 000 were imposed. A compensatory claim amounting to CHF 389 229 was also ordered.

Text of recommendation 7(d):

7. Regarding investigation and prosecution, the Working Group recommends that Switzerland:

(d) publish, promptly and in conformity with the applicable procedural rules, certain elements of these summary punishment orders including the legal basis for the choice of procedure, the facts of the case, the

⁵¹ <http://ge.ch/justice/licences-minieres-en-guinee-beny-steinmetz-renvoye-en-jugement>

natural and legal persons sanctioned (anonymised if necessary), and the sanctions imposed. [Convention Arts 3 and 5; 2009 Recommendation III(i)].

Action taken as of the date of the follow-up report to implement this recommendation:

At the political level, it should be noted that in March 2018 the Committee for Legal Affairs of the National Council dismissed a motion calling for the non-applicability of the principle of the public nature of orders declaring no grounds for prosecution, and orders to discontinue a case⁵². In doing so, the Committee followed the opinion of the Federal Council. This reflects the strong attachment of both Government and Parliament to the principle of the public nature of criminal justice.

This desire for transparency in criminal justice is confirmed by those practicing. Indeed, on 23 November 2017 the Swiss Conference of Prosecutors (CPS) adopted the “Recommendation concerning the consultation of summary punishment orders and orders to discontinue a case”⁵³. With regard to summary punishment orders, item 3.1 of the Recommendation notably provides as follows, “*Interested parties have the right to consult the complete, integral and non-anonymised summary punishment orders. If there are legitimate interests against such consultation, consideration should be given to whether the summary punishment order can be consulted in a redacted and/or anonymised version*”. Item 3.2 recalls that there are no restrictions on consulting summary punishment orders for at least 10 days and no more than 30 days after the decision enters into force.

There are seven positions in the OAG’s communication service (including the head of information and an intern). In 2018, they handled around 6 500 requests from Swiss and foreign media, with each request receiving a reply. Any journalist, as well as any person with a justified interest (e.g. a jurist or the head of compliance of a given entity) can have full access to the OAG’s decisions, if they go in person to one of the OAG’s sites, insofar as they submit a request within the first 30 days after the decision enters into force. After this period, or in the event that the applicant does not wish to go to a site, he/she may request an anonymised version of the decision.

The OAG’s legal service is responsible for answering requests for consultations. The said service receives on average four requests a month mainly from journalists but also from people working in law firms or involved in compliance (consultation for scientific or educational purposes). Journalists receive a list of decisions rendered by the OAG during the current period and can therefore use this list to select the proceedings that they wish to consult. They receive a response very quickly. The OAG’s website⁵⁴ gives the rules for the public access to summary punishment orders and decisions.

Several examples are given below:

1. Case SV.11.0097:

The summary punishment order was imposed on 13 May 2019. It received media coverage, mainly through the Gotham City specialised website:



Gotham City N°110
L’avocat genevois R

⁵² Motion 18.3004: *Ne pas exposer inutilement la sphère privée de personnes mises en examen* (<https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaefte?AffairId=20183004>).

⁵³ https://www.ssk-cps.ch/sites/default/files/dv_2017_trakt_6a_fr.pdf.

⁵⁴ <https://www.bundesanwalt.ch/mpc/en/home/zugang-zu-amtlichen-dokumenten/strafbefehle--einstellungen--und-nichtanhandnahmeverfuegungen.html>

2. Case SV.15.0787 :

The summary punishment order was imposed on 15 November 2019. After it entered into force, it was made publically available as of 31 December 2019, and consulted thereafter by several journalists. It was subsequently referred to in several media as of 09 January 2020, as demonstrated below:

- [Gotham City Numéro 133 – 9.01.2020 "Le MPC condamne le groupe brésilien Andrade pour corruption"](#)
- <https://twitter.com/JamilChade/status/1215272125843562496>
- [Affaire Petrobras: 2 millions de francs d'amende pour le groupe brésilien Andrade Gutierrez](#)

3. Gunvor Case:

In October 2019, the OAG communicated on the entry into force of a summary punishment order against the company Gunvor for a foreign bribery offence. The OAG's press release repeated the most important sections from the punishment order and mentioned the fact that the said order was available upon submission of a request to the OAG's legal service. Over 15 requests for consultation were received, and an anonymised version of the summary punishment order was sent to 10 persons. The case received extensive media coverage.

The aforementioned press release is available below:



résumé (article
comm) GUNVOR_FR.

The examples above do not include cases that were brought to court and which received a lot of publicity due to being open to the public.

Text of recommendation 7(e):

7. Regarding investigation and prosecution, the Working Group recommends that Switzerland:

(e) ensure that the law enforcement authorities do not have recourse to article 53 CC in foreign bribery cases [Convention Articles 3 and 5; 2009 Recommendation III(ii)].

Action taken as of the date of the follow-up report to implement this recommendation:

On 14 December 2018, the Federal Assembly adopted the Federal Law amending the provision on reparation (amendment of CC, juvenile criminal law and the Military Criminal Code)⁵⁵. According to the precise terms of the explanatory report, the purpose of the said law is to “*reduce the scope of application of Art. 53 CC*” and to “*restrict it to petty crime*”⁵⁶. To achieve this objective, the maximum sentence enabling recourse to Art. 53 CC was reduced (from two years to one year) and an additional condition – the admission of the facts by the offender – was introduced. With these amendments, the application of Art. 53 CC in foreign bribery cases, which are clearly linked to petty crime, should be *de facto* excluded. As the referendum deadline was not used, the law entered into force on 1 July 2019⁵⁷. The new provision therefore reads as follows:

⁵⁵ <https://www.admin.ch/opc/fr/official-compilation/2019/1809.pdf>

⁵⁶ Parliamentary Initiative, Amend Art. 53 CC, Report of 3 May 2018 by the Committee for Legal Affairs of the National Council, Opinion of the Federal Council dated 4 July 2018, p. 5031 et seq.

⁵⁷ See DFJP press release date 22 May 2019:

<https://www.ejpd.admin.ch/ejpd/fr/home/aktuell/news/2019/2019-05-220.html>

Art. 53 CC (former version)	Art. 53 CC (version dated 1 July 2019)
<p>If the offender has made reparation for the loss, damage or injury or made every reasonable effort to right the wrong that he has caused, the competent authority shall refrain from prosecuting him, bringing him to court or punishing him if:</p> <ol style="list-style-type: none"> The conditions for suspending the execution of sentence are met (Art. 42)⁵⁸; and the interest in prosecution of the general public and of the persons harmed are negligible; and. 	<p>If the offender has made reparation for the loss, damage or injury or made every reasonable effort to right the wrong that he has caused, the competent authority shall refrain from prosecuting him, bringing him to court or punishing him if:</p> <ol style="list-style-type: none"> <u>a suspended custodial sentence not exceeding one year, a suspended monetary penalty or a fine are suitable as a penalty;</u> the interest in prosecution of the general public and of the persons harmed are negligible; and <u>the offender has admitted the facts.</u>
<p>Also in this context, it should be noted that the <u>current Art. 53 CC has not been used</u> – either by the OAG or by a cantonal Office of the Attorneys General – to settle a foreign bribery case since the Phase 4 Report. It should also be noted that the new Article 53 CC is even more restrictive in terms of its application to the foreign bribery offence.</p>	

Text of recommendation 7(f):

7. Regarding investigation and prosecution, the Working Group recommends that Switzerland:

(f) consider, where necessary taking existing procedures as a basis, the introduction of an alternative procedure to prosecution which has a strict framework, allows for the application of effective, proportionate and dissuasive sanctions and respects the necessary rules of predictability and transparency that are essential in this type of procedure [Convention Article 3(1); 2009 Recommendation III(ii)].

Action taken as of the date of the follow-up report to implement this recommendation:

Swiss legislation has no mechanism for waiving prosecution, as is the case in English-speaking countries. Accordingly, when a company is found guilty of an offence, it must be sentenced, regardless of the extent to which it may have collaborated. On 1 December 2017, the Federal Council presented for consultation a bill to amend CrimPC. The main purpose of this amendment was primarily to make it a tool better suited for practitioners. In the framework of the consultation, the OAG (cf. response to recommendation 4) suggested using this revision to introduce into CrimPC a provision on the prosecution of legal persons that would notably allow a criminal prosecution authority to suspend the criminal prosecution of a company provided that the latter collaborate and make an agreement with the aforementioned authority. The agreement would contain in particular the statement of fact recognised by the company, the amount of the fine, the assets confiscated, the amount of civil reparation and the organisational measures to implement⁵⁹.

The Federal Council carefully examined this proposal. In its message dated 29 August 2019 in support of the draft amendment, it acknowledged that it could be important for Offices of the Attorneys General

⁵⁸ According to the former Art. 42 para. 1 of the CC: “The court shall normally suspend the execution of a monetary penalty, community service or custodial sentence of at least six months and no more than 24 months when an unsuspended sentence does not appear to be necessary to prevent the offender from committing further felonies or misdemeanours” (underline added)

⁵⁹ The OAG’s proposal can be consulted at:

<https://www.bj.admin.ch/dam/data/bj/sicherheit/gesetzgebung/aenderungstpo/vn-stgn-organisationen.pdf>,

p. 40 ff (in Germany only).

to have the means to settle more rapidly complex proceedings against companies. It nevertheless decided not to act on the model proposed by the OAG, primarily for the following reasons⁶⁰:

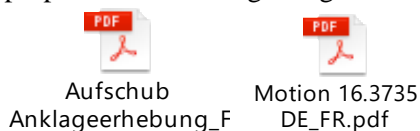
- the proposal would only strengthen the already strong position of the Office of the Attorney General without any countervailing powers and without control mechanisms (e.g. judicial authorisation, legal avenues),
- under criminal law, individuals comply with the rules because they risk punishment for infringements. This conception would be undermined if it were possible to "buy" the waiver of criminal prosecution for an offence by paying a fine and promising to behave well in future. This would be particularly problematic in the case of an intentional infringement,
- under the current law, any punishment is based on a guilty verdict. Under the OAG's proposal, however, the company could agree to pay a fine without being found guilty,
- the proposal leaves the door open to agreements on sanctions, ancillary effects, civil claims, etc. between the company and the Office of the Attorney General, without a judge being able to rule on the agreement reached. The rules requested go further than those relating to the simplified procedure,
- the Office of the Attorney General and the company could agree on civil claims without the private claimant even being involved in the agreement,
- finally, the OAG's proposal makes it a precondition for an agreement that the company participate fully in the investigation. It does not say what would happen to the evidence gathered if charges were ultimately brought.

It follows from the above that the criminal prosecution of companies will continue to be governed by the procedures currently provided for in CrimPC, i.e. the ordinary proceeding, the simplified procedure or the summary punishment order. These different possibilities are tried and tested, guarantee judicial review, allow criminal prosecution authorities to complete their work efficiently, are transparent and ultimately flexible enough to take account of the specific situations of the prosecuted companies. With specific regard to the summary punishment order procedure, it should be emphasised that the review of CrimPC proposes allowing the private claimant to oppose it.

Switzerland has therefore carefully examined the opportunity of introducing into CrimPC an alternative procedure to prosecution under Swiss substantive law, as request in the Working Group's recommendation. It has reached the conclusion that a tool such as this is not necessary.

Furthermore, the OAG is not able to establish a framework of this kind on its own. Indeed, it can in no way oblige the **cantonal** courts or Offices of the Attorneys General to adopt its possible solution in light of their independence. If applicable, it would be the responsibility of the legislator to establish such a framework. Lastly, it should be specified that there have been no new acquittals by a court in an issue related to foreign bribery or to the notion of foreign public official.

Annex relating to the legislative proposal for deferring charges brought against legal persons:



Text of recommendation 7(g):

7. Regarding investigation and prosecution, the Working Group recommends that Switzerland:

⁶⁰ For more details, see the Federal Council Dispatch dated 28.08.2019 (FF 2019 6351, <https://www.admin.ch/opc/fr/federal-gazette/2019/6351.pdf>), p. 6375 ff.

(g) collect statistics on the number of foreign bribery cases abandoned and the number of acquittals [Convention Article 5; 2009 Recommendation III(ii); Phase 3 Recommendation 5].

Action taken as of the date of the follow-up report to implement this recommendation:

The statistics concerning the OAG ranking of cases under Art. 322septies CC for the period since the Phase 4 Report indicate:

2017: 25 cases abandoned, of which 4 in the Petrobras complex (16%)
 2018: 13 cases abandoned, of which 8 in the Petrobras complex (61%)
 2019: 13 cases abandoned, of which 7 in the Petrobras complex (54%).

Text of recommendation 8(a):

8. Regarding methods, resources and training, the Working Group recommends that Switzerland:

(a) periodically review the resources available to cantonal law enforcement authorities in order to effectively combat bribery of foreign public officials [Convention Article 5; 2009 Recommendation Annex I.D and Phase 3 Recommendation 2(b)].

Action taken as of the date of the follow-up report to implement this recommendation:

The OAG performed a review such as the one referred to above, which led it to ask Parliament to create two additional positions (one prosecutor and one assistant prosecutor) in order to combat transnational economic crime, representing an 8% increase in staff at the OAG working on economic crime. Despite the fact that the current trend is more towards limiting positions, the Parliament agreed to grant these positions to the OAG, as of 1 January 2020.

Concerning the cantonal Offices of the Attorneys General, it should be remembered that most of them do not handle any foreign bribery cases, due to the modest size of most cantonal economies and the scarcity, or even inexistence, of foreign bribery cases that involve them. Since the Phase 4 evaluation, only the Office of the Attorney General of the canton of Geneva has been actively involved in a case of this kind⁶¹. More generally, the OAG is a member of the Swiss Conference of Prosecutors (CPS), which works to foster co-operation between the **cantonal** and **federal** criminal prosecution authorities. In particular, it encourages the cantonal criminal prosecution authorities to exchange views with each other, and with the Confederation's criminal prosecution authorities, along with co-ordination and the development of their common interests. It promotes the harmonisation of practices in terms of criminal law and criminal procedure. It takes position on the Confederation's draft legislation, adopts resolutions and recommendations, and takes part in shaping opinion on issues related to criminal law, criminal procedures and related areas. The Attorney General of the Confederation is currently CPS vice-chair.

Text of recommendation 8(b):

8. Regarding methods, resources and training, the Working Group recommends that Switzerland:

(b) provide the cantonal authorities with sufficient resources to enable them effectively to handle seizures in practice, including those in foreign bribery cases; [Convention Article 5; 2009 Recommendation Annex I.D and Phase 3 Recommendation 2(b)].

⁶¹ <http://ge.ch/justice/licences-minieres-en-guinee-beny-steinmetz-renvoye-en-jugement>

Action taken as of the date of the follow-up report to implement this recommendation:

Switzerland is a Federal State which entrusts a wide range of powers to its entities i.e. the 26 cantons and half-cantons, and the 2,205 municipalities; It is not the responsibility of the Federal Council to provide the cantonal authorities with capacities and resources. Upon being asked, 8 cantons (AG, BE, BS, GE, SH, TG, TI, ZH) considered that they had sufficient capacities; this is notably the cases in the two cantons which are traditionally the most involved in cases of foreign bribery (GE, ZH). In its appraisal, the canton of GE expressed its support for a regular reassessment of the resources available to the cantonal Offices of the Attorneys General. Two cantons (AI, GR) stated their interest in a reassessment of the resources available to the cantonal Offices of the Attorneys General for fighting money laundering and bribery. Other cantons (AI, BL, FR, JU, VD, VS) reported their appreciation for the work carried out by the OAG in this area, thus justifying the *status quo* in terms of the cantons capacities and resources.

Text of recommendation 8(c):

8. Regarding methods, resources and training, the Working Group recommends that Switzerland:

(c) conduct training for the judiciary in the offence of foreign bribery and the use of mitigating factors, in particular those relating to solicitation and alleged necessity of a corrupt payment [Convention Article 5; 2009 Recommendation Annex I.D and Phase 3 Recommendation 2(b)].

Action taken as of the date of the follow-up report to implement this recommendation:

First and foremost, reference should be made to the response to recommendation 6 above, especially the launch in 2020 of the CCDJP's Special council for training and development. Comprising representatives of the OAG, the legal profession, forensic psychology, forensic medicine, criminology, the police, the criminal justice system, and the Federal Department of Justice and Police (DFJP) and judges, and at all times taking account of the country's linguistic and geographic balance, the Special Council will undoubtedly represent an important additional instrument for ensuring high quality training and development in fields of criminal law, that is co-ordinated at the level of Switzerland.

In addition, it should be noted that the Foundation for the continuous training of Swiss Judges also regularly offers further training for judges on the topic of "sentencing".

Text of recommendation 8(d):

8. Regarding methods, resources and training, the Working Group recommends that Switzerland:

(d) provide police forces with appropriate training in the combating of financial crime, including foreign bribery [Convention Article 5; 2009 Recommendation Annex I.D and Phase 3 Recommendation 2(b)].

Action taken as of the date of the follow-up report to implement this recommendation:

Every year, the Swiss Police Institute offers Swiss police forces training sessions and classes of various lengths and differing content on combating white-collar crime and financial investigations.⁶² The Institute also offers the possibility of following specific training in neighbouring countries. The DFJP's 2020-2023 Strategy for fighting crime provides for the ongoing development and provision of training and professional development in institutes (such as the Swiss Police Institute) and of special events related to fighting corruption.

⁶² See: <https://www.institut-police.ch/fr>

In Chapter C. International Dimension of the Federal Council’s Anti-corruption Strategy, objective 2 concerns police and judicial co-operation. With regards to training police forces, the following measure is proposed:

- The regular participation of Swiss police forces in exchanges of information on foreign bribery cases, within the framework of the International Anti-Corruption Coordination Centre (IACCC) for example.

At the level of the **cantons**, it should be mentioned in advance that 11 cantons (AR, BE, GE, GL, JU, NE, SH, TI, VD, VS, ZH) consider that the training on offer on both general subjects and financial crime is tailored to requirements; this is notably the case for the two cantons most actively involved in foreign bribery cases (GE, ZH). VD added that, as of 2020, the members of the financial brigade – the entity of the criminal investigation departments specialised in financial crime – would be following additional training put in place by ILCE. Two other cantons (AI, TG) expressed an interest in additional training in financial crime, if possible in co-ordination with other cantons for the purposes of harmonisation.

Text of recommendation 9(a):

9. Regarding sanctions, the Working Group recommends that Switzerland:

(a) increase the statutory maximum fine (CHF 5 million) for legal persons convicted of foreign bribery [Convention Article 3(1); 2009 Recommendation III(ii)]

Action taken as of the date of the follow-up report to implement this recommendation:

Within the framework of a bill to harmonise sentences provided for in CC and supplementary criminal provisions, the Federal Council considered that a harmonisation of provisions governing corporate criminal liability would not fit within the scope thereof⁶³. At present, there is no ongoing legislative proposals providing for an increase in the maximum fine under Art. 102 CC. In this context, it should be noted that the OAG recently sentenced the company Gunvor to a fine of CHF 4 million for failing to take all the necessary and reasonable measures to prevent the bribery of public officials by its employees and its intermediaries in efforts to gain access to the oil markets of the Republic of Congo and Côte d’Ivoire (see the response to recommendation 4 above). Accordingly, the upper limit of the sentence has still not been reached in practice⁶⁴.

However, and for the sake of completeness, it should be pointed out that in March 2019 the National Council accepted a postulate instructing the Federal Council to review the possible solutions for introducing into Swiss law an Administrative Monetary Penalty System⁶⁵. Indeed, alongside Art. 102 CC, some laws acknowledge a general administrative criminal process for corporate liability⁶⁶. The Parliament wants to harmonise these disparate systems in order to improve legal security and guarantees

⁶³ Federal Council Dispatch dated 25 April 2018 concerning the harmonisation of sentences and the Federal Law on the adaptation of ancillary criminal law to the amended law on penalties d (FF 2018 2889, <https://www.admin.ch/opc/fr/federal-gazette/2018/2889.pdf>), p. 2993 ff.

⁶⁴ See the Press Release by the Office of the Attorney General dated 17.10.2019, available at: <https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-76725.html>.

⁶⁵ Postulate 18.4100 “Administrative Monetary Penalty System”, available at: <https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaefft?AffairId=20184100>:

⁶⁶ In particular: Federal Law on Cartels, Federal Law on VAT, Federal Law on Customs Tariffs, Federal Law on Financial Market Supervision, Law on Auditor Oversight.

which are essential for these types of proceeding. Within this context, the amount of statutory maximum fines will probably be reviewed, and it is not excluded that the solution adopted may – in the medium term – have an impact on the sentence provided for in Art. 102 CC⁶⁷.

Text of recommendation 9(b):

9. Regarding sanctions, the Working Group recommends that Switzerland:

(b) ensure that the sanctions imposed in practice for foreign bribery against natural and legal persons are effective, proportionate and dissuasive [Convention Article 3(1); 2009 Recommendation III(ii)]

Action taken as of the date of the follow-up report to implement this recommendation:

2018:

SK.2018.38: Sentencing of a natural person in the context of the Gunvor case for bribery of foreign public officials. The indictment was referred to the FCC on 06 July 2018. An 18-month sentence, with a three-year probation period was imposed. The facts were deemed serious but the behaviour of the accused and in particular, his active involvement in the criminal proceedings and establishing the facts (leading to professional ostracism) helped reduce the sentence. The FCC's judgment can be consulted below:



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Case SV.15.0584, the summary punishment order which was imposed in 2017 by the OAG became final and binding (cf. judgment of the Federal Tribunal dated 7 December 2018, 6B_233/2018) after the observation by the Federal Tribunal (FT) that the opposition filed against the said order was inadmissible. To sum up the facts: on 23 March 2017, the OAG issued a summary punishment order against a company which it sentenced for the predicate offence of bribery of foreign public officials. The OAG sentenced the company to pay a symbolic fine of one Swiss franc due to its exemplary collaboration in the proceedings (unprompted self-reporting) and ordered the confiscation of an amount of CHF 35 million. The case has already been addressed in the Phase 4 evaluation of Switzerland.

2019:

SV.11.0097: Sentencing of a natural person by summary punishment order on 13 May 2019 for complicity, bribery of foreign public officials and aggravated money laundering. This individual had fostered banking relationships enabling the public official to collect sums gained from corruption and had helped transfer certain amounts, which explained the sentence for aggravated money laundering. Due to the expiry of the limitation period, some of the facts were not retained. A sentence of 180 fine-days at CHF 600 and a fine of CHF 50 000 were imposed. A compensatory claim amounting to CHF 389 229 was also ordered.

SV.15.0770: In this case involving a natural person, the OAG reviewed the facts which had led to a conviction in Brazil and noticed that a corrupt payment of EUR 66 175.34 was missing. Given that a ten-year prison sentence had been imposed in the other jurisdiction, on 4 October 2019 the OAG imposed a sentence for the additional corrupt payment, but decided not to impose an additional penalty, given that

⁶⁷ For example, Articles 49a and 50 of the Law on Cartels (LCart, RS (Systematic Compendium of Swiss Federal Law 251) provide for a fine against companies of up to 10% of the turnover generated in Switzerland in the last three financial years.

the maximum punishment for foreign bribery in Switzerland is 5 years. As the amount confiscated in the foreign country did not cover the full amount which it was likely to have been under the regulations of the CC, the OAG imposed an additional equivalent claim of CHF 1 140 597.05.

SV.15.0787: This case resulted in the sentencing of a legal person on 15 November 2019 (no proceedings could be carried out against its CFO who had passed away in the meantime) for the underlying offence of bribery of foreign public officials. The company was sentenced for corrupt payments amounting to USD 17 579 474 and EUR 2 159 850 to the senior managers of a state-owned company. The OAG imposed a fine of CHF 2 million and a compensatory claim amounting to CHF 16 603 730. The fine took into consideration the company's precarious financial situation.

SV.18.0958: This concerned the sentencing of companies in the Gunvor Group (detailed above). The sentence was imposed on 14 October 2019, with a fine of CHF 4 million and a compensatory claim of CHF 89 665 378.

SK.2019.58: Decision of the FCC on 26 February 2020C against a natural person for bribery of foreign public officials, aggravated money laundering and simple money laundering. The accused was sentenced to a 16-month prison sentence with a five-year probation period, as well as a compensatory claim amounting to USD 1 600 000.

2020:

SV.19.1401/SK.2020.8: Sentencing of a natural person for bribery of public officials. The indictment was submitted to the FCC on 3 March 2020 as part of a simplified procedure. The decision, rendered on 6 July 2020, sentences the accused to 24 months of imprisonment, fully suspended, with three years of probation. In addition the person must pay a compensatory claim amounting to USD 480 200.

Canton of Geneva:

In July 2019, the Office of the Attorneys General of the canton of Geneva brought charges in an ordinary proceeding and referred to the criminal court a businessman and his two employees for bribery of foreign public officials and forgery of documents, in an ordinary proceeding⁶⁸.

Lastly, Chapter B. Detection and Law enforcement of the Federal Council's Anti-corruption Strategy contains an objective (3) aimed at ensuring that corruption offences be systematically prosecuted and punished in an appropriate manner. The following measures are suggested:

- That the Federal Council support the revised Federal Law on Public Procurement. As soon as a relevant legal basis is in place, the Confederation will make consistent use of the possibility of temporary excluding suppliers sentenced for bribery in public procurement.
- That the Confederation examine whether the preventive and punitive measures of penalties and measures applicable to legal persons for bribery offences should be strengthened. In particular, this includes extending the current framework of criminal law, and the possibility of ordering measures designed to eliminate organisational shortcomings in delinquent companies.
- That Switzerland avoid granting right of residence or establishment to politically exposed persons and their relatives when there are concrete indications that their assets are derived from corruption.

Text of recommendation 9(c):

⁶⁸ See: <http://ge.ch/justice/licences-minieres-en-guinee-beny-steinmetz-renvoye-en-jugement>

9. Regarding sanctions, the Working Group recommends that Switzerland:

(c) use the full range of criminal penalties applicable to natural persons under the law including deprivation of liberty where appropriate [Convention Article 3(1); 2009 Recommendation III(ii) and V].

Action taken as of the date of the follow-up report to implement this recommendation:

Reference is made to the response to recommendation 9(b) above.

Text of recommendation 9(d):

9. Regarding sanctions, the Working Group recommends that Switzerland:

(d) use factors such as solicitation, the alleged necessity of the corrupt payment or sincere remorse in accordance with the standards of the Convention and the 2009 Recommendation [Convention Articles 1 and 3(1); 2009 Recommendation III(ii) and V].

Action taken as of the date of the follow-up report to implement this recommendation:

The summary punishment order under which a company was sentenced to a symbolic fine of one Swiss franc and the confiscation of CHF 35 million is now final and binding. It was discussed at length in the Phase 4 evaluation. It is this case that encouraged the OAG to develop the idea of a legal amendment to create a more institutionalised framework for this type of case.

In the decisions issued by the OAG since the Phase 4 evaluation, there have been no instances of cases resulting in a reduced sentence as a result of solicitation or a situation that could be considered akin to necessitous.

As was mentioned in item 9(b) above, in the context of the Gunvor case, the OAG used a simplified procedure to bring to court the case of a natural person whose collaboration in the proceedings was exemplary. An 18-month sentence with a three-year probation period was imposed. The facts were deemed serious but the behaviour of the accused and in particular his active involvement in the criminal proceedings and establishing the facts (leading to professional ostracism) incited the court to reduce the sentence.



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Text of recommendation 9(e):

9. Regarding sanctions, the Working Group recommends that Switzerland:

(e) consider making a broader range of additional sanctions available to the relevant authorities in respect of legal persons, such as those mentioned as examples in the Commentary on Article 3(4) of the Convention, in order to ensure effective deterrence [Convention Article 3(4); 2009 Recommendation III(ii)].

Action taken as of the date of the follow-up report to implement this recommendation:

The revised Federal Law on Public Procurement (LMP) and the Ordinance relating thereto have been adopted by the Parliament and will enter into force on 1 January 2021. Inter alia, they govern cases of the exclusion of proceedings and the revocation of the award of contract, especially in the event of

infringements of the anti-bribery provisions. For more details, see the responses to recommendations 17(a) and 17(b) below.

Text of recommendation 9(f):

9. Regarding sanctions, the Working Group recommends that Switzerland:

(f) adopt the bill currently being drafted with a view to clarifying the tax treatment of criminal sanctions and clarifying by all appropriate means the tax treatment applicable to other non-criminal financial measures such as confiscation and other forms of claim or compensation [Convention Article 3(1); 2009 Recommendation III(ii)].

Action taken as of the date of the follow-up report to implement this recommendation:

Parliament started discussions on this legislative revision in 2017. The Federal Chambers approved the law on 19 June 2020⁶⁹. The deadline for an optional referendum, which was not used, expired on 8 October 2020. The Federal Council will very shortly set the date for the entry into force of the law (probably on 1 January 2021).

Text of recommendation 9(g):

9. Regarding sanctions, the Working Group recommends that Switzerland:

(g) take account, when determining sanctions for foreign bribery, of the tax treatment applicable to measures such as confiscation and equivalent claims, given that the deductibility of such measures is likely to undermine their impact, especially in terms of their dissuasive effect [Convention Article 3(1); 2009 Recommendation III(ii)].

Action taken as of the date of the follow-up report to implement this recommendation:

The OAG, and the **cantonal** Offices of the Attorneys General, based on the law in force, have the opportunity to inform tax administrations of cases in which there is a likelihood that corrupt payments were made. The tax administrations may use this information to check if the said amounts were deducted from taxable profits and therefore gave rise to a tax deduction not allowed under tax law, which makes it possible, where appropriate, to initiate proceedings for tax evasion for the periods in question.

Under the case law of the FT, criminal finances and monetary sanctions imposed on legal persons are generally considered to be non-business expenses and as such are not tax deductible. In accordance with Art. 58, para. 1 b of the Federal Law on direct taxes (LFID)⁷⁰, provisions and depreciations on these expenses must be added to the net taxable profit as it is recorded in the income statement. However, according to the rulings of the highest courts, sanctions for profit absorption are related to economic activity and are therefore tax deductible, provided that they are not part of criminal prosecutions⁷¹.

⁶⁹ <https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaef?AffairId=20160076>

⁷⁰ <https://www.admin.ch/opc/fr/classified-compilation/19900329/index.html>

⁷¹ cf. the judgment of the Federal Tribunal 2C_91612014 dated 26 September 2016 E. 7.8, published in ATF 143 II 8; see also Marcel Alexander Niggli & Louis Frédéric Muskens, Bussen und Steuern: Warum Steuerrecht nicht moralisch sein soll, Kommentar zu BGE 143118 [BGer 2C_91612014 and 2C_91712014]; as well as a criticism of the moralisation of tax law in: ContraLegem 2018 1, p. g-28).

This case law was then confirmed by the FT which considers that insofar as it is only the financial benefit obtained in relation to a criminal offence that is taken, confiscation is not repressive but is first and foremost characterised as a material form of compensation. Consequently, unlike fines imposed on a taxpayer, nothing prevents the tax deductibility of the corresponding amount in accordance with the decisions of the highest courts (cf. FT decision FT 2C_10212018 of 15 November 2018 E. 5.5.1).

It is possible to wonder whether it can be concluded – within the meaning of the OECD recommendation – and taking into consideration the current legal situation, that a criminal court can take into consideration the possible aforementioned future tax deduction in its decision relative to a request for confiscation or compensation. The "dissuasive effect" mentioned in the recommendation should not in any case be decisive in the event of measures such as confiscation or in establishing a request for compensation as, according to the doctrine and case law, these measures are equated with social disapproval⁷². Ultimately, the decision lies in the hands of the criminal jurisdiction specifically addressing the issue. Each of these courts carries out its judicial activity independently (and therefore also with regard to the issue addressed above) and is only bound by the law, as stipulated in the Federal Constitution of the Swiss Confederation (Article 191c). A final clarification at the national level will have to be provided by the FT if so required.

Text of recommendation 10(a):

10. Regarding sanctions imposed by the OAG, the Working Group recommends that the OAG:

(a) conduct a systematic analysis of Swiss case law on the application of mitigating factors, specifically those relating to solicitation and the alleged necessity of the corrupt payment [Convention Article 3(1); 2009 Recommendation III(ii) and V].

Action taken as of the date of the follow-up report to implement this recommendation:

Systematically, the OAG carries out research of relevant case law for each case it handles. To this end, it has made available to its prosecutors several IT tools designed for case-law that enable them to carry out research using key words. These are FT and FCC sites, the Swisslex platform as well as the EKARTO map library. The OAG's division specialised in prosecuting international economic crime (WIKRI) has also decided to initiate an internal comparative analysis of sentences pronounced in recent years in international economic crime.

Text of recommendation 10(b):

10. Regarding sanctions imposed by the OAG, the Working Group recommends that the OAG:

(b) identify from its guidelines for criminal policy on administering sanctions that are consistent with the Convention and the 2009 Recommendation [Convention Article 3(1); 2009 Recommendation III(ii) and V].

Action taken as of the date of the follow-up report to implement this recommendation:

Each case handled by the OAG is subject to a review by the hierarchy before any decision is made. Insofar as the criteria for determining the sentence are listed in the CC, and insofar as the sentence must be individualised, the creation of guidelines would be illegal. In addition, such guidelines could under

⁷² See also Florian Baumann in: Marcel Alexander Niggli & Hans Wyprächtiger [eds.], Basler Kommentar CC, 4. Edition 2019, n° 7 on Art. 70/71 CC

no circumstances bind the **cantonal** Offices of the Attorneys General and the courts, given their independence.

Reference should be made to the judgments and summary punishment orders issued following the Phase 4 evaluation of Switzerland (presented above) which demonstrate the application of the OECD recommendations regarding the application of sufficiently dissuasive sanctions in foreign bribery cases. This indicates that effective, proportionate and dissuasive sentences were handed down. In addition, it should be noted that the OAG has for the past several years clearly expressed that Art. 53 CC is inapplicable to foreign bribery.

Text of recommendation 11(a):

11. Regarding asset seizures and confiscation, the Working Group recommends that Switzerland:

(a) pursue its efforts to ensure that such measures in foreign bribery cases are publicised and transparent, at federal and cantonal level [Convention Article 3(3); 2009 Recommendation III(i) and Phase 3 Recommendation 5].

Action taken as of the date of the follow-up report to implement this recommendation:

Reference is made to the response made to Recommendation 7b.

Text of recommendation 11(b):

11. Regarding asset seizures and confiscation, the Working Group recommends that Switzerland:

(b) collect more detailed statistics on assets seized, confiscated and returned as part of mutual assistance in cases of foreign bribery [Convention Article 3(3); 2009 Recommendation III(i) and Phase 3 Recommendation 5].

Action taken as of the date of the follow-up report to implement this recommendation:

On 30 June 2019 (data from the 31 December 2019 is not yet available), the OAG had seized total assets amounting to an estimated CHF 6 billion, from all combined cases.

Petrobras complex:

In the framework of the complex of cases related to Petrobras, in October 2019 the OAG still had under seizure assets amounting to over CHF 620 million. To date, over CHF 400 million has been returned to the Brazilian authorities.⁷³ Moreover, 31 procedures for mutual legal assistance have been completed and 23 are still ongoing. In the course of these procedures, assets in excess of CHF 155 million have been seized for Brazil, and around CHF 20 million has been seized for other countries in South America.

In over ten decisions handed down within the framework of this complex, the OAG has imposed total confiscations in excess of CHF 40 million.

⁷³ See notably the OAG's press release dated 22 October 2019 at:

<https://www.bundesanwaltschaft.ch/mpc/en/home/medien/archiv-medienmitteilungen/news-seite.msg-id-76765.html>

For example, in 2015, the OAG launched proceedings against a natural person for bribery of foreign public officials and aggravated money laundering. It closed the case in February 2019 after observing that the accused had already been sentenced for these acts to an eight-year prison sentence in Brazil, and a compensatory claim of BRL 70 000 000.-, after reaching an agreement with the prosecuting authority. In this same order, the OAG imposed a USD 9 980 000.- compensatory claim against a third party, in application of Articles 70bis and 71 CC. An appeal against this decision was filed with the Appellate Division of the FCC. In a decision dated 18 February 2020, the Court dismissed the appeal (BB.2019.36-37, BP.2019.26-27). The specificity of this case lies in the fact that the compensatory claim did not directly concern the proceeds of corruption but the fees received by the accused who acted as an intermediary for transferring sums involved in corruption between the bribe-giver and the bribe-takers, and for negotiating bribes.

In addition, confiscations were imposed in several cases.

Complex of cases linked to Uzbekistan:

Within the framework of the complex of cases related to Uzbekistan, in May 2018, the OAG issued several orders in which it imposed the confiscation of an amount totalling CHF 685 million. Appeals were subsequently filed. To date, only one of the decisions, ordering the confiscation of an amount totalling CHF 130 million, is in force. Upon a decision of the Federal Council, this amount should be returned in its entirety to Uzbekistan, in derogation from the usual rules provided for under Federal Law on the Sharing of Confiscated Assets (LVPC)⁷⁴. The other appeals are still pending before the FCC.

Confiscation ordered of an inheritance:

In 2011, the OAG launched proceedings against a public official from Bahrein for money laundering. He was alleged to have received USD 3 million within the framework of a bribery scheme. The reason preventing the OAG from bringing charges of passive bribery of foreign public officials was the principle of non-retroactivity of laws, as the payment was made prior to the entry into law of the provision punishing the said offence. In 2016, respectively in 2017, the OAG closed the case following the death of the accused and issued a compensatory claim against his successors amounting to assets of around USD 2.4 million, corresponding to the amount available in banking networks in Switzerland. An appeal against the decision was filed with the Federal Criminal Court and then the Federal Tribunal (ATF dated 22 March 2019 6B_256/2019), and was rejected by both courts. The decision is now final and binding.



Gunvor: an amount slightly below CHF 90 million

The OAG considers that it has established an initial good practice for calculating the size of a compensatory claim, by taking into consideration the net profits generated by the company in the incriminated markets, by refusing to deduct fixed indirect costs (as the incriminated markets should not absorb expenses which should have been incurred in any case), and by charging the company compound interest taking into account its financing cost. The methodology of this best practice will be developed further, notably by systematically using the weighted average cost of capital (WACC) as a reference for calculating the compound interest.

SV.15.0770: CHF 18 million in 2019

⁷⁴ <https://www.admin.ch/opc/fr/classified-compilation/20011886/index.html>

The banknotes case: CHF 35 millions

On 23 March 2017, the OAG sentenced a legal person to a symbolic fine of one Swiss franc, which reflected its self-reporting and active cooperation in revealing the facts relating to foreign bribery. In addition, it imposed a compensatory claim of CHF 30 million. This order was unable to enter into force owing to the various appeals filed by natural persons. In a Federal Tribunal judgment dated 7 December 2018, the right of appeal of these individuals was definitively rejected, and the summary punishment order therefore entered into force.



The OAG's enforcement service is responsible for the recovery of confiscated assets and equivalent claims, along with their expenses. After recovery, the confiscated assets and compensatory claims made available to the Federal Office of Justice, which takes responsibility for organising, as applicable, the sharing of assets at the international or national level, in application of the principles contained in the Federal Law on the Sharing of Confiscated Assets (LVPC).

Text of recommendation 12(a):

12. Regarding mutual legal assistance, the Working Group recommends that:

(a) Switzerland urgently adopt the reform of the IMAC that is underway to formalise proactive MLA and; in this context, review the conditions governing access to the MLA request and conditions governing appeals by interested persons, in order to create the conditions for more timely and effective MLA [Convention, Article 9(1)]

Action taken as of the date of the follow-up report to implement this recommendation:

On 14 September 2018, the Federal Council submitted to Parliament a bill designed to implement the Council of Europe Convention on the Prevention of Terrorism and its additional protocol. In this context, the Federal Council proposed that Parliament strengthen some provisions of the Federal Law on International Mutual Assistance in Criminal Matters (IMAC)⁷⁵.

The objective is to simplify and speed up mutual legal assistance, notably by facilitating the creation of joint investigation teams and the advance transmission of information and evidence. According to the Federal Council: "spontaneous transmission, be it on request or spontaneously, will help significantly improve the effectiveness of investigations that must remain secret for a certain period of time"⁷⁶. The introduction of joint investigation teams may be required as a result of the complexity, difficulty, and cross-border nature of the case in question, and the need for joint intervention by several States⁷⁷.

The Law providing for the modification of the IMAC was adopted by Parliament on 25 September 2020. The final text of Art. 80dbis IMAC governing proactive MLA has the following content:

Art. 80dbis Advance transmission of information and means of proof

1 Before issuing a decision to close a case, the competent federal or cantonal authority may exceptionally decide to transmit information or evidence gathered in advance: a. if foreign investigations into organised crime or terrorism would be excessively difficult without this measure of

⁷⁵ <https://www.admin.ch/opc/en/classified-compilation/19810037/index.html>

⁷⁶ See Federal Council Dispatch dated 14.09.2018, FF 2018 6469, p. 6530.

⁷⁷ Federal Council Dispatch dated 14 September 2018, p. 6532.

mutual assistance, in particular because of the risk of collusion, or because the confidentiality of the proceedings must be preserved, or b. in order to prevent a serious and imminent danger, in particular the commission of a terrorist act.

2 The information or evidence concerned must relate to the prevention or prosecution of extraditable offences.

3 Advance transmission may take place spontaneously or on request. If it takes place spontaneously, the competent federal or cantonal authority shall limit itself to communicating the non-personal data necessary for the assessment of the situation until it has received the guarantees provided for in paragraph 4.

4 Prior to advance transmission, the requesting authority must have given a prior undertaking:

a. to use the information or evidence only for investigative purposes and under no circumstances to request, justify or pronounce a final decision;

b. to inform the competent federal or cantonal authority, as soon as the foreign proceedings permit, of the fact that the advance transmission may be brought to the attention of the person concerned, in accordance with Article 80m, so that he or she can take a position before the final decision is taken;

c. to withdraw the information or evidence provided in advance from the file of the foreign proceedings, if assistance is refused.

5 Information to the person concerned shall be deferred.

6 Prior to any early transmission, the incidental decision referred to in paragraph 1 shall be notified immediately to the Federal Office. It may not be appealed separately.

The referendum deadline expires on 14 January 2021, so that the provision should probably enter into force during the first semester of 2021.

In Chapter C. International Dimension of the Federal Council's Anti-corruption Strategy, objective 2 concerns police and judicial co-operation. Regarding mutual legal assistance, the following measures are foreseen:

- In the event of corruption, the Confederation encourages the spontaneous transmission of information and authorises the creation of joint investigation bodies, including with non-European countries.
- Switzerland offers technical support as required to those States that request it.

Text of recommendation 12(b):

12. Regarding mutual legal assistance, the Working Group recommends that:

(b) the FOJ collect statistics on rejected MLA requests concerning bribery of foreign public officials [Convention, Article 9(1)].

Action taken as of the date of the follow-up report to implement this recommendation:

During the period from 2017-2019: the OAG opened 97 MLA procedures related to foreign bribery (Art. 322septies CC). None of these MLA procedures were rejected.

Text of recommendation 12(c):

12. Regarding mutual legal assistance, the Working Group recommends that:

(c) the Swiss authorities collect separate statistics on MLA requests concerning bribery of a foreign public official and money laundering predicated on foreign bribery that it has received, processed or

rejected and invite the cantons to provide the same information to the central authority [Convention, Article 9(1) and Phase 3 Recommendation 5].

Action taken as of the date of the follow-up report to implement this recommendation:

As indicated in the response to recommendation 12(b) above, 97 MLA requests concerning foreign bribery were received between 2017-2019 and none were rejected.

At cantonal level, almost none of the cantonal Offices of the Attorneys General keep statistics on MLA requests concerning international bribery or other matters. In some cases, this is because they never receive requests of this nature, and in other cases, they consider that compiling the said statistics would generate an additional workload disproportionate with the intended benefits. The canton of ZH does keep statistics, and for the period 2017-2019, it reported 8 MLA requests concerning foreign bribery, none of which were rejected.

Recommendations for corporate liability

Text of recommendation 13:

13. Regarding corporate liability, the Working Group recommends that Switzerland clarify the concept of “*defective organisation*” whereby a legal person may be held liable [Convention, Article 2; 2009 Recommendation Annex I.B.; Phase 3 Recommendation 1].

Action taken as of the date of the follow-up report to implement this recommendation:

Within the OAG, the following research has been carried out by the Working Group responsible for unifying practice in proceedings related to corporate criminal liability:

Insofar as a clarification of the concept of “defective organisation” whereby a legal person may be held liable (to quote the OECD’s recommendation) is required – which is strongly and formally contested – it would first and foremost fall under the responsibility of the legislator, and then the judge (case law). The OAG, as the criminal prosecution authority, cannot define this concept. Besides, it does not have the legal power to do so. However, the OAG can explain its practices and the way in which it applies this “concept” to cases under its responsibility, with the specification that cantonal practices may, as applicable, differ. The following lines present the OAG’s practice relative to the concept of defective organisation.

As a preliminary remark, it should be remembered that all companies are under an obligation – be it civil, regulatory and, generally speaking, practical– to manage the risks generated by their business activities and to put in place a risk management system to this effect.

In this context, Art 102 CC is the consequence – in criminal matters – of defective risk management by the company resulting in the commission of an offence therein; Art. 102 CC is not at the origin of the company’s obligation to perform a risk assessment but rather strengthens the obligation by attaching thereto a specific criminal punishment.

According to Art. 102bis CC, a company is punished (independently of the punishability of natural persons) *provided the undertaking has failed to take all the reasonable organisational measures that are required in order to prevent such an offence.*

The defective organisation whereby corporate criminal liability may be established is therefore related to the measures taken (or not) by the company at the time of the acts under investigation, to prevent an offence from being committed within it. Reasonable organisational measures that are required refer to,

under the doctrine, all the measures necessary to prevent the offence from occurring. Nevertheless, the said measures must all appear reasonable, in that they must be adequate and proportionate for the risks generated by the company's own business activities.

Ultimately, it is the various risks related to the company's size and activities that will define, based on normal practice in the matter, the reasonable organisational measures that are required by the company.

Specifically, companies are expected to carry out a regular assessment of the risk of corruption to which they may find themselves exposed as a result of their activities, notably taking into consideration the type of activities undertaken, the context thereof (in particular country risk), and the size of the company.

This approach to defective organisation based on the risks to which companies are exposed complies with best practices, both in Switzerland and internationally, arising in particular from:

- The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 21 November 1997 and its associated documents, in particular the Good Practice Guidance on Internal Controls, Ethics, and Compliance of 18 February 2010;
- The advice issued to Swiss companies active abroad in the brochure "Preventing corruption" published by the State Secretariat for Economic Affairs (SECO), 3rd edition dated 2017 ;
- The 2011 edition of the ICC Rules for Combating Corruption;
- Standard ISO 37001 Anti-Bribery Management Systems – Requirements and guidance for implementing an anti-bribery management system, or similar principles in place prior to the introduction of this ISO;
- Standards and norms related to the sector in question, provided that they were in existence at the time of the alleged acts, or implemented soon afterwards.

The approach presented above, launched by the OAG as of 2011 (see in particular the Alstom Network Schweiz case), was applied recently within the framework of the OAG summary punishment order against the commodity trading company Gunvor dated 14 October 2019.

As stated in the aforementioned order, the purpose of the approach is to lead Swiss companies to take, inter alia, the following measures to prevent the offence of bribery from occurring within their organisation:

- A corruption risk analysis within the company, based on the type of activities undertaken, the context thereof (in particular country risk), and the size of the company;
- Anti-corruption measures, in particular an appropriate compliance programme;
- Anti-corruption policies, code of conduct, internal guidelines and processes;
- Awareness-raising and in-house training on combating corruption;
- Internal monitoring of compliance with guidelines and anti-corruption procedures, and disciplinary action related thereto;
- A process of constant evaluation and upgrading of the anti-corruption system;
- A whistleblowing procedure.

Text of recommendation 14:

14. Regarding awareness-raising among companies on the issues and prevention of bribery of foreign public officials, the Working Group recommends that Switzerland intensify its efforts to raise awareness among SMEs, encouraging them to take internal measures to prevent and detect foreign bribery [2009 Recommendation X.C. and Annex II].

Action taken as of the date of the follow-up report to implement this recommendation:

Since the Phase 4 evaluation, the State Secretariat for Economic Affairs (SECO) has pursued and stepped up its efforts to raise awareness among companies on the issues and prevention of bribery of foreign public officials. In 2017, it organised together with the NGO Transparency International Schweiz awareness-raising sessions for export companies, in particular SMEs, on the topic of bribery of foreign public officials, and encouraged them to adopt compliance standards. These tailored sessions continued into 2018. In addition, the SECO increased its involvement in conferences organised by other private, semi-private and public institutions, at which it presented the OECD Convention, its implications for Swiss companies active abroad, and how to comply with it. The number of events of this nature has increased, from three in 2017 to seven in 2018 and eight in 2019. Each of them was attended by 10 to 100 companies, mainly SMEs. Below is a description of the awareness-raising activities, some of which were also attended by trainee Swiss diplomats.



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Other recommendations to improve implementation of the Convention

Text of recommendation 15(a):

15. Regarding accounting standards, the Working Group recommends that Switzerland:

(a) clarify that external auditors who find indications of suspected acts of foreign bribery are required to report these to management and, where appropriate, to the company's oversight bodies [2009 Recommendation X.B. (iii); Phase 3 Recommendation 7(a)].

Action taken as of the date of the follow-up report to implement this recommendation:

The obligation of the auditor in this situation is already sufficiently clear and well established. Specifically:

1. If the auditor finds, during an ordinary audit, that there have been *violation of the law*, the articles of association or the organisational regulations, it gives notice of this to the board of directors in writing (Art. 728c para. 1 Code of Obligations (CO) and CM 7 c Circular 1/2009 of the FAOA⁷⁸). An act of bribery is violation of the law (Art. 322septies CC), which thereby falls under the aforementioned Art. 728c para. 1 CO. The board of directors shall take all appropriate measures and, where applicable, report the facts to the prosecution services.
2. The auditor also informs the general assembly of any violations of the law or the articles of association, if said violations are serious or if the board of directors fails to respond appropriately on the basis of written notice given by the auditor (Art. 728c para. 2 CO).
3. In addition, if the board of directors prevents the auditor from addressing the general assembly, the auditor may convene one directly, without referring to the board of directors (Art. 699 para. 1 CO). The participants at the general assembly may then inform the criminal prosecution authorities at any time since they are under no obligation to respect the company's privacy.

⁷⁸ Circular 1/2009 concerning the detailed audit report for the board of directors. For a copy, see:

<https://www.rab-asr.ch/#/page/123?lang=en>

4. Where a fraud has been identified or the auditor has obtained information indicating that a fraud may have been committed, this information must be reported immediately by the auditor to the management of the audited company (Swiss Auditing Standards, NAS 240.40).
5. Where the auditor suspects non-compliance with relevant legislation and regulations, it must address this issue with the company's management and, where necessary, with the persons charged with the governance of the audited company (NAS 250.19). If the auditor suspects the involvement of the management or the persons charged with governance in the aforementioned non-compliance, it must inform the board of directors of its suspicions (NAS 250.24 s.).

In addition, the difference between an ordinary audit and a limited audit must be respected. This exists only in Switzerland. As a reminder, the ordinary audit is an audit in the full sense of the term that applies to the accounts of a company as defined in Art. 727 CO. This includes, for example, companies considered to be public interest entities (under Art. 2c of the Law on Audit Oversight [LSR; RS (Systematic Compendium of Swiss Federal Law) 221.302]). The purpose of this type of audit is to increase the level of confidence of the intended users of the financial statements. This objective is achieved when the auditor expresses in an audit report (Art. 728b para. 2 CO) the opinion that the accounts were prepared, in all material respects, in accordance with the applicable accounting regulations. In Switzerland, an audit of the accounts performed in compliance with Swiss Auditing Standards and the relevant rules of professional ethical conduct allows the auditor to formulate this audit opinion.⁷⁹

A limited audit is not an audit in the full sense of the term. The limited audit confines itself to a brief examination of whether there are any facts suggesting that the annual accounts and the proposal for the allocation of profits do not comply with the law and the articles of associations.⁸⁰ The limited audit cannot be used for public interest entities but only for companies that do not satisfy the conditions for an ordinary audit. In practice, this is the case for small companies that are often local and unlisted.

In an ordinary audit, the auditor issues a reasonable assurance in the form of a positive assurance. A limited audit only provides a limited assurance. That is why the auditor's report in a limited audit – unlike an ordinary audit – contains no recommendation to approve or reject, with or without qualification, the annual accounts⁸¹.

The only duty to notify the court provided for explicitly by law in the course of a limited audit is in the event that the company is obviously over-indebted (Art. 729c CO). Nevertheless, according to the doctrine and professional practice, and although it is not expressly provided for in the formulation of the law, the auditor is however also obliged to disclose in its audit report or to mention in a notice to the general assembly serious cases of infringements of the law that have an impact on the annual accounts, insofar as they have to be considered as part of the “results of the audit” under Art. 729b para. 1 CO⁸². In addition, comments on infringements of the law, even if they are items that do not fall under the scope of the audit, must be included in the audit report if they are (a) significant, (b) directly related to the annual accounts, and (c) were observed as a result of the audit performed (NCR⁸³ 8.3.2.1, p. 29).

⁷⁹ EXPERTsuisse, Swiss Manual of Auditing, Volume “Ordinary audit”, 2016 issue, p. 2.

⁸⁰ EXPERTsuisse, Swiss Manual of Auditing, Volume “limited audit”, 2014 issue, p. 2.

⁸¹ EXPERTsuisse, Swiss standard applicable to limited audit (NCR), 2015 issue, p. 7 s.

⁸² Tercier/Amstutz/Trigo Trindade, Commentaire Romand Code des obligations II, 2nd edition, Basel 2017, ad art. 729b al. 1, N 9 and ad art. 729c, N 2a; Renggli/Kissling/Camponovo/Feller/Honold, Die eingeschränkte Revision, 2nd edition, Mörschwil 2014, p. 187 et seq.

⁸³ EXPERTsuisse, Swiss standard applicable to limited audit (NCR), 2015 issue.

In the event that the company is not obviously over-indebted or that the violation of the law observed in the course of the audit has no impact on the annual accounts, the auditor must however consider reporting the violation to the company under audit. This duty of information stems from the general principle of due diligence and faithful performance by auditors with regard to the company being audited (Art. 398 para. 2 CO and Art. 2 para. 1 CC⁸⁴). In other words, an auditor cannot ignore concrete indications of violations of the law as it is in the interest of the audited company to be informed thereof.

It should also be remembered that the FAOA has no investigative jurisdiction with regard to limited audits. The FAOA directly monitors auditing firms performing ordinary audits on public interest entities.

Text of recommendation 15(b):

15. Regarding accounting standards, the Working Group recommends that Switzerland:

(b) consider requiring external auditors to report suspected acts of bribery of foreign public officials to competent authorities such as law enforcement authorities [2009 Recommendation X.B.(v); Phase 3 Recommendation 7(b)].

Action taken as of the date of the follow-up report to implement this recommendation:

Anti-bribery measures are in principle sufficiently developed in terms of the existing obligations to report to the management and general assembly of the audited company (see also the Phase 4 follow-up questionnaire dated 27 February 2017).

Also, “international standards” do not directly validate the principle of the reporting of irregularities by auditors and accountants to competent authorities. Firstly, the standard referred to (CoE 360.6)⁸⁵ explicitly reserves domestic law, which takes precedence (CoE 360.25 A1): “*Disclosure of the matter to an appropriate authority would be precluded if doing so would be contrary to law or regulation*”. Secondly, although a few countries have enacted laws requiring external auditors to report directly to the criminal prosecuting authorities on the bribery of foreign public officials, this is by far not the majority of countries in the world. It is therefore not yet possible to speak of an international standard.

An auditing firm acting as a consultant (and not an auditor) for a company and as such involved in an act of money laundering as co-offender, accomplice or instigator, shall be punishable (Art. 305^{bis} CC).

As a consequence, a distinction must be noted between the legal situation of the financial and non-financial sectors: audit companies auditing institutions subject to FINMA have a reporting obligation to FINMA pursuant to Art. 27 of the Financial Market Supervision Act (FINMASA). If the audit company discovers supervisory violations or other irregularities, it first invites the supervised entity to regularise its situation within an appropriate period of time. If this deadline is not met, it will inform FINMA. If the audit company discovers serious breaches of supervisory law (e.g. AMLA) or serious irregularities, the audit company shall immediately refer the matter to FINMA (Art. 27 Para. 2 FINMASA). It should also be noted that bribery is a predicate offence to money laundering (Art. 305^{bis} SCC). In this sense, all measures to prevent money laundering indirectly lead to the prevention of corruption.

De lege ferenda, an auditing firm acting as a consultant⁸⁶ (and not an auditor) for a company and suspecting, based on reasonable suspicions, an act of money laundering (also in relation to the act of

⁸⁴ Civil Code; RS (Systematic Compendium of Swiss Federal Law) 210.

⁸⁵ International Ethics Standards Board for Accountants (IESBA), International Code of Ethics for Professional Accountants (CoE), Responding to Non-Compliance with Laws and Regulations (NOCLAR), New York, 2018.

⁸⁶ Under Art. 2 para. 1c Draft money laundering bill, P-AMLA dated 26 June 2019.

corruption as a predicate offence), shall immediately inform the Money Laundering Reporting Office (MROS) thereof (Art. 9 para. 1^{ter} P-AMLA in relation with Art. 305^{bis} CC).

Text of recommendation 15(c):

15. Regarding accounting standards, the Working Group recommends that Switzerland:

(c) organise training and awareness-raising activities for external auditors, to promote their role in the identification and reporting of foreign bribery [2009 Recommendation X.B.].

Action taken as of the date of the follow-up report to implement this recommendation:

Between 2018 and 2019, the FAOA carried out the following training and awareness-raising activities:⁸⁷

Date and Place	Participants	Topic(s)
4 December 2019, Lausanne	EXPERTsuisse	- Fraud with case studies - Occupational fraud risk
29 November 2019, Olten	EXPERTsuisse	- Fraud with case studies
6 November 2019, Zurich	EXPERTsuisse	- Fraud with case studies
18 January 2019, Berne	Swiss Federal Audit Office	- Results of the <i>Association of Certified Fraud Examiners (ACFE)</i> survey: Report to the Nations, 2018 Global Study on Occupational Fraud and Abuse - Types of Fraud and Case Studies
9 January 2019, Berne	Swiss Federal Audit Office	- Results of the <i>Association of Certified Fraud Examiners (ACFE)</i> survey: Report to the Nations, 2018 Global Study on Occupational Fraud and Abuse - Types of Fraud and Case Studies
8 January 2019, Berne	Swiss Federal Audit Office	- Results of the ACFE survey: <i>Report to the Nations, 2018 Global Study on Occupational Fraud and Abuse</i> - Types of Fraud and Case Studies
5 December 2018, Lausanne	EXPERTsuisse	- Selected issues on fraud - Results of the ACFE survey: <i>Report to the Nations, 2018 Global Study on Occupational Fraud and Abuse</i>

In 2020, the FAOA plans to carry out the following training and awareness-raising activities:⁸⁸

Place	Participants	Topic(s)
Lausanne	EXPERTsuisse	- Issues in Implementing the Auditor's Requirements Relating to Fraudulent Acts

⁸⁷ More details are available on request

⁸⁸ More details are available on request

Olten	EXPERTsuisse	- Issues in Implementing the Auditor's Requirements Relating to Fraudulent Acts
Zurich	EXPERTsuisse	- Issues in Implementing the Auditor's Requirements Relating to Fraudulent Acts
Lugano	EXPERTsuisse	- Issues in Implementing the Auditor's Requirements Relating to Fraudulent Acts

Since 2013, professional associations in Switzerland have trained over 700 auditors on the topic of economic crime. Listed below are the seminars and events organised for external auditors, among others, across Switzerland since 2017 on themes related to combating fraud and economic crime.⁸⁹

Date and Place	Organiser	Topic(s)
27 November 2019, Lausanne	EXPERTsuisse	- Raising awareness of cyber security in everyday life, including how to detect fraud attempts and real-life case studies
7 November 2019, Zurich	EXPERTsuisse	- Corporate crises and crisis management in SMEs - Introduction, including responsibility of the board of directors and other bodies (auditors) and the consequences thereof in crises
31 October 2019, Zurich	EXPERTsuisse	- Fraud risks within the scope of the audit, including the duty of the auditors to report any infringements of the law, fraud in the context of Non-Compliance with Laws and Regulations (NOCLAR)
24 October 2019, Zurich	EXPERTsuisse	- Fraud risks within the scope of the audit, including the duty of the auditors to report any infringements of the law, fraud in the context of Non-Compliance with Laws and Regulations (NOCLAR)
1 October 2019, Lausanne	EXPERTsuisse	- Cyber Security: From Threat to Response – Better understand, address and act against the cyber-threats surrounding us
7 June 2019, Fribourg	EXPERTsuisse	- Economic criminal law day
3 June 2019, Zurich	EXPERTsuisse	- White-collar crime in SMEs, including awareness-raising; prevention - detection - reaction; non-compliance; capacity to act in the event of non-compliance, economic crime and cybercrime

⁸⁹ More details are available on request

22 May 2019, Lausanne	EXPERTsuisse	- Raising awareness of cyber security in everyday life, including how to detect fraud attempts and real-life case studies
5 December 2018, Zurich	veb.ch	- Accounting fraud (including fraud, infringements of the law and combating corruption)
15 November 2018, Zurich	EXPERTsuisse	- Corporate crises and crisis management in SMEs - Introduction, including responsibility of the board of directors and other bodies (auditors) and the consequences thereof in crises
2 October 2018, Lausanne	EXPERTsuisse	- Cyber Security: From Threat to Response – Better understand, address and act against the cyber-threats surrounding us
15 June 2018, Neuchâtel	EXPERTsuisse	- Economic criminal law day
14 June 2018, Zurich	EXPERTsuisse	- White-collar crime in SMEs, including awareness raising; prevention - detection - reaction; compliance; - The ability to act in the event of non-compliance, economic crime and cybercrime
14 June 2018, Chur	FIDUCIAIRE SUISSE, EXPERTsuisse and veb.ch	- Seminar: <i>Fraud Awareness</i> -combating fraud
2018-2019	FIDUCIAIRE SUISSE	- Criminal training relevant to the audit sector: <ul style="list-style-type: none"> • Roadshows by the Swiss institute for limited audits (ISCOR) • Seminars by units of FIDUCIAIRE SUISSE - As of 2019: seminars by the Swiss Forum of auditors and trustees
27.09.2017, Lausanne	EXPERTsuisse	- Cyber Security: From Threat to Response – Better understand, address and act against the cyber-threats surrounding us
Autumn 2017, Zurich	veb.ch	- Certificate course: Money laundering (incl. fraud, legal infringements and anti-corruption)
9 June 2017, Neuchâtel	EXPERTsuisse	- Economic criminal law day
17 May 2017, Zurich	EXPERTsuisse	- White-collar crime in SMEs, including awareness raising; prevention - detection - reaction; compliance; - The ability to act in the event of a serious case

03 May 2017, Zurich	EXPERTsuisse	- Corporate crises and crisis management in SMEs
25 January 2017, Zurich	EXPERTsuisse	- Detecting and fighting accounting fraud, including the mind-set & actions of "corrupt" accountants and checking accounting data (Excel, CSV, text) using Benford's law

The following seminars/events for auditors on the same theme are scheduled for 2020/2021:⁹⁰

Date and Place	Organiser	Topic(s)
19 May 2020, Lausanne	EXPERTsuisse	- Raising awareness of cyber security in everyday life, including how to detect fraud attempts and real-life case studies
11 May 2020, Zurich	EXPERTsuisse	- Fraud risks within the scope of the audit, including the duty of the auditors to report any infringements of the law, fraud in the context of Non-Compliance with Laws and Regulations (NOCLAR)
4 June 2020, Zurich	EXPERTsuisse	- White-collar crime in SMEs, including prevention - detection - reaction; effective sensitisation; ensuring the ability to act in the event of a serious case
25 June 2020, location TBD	EXPERTsuisse	- Introduction to cybersecurity for SMEs
27-29.07.2020, Zurich	vcb.ch	- Certificate course: ICS Risk Management Compliance (incl. fraud, legal infringements and anti-corruption)
Autumn 2020, Zurich	vcb.ch	- Certificate course: The limited audit (incl. fraud, legal infringements and anti-corruption)
22 October 2020, Zurich	EXPERTsuisse	- Fraud risks within the scope of the audit, including the duty of the auditors to report any infringements of the law, fraud in the context of Non-Compliance with Laws and Regulations (NOCLAR)
2-17 November 2020, Zurich	vcb.ch	- Certificate course: Corporate law (1/2 Day: Corporate criminal law for SMEs from the accountant's/trustee's perspective (including fraud, accounting fraud and bribery)

⁹⁰ More details are available on request

12 November 2020, Zurich	EXPERTsuisse	- Corporate crises and crisis management in SMEs - Introduction, including responsibility of the board of directors and other bodies (auditors) and the consequences thereof in crises
17 November 2020, Zurich	veb.ch	- - One-day seminar: The limited audit (incl. fraud, legal infringements and combating corruption)
19 November 2020, location TBD	EXPERTsuisse	- Introduction to cybersecurity for SMEs
25 November 2020, Lausanne	EXPERTsuisse	- Raising awareness of cyber security in everyday life, including how to detect fraud attempts and real-life case studies
27 November 2020, Zurich	EXPERTsuisse	- Risk management in SMEs
Q1 2021	www.veb.ch	- Certificate course: Board of directors www.veb.ch . Component: “Governance and Compliance”, incl. fraud, infringements of the law and combating corruption

In addition, professional associations have the resources necessary for raising the profession’s awareness on combating corruption and economic crime through basic training, advanced training and professional publications (including “Schweizer Handbuch der Wirtschaftsprüfung” (Swiss Audit Manual) and the academic review *Expert Focus*). The associations regularly make use of these resources, and have done so for years. Below is a selection of contributions published since 2017:

- Les incitations en matière de conformité anticorruption, Léonard Gerber/Fabian Teichmann, *Expert Focus*, issue of January-February 2020
- Risques de fraude dans le cadre de la révision des comptes annuels, Alexander Schuchter, *Expert Focus*, issue of September 2019
- Die Verantwortlichkeit in Banken für Meldungen bei Geldwäschereverdacht, Othmar Strasser, *Expert Focus*, edition of August 2019
- Bilanzfälschung, *Rechnungslegung nach Obligationenrecht*, *veb.ch Praxiskommentar*, 2. Auflage, Susanne Grau, 2019
- Bilanzfälschung (2. Teil), *Rechnungswesen & Controlling*, Stephan Glanz/Susanne Grau, March 2018
- Bilanzfälschung, *Rechnungswesen & Controlling*, Stephan Glanz/Susanne Grau, February 2018
- *Blockchain* et lutte contre le blanchiment d’argent, Pascal De Preux/Daniel Trajilovic, *Expert Focus*, issue of January-February 2018
- Indicateurs de fraude basés sur des données librement accessibles, Isabelle Augsburger-Bucheli, *Expert Focus*, issue of January-February 2018
- La criminalité économique négligée, Daniel Fink, *Expert Focus*, issue of January-February 2018
- L’exposition des ONG aux risques de fraude et de corruption, Jeremy Isnard/Olivier Beaudet-Labrecque, *Expert Focus*, issue of January-February 2018
- Handlungsfähigkeit im Ernstfall von Cyber-Kriminalität, Barbara Klett/Sonja Stirnimann, *Expert Focus*, issue of November 2017
- Ist Cyber (k)ein Risiko für die Abschlussprüfung? Anja Walter, *Expert Focus*, issue of November 2017

- L'employé, la PME et le cybercriminel, Sébastien Jaquier, *Expert Focus*, issue of November 2017
- Anomalie-Erkennung in der Wirtschaftsprüfung mithilfe von Machine Learning, Christian B. Westermann/Christian Spindler, *Expert Focus*, issue of November 2017
- Bilanzkosmetik auf Abwegen, Susanne Grau, posted on 21 February 2019 on the blog of www.veb.ch

Text of recommendation 16(a):

16. Regarding the non-deductibility of bribes paid to foreign public officials, the Working Group recommends that Switzerland:

(a) continue its efforts to ensure that cantonal tax officials are adequately trained in this matter [2009 Recommendation VIII(i) and 2009 Recommendation on Tax Measures].

Action taken as of the date of the follow-up report to implement this recommendation:

The training and presentations referred to in the responses to recommendations 3 and 5(c) above tackle the issue of corruption and include numerous examples and case studies. Accordingly, the tax officials are not only made aware, they are also trained to be better equipped to detect possible corrupt payments.

Text of recommendation 16(b):

16. Regarding the non-deductibility of bribes paid to foreign public officials, the Working Group recommends that Switzerland:

(b) be more proactive and more energetic in enforcing the non-deductibility of bribes in cases of foreign bribery, inter alia by systematically re-examining the tax position of Swiss companies that are convicted of foreign bribery [2009 Recommendation VIII(i) and 2009 Recommendation on Tax Measures].

Action taken as of the date of the follow-up report to implement this recommendation:

It goes without saying that tax officials are not called on, due to a lack of legal prerogative and resources, to carry out similar investigations to those performed by the criminal authority in the course of their audits and taxation. It is this legal framework which limits tax authorities' ability to detect and not any alleged lack of proactivity. In the absence of a justified suspicion, no report is made to Office of the Attorney General, even if the tax deduction of the payments referred to is refused. That said, the ties and communication channels between the OAG and the FTA (see the responses to recommendations 9(g) above and 16(c) below) ensure that the tax administration is informed of judgments related to bribery, and in particular foreign bribery. Based on this, the tax authorities are able to take into consideration the sentences and other punishments when (re) examining the tax position of the Swiss companies concerned.

Text of recommendation 16(c):

16. Regarding the non-deductibility of bribes paid to foreign public officials, the Working Group recommends that Switzerland:

(c) introduce systems of information exchange so that tax authorities can be informed of convictions by the Swiss courts and Offices of the Attorneys General in cases of foreign bribery [2009 Recommendation VIII(i) and 2009 Recommendation on Tax Measures].

Action taken as of the date of the follow-up report to implement this recommendation:

The FTA's division of criminal cases and investigations (DAPE) and the OAG have established a single point of contact in order to facilitate exchanges of information between them. An annual meeting is organised to review cooperation between both agencies. If appropriate, regular additional meetings are also organised. Within the OAG, the Federal Attorney who is notably specialised in money laundering and the tax implications thereof, responds to queries from prosecutors and provides them with guidance in relation to the correct procedure for reporting a case to the tax authorities. Within the FTA, the contact points have managerial positions in the DAPE and are members of the CSI's inter-cantonal working group on criminal tax law. Instructions and technical answers on reporting can therefore be given and disseminated by these individuals.

Text of recommendation 17(a):

17. Regarding access to public advantages and official development assistance, the Working Group recommends that Switzerland:

(a) adopt legislation allowing the authorities to suspend companies convicted of foreign bribery from competing for public procurement contracts or other public advantages [2009 Recommendation XI(i); Phase 3 Recommendation 12(a)].

Action taken as of the date of the follow-up report to implement this recommendation:

On 21 June 2019, The National Council and the Council of States adopted the revised Federal Law on Public Procurement (LMP)⁹¹ and the WTO's revised Government Procurement Agreement (GPA). Combating corruption in public procurement was one of the main priorities in the revision of the GPA. The Federal Council subsequently adopted the revised Ordinance on Public Procurement (OMP)⁹² on 12 February 2020. The Law and the Ordinance are set to enter into force on 1 January 2021.

Bribery can take many forms. The decisive factor is the offering or acceptance of pecuniary benefits for which there is no legal basis. Two new provisions of the LMP take full account of the recommendation of the OECD Working Group:

Art. 44 LMP regulates cases of exclusion from the procedure and revocation of the invitation to tender. The contracting authority may exclude a tenderer from the award procedure, strike it from a list or revoke an award if it is established that the tenderer, one of its organs, a third party that it uses or an organ thereof has infringed anti-bribery provisions, which are listed in part in the CC (Art. 322ter et sq CC) but also include the provisions of the Federal Law Against Unfair Competition (LCD) and other civil law provisions (such as contract clauses and terms and conditions) designed to combat corruption.

Under Art. 45 LMP, entitled "sanctions", a bidder involved in a case of corruption may be excluded from future public procurement. The corruption must be proven; mere suspicion is not enough. This does not mean, however, that the tenderer or the tenderer's body in question has to have been convicted with binding effect. Strong presumptions, based for example on the opening of an investigation by the criminal investigation authorities, are sufficient. When imposing a sanction, the contracting authority must take into account the principle of proportionality and the seriousness of the offence. In the event of a serious corruption offence, the contracting authority may, without prior warning, exclude, for a maximum period of five years, the offending tenderers or sub-contractors from future contracts of all contracting authorities subject to the Law. All tenderers punished for this offence shall be registered on

⁹¹ <https://www.admin.ch/opc/fr/federal-gazette/2019/4329.pdf>

⁹² <https://www.news.admin.ch/newsd/message/attachments/60198.pdf>

a confidential list (see Art. 25 OMP entitled “exclusion and sanctions”). If the offence is not deemed serious, a warning may be issued.

Moreover, the implementing legislation of LMP also provides that the authorities responsible for carrying out public procurement may ask tenderers to provide evidence of codes of conduct aimed at preventing corruption (“anti-bribery statement”, see annex 1 1d OMP). The Ordinance also contains additional relevant provisions, such as measures against conflict of interest and corruption (see Art. 3 OMP).

At the same time as the revised LMP, the **cantons** provided for identical regulations during the revision of their legal basis, the Inter-cantonal agreement on public procurement (AIMP)⁹³.

Text of recommendation 17(b):

17. Regarding access to public advantages and official development assistance, the Working Group recommends that Switzerland:

(b) amend its legislation to ensure (i) that blacklists of national institutions and multilateral financial institutions can serve as a possible basis for excluding bidders from contracts funded by official development assistance; and (ii) that persons bidding for contracts funded by ODA are required to declare that they have no convictions for bribery [2009 Recommendation XI(i) and Phase 3 Recommendation 12(a)].

Action taken as of the date of the follow-up report to implement this recommendation:

Switzerland’s international co-operation has various instruments for allocating public funds. When implementation partners are sought within the frame of mandates or for undertaking projects, the legislation governing public procurement is generally applied. When Switzerland co-finances (via financial assistance or contributions) projects from partners (e.g. other donor countries or international organisations), the legislation governing official development assistance applies.

Mandates (public procurement):

The National Council and the Council of States adopted on 21 June 2019 the adopted the revised Federal Law on Public Procurement (LMP) and the WTO’s revised Government Procurement Agreement (GPA). In application of the provisions of Art. 44 LMP, a tenderer or subcontractor may be excluded from a procurement procedure if it appears on an international financial institution’s sanctions list (see Art. 25quater OMP). Other examples of exclusion from the procedure and revocation of the invitation to tender are presented in the response to recommendation 17(a) above.

The implementing provisions also provide that the authorities responsible for carrying out public procurement may ask tenderers to provide evidence of rules of conduct aimed at preventing corruption (“anti-bribery statement”, see annex 1 1d OMP).

Accordingly, when awarding mandates for project implementation in the field of development co-operation, Switzerland systematically requests, by means of a specific “suitability criterion” for the prevention of irregularities, confirmation that the service provider:

- a) has not in the past five years been convicted in Switzerland or abroad for an offence relevant to the execution of the contract (including bribery);
- b) is not on a an international financial institution’s sanctions list;

⁹³ See in particular Articles 44 and 45 of the revised AIMP, accessible via the following link (French version): <https://www.dtap.ch/fr/dtap/concordats/aimp/aimp-2019/>

- c) has not behaved, within the framework of the invitation to tender, in such a way as to compromise or call into question the awarding of the contract under conditions of competitive neutrality and legal equality or the most economically advantageous execution of the contract.

All the selection criteria set by the contracting authority must be met by the tenderers. A tenderer who does not meet one of the selection criteria is not suitable to provide the service being tendered and is excluded from the procedure.

The definition of the aforementioned selection criteria are available below:



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Co-financing (financial aid or contributions):

It is left to the discretion of the authorities to decide which of a partner's projects they wish to support. The legislation (Law on Subsidies / Law on Development Assistance) does not contain any restrictions or obligations in this respect. Consequently, companies that have been convicted of bribery of foreign officials or are on the sanctions list of an international financial institution can be disregarded. In practice, this issue is already addressed accordingly. It is also possible to request an anti-bribery statement from partners.

PART II: ISSUES FOR FOLLOW-UP BY THE WORKING GROUP

Text of issue for follow-up:

18. The Working Group will follow up the issues below as case law and practice develop, in order to check:

- (a) prosecutions brought in Switzerland against whistleblowers who report suspected financial offences including, in particular, foreign bribery.

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

Criminal proceedings for infringement of Art. 273 CC were initiated against one of the persons who helped bring to light the 1MDB case. A criminal charge was filed with the OAG by the injured party for data theft and the reception of an amount totalling several million CHF by the accused for the sale of the said data. The accused disputes the facts. The case was investigated for both exculpatory and incriminatory evidence. It should be remembered that as is stands, the principle of the presumption of innocence applies to the accused.

Text of issue for follow-up:

18. The Working Group will follow up the issues below as case law and practice develop, in order to check:

- (b) Swiss law enforcement authorities' use of MLA requests to open investigations into foreign bribery in Switzerland.

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

Since 1 January 2017, no investigation into foreign bribery has been opened at the OAG as the result of an MLA request. This is explained by reversing the assumption made by the Working Group. In the example of the Petrobras's complex of cases, it can be seen that the OAG's criminal investigations were regularly opened on the basis of reports to the MROS, which themselves resulted from information in the media and from other public sources referring to ongoing criminal investigations in Brazil concerning the subsequent predicate offence of money laundering under investigation in Switzerland. Therefore, in the Petrobras complex, the OAG adopted the strategy of regularly sending spontaneous information to the competent authorities in Brazil, pursuant to Article 67a of IMAC, reporting the existence of relevant banking documents, in order to enable them to submit an MLA to the OAG. The Brazilian requests for mutual assistance received by the OAG were the outcome of this strategy.

Text of issue for follow-up:

18. The Working Group will follow up the issues below as case law and practice develop, in order to check:

- (c) efforts by Swiss authorities to encourage greater transparency in relation to legal persons and complex legal structures, including domiciliary companies in Switzerland.

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

On 26 June 2019, the Federal Council sent to Parliament the message concerning the amendment to the Law on Anti-Money Laundering (AMLA). This bill provides for several measures: i) extend the scope of application of AMLA to cover some non-financial activities, related in particular to the creation, management and administration of companies and trusts; ii) expressly introduce into the Law the verification of the identity of the beneficial owner and the obligation to update customer data. iii) introduce a number of measures to improve the transparency of associations exposed to a higher risk of terrorist financing⁹⁴.

On 1 November 2019, the Federal Law on the implementation of the recommendations of the Global Forum entered into force⁹⁵. Under this law, bearer shares are only permitted if the company has publically traded equity securities or if the bearer shares are issued in the form of intermediated securities. In addition, the law provides for a criminal sanction in the form of a fine for shareholders and directors who violate the transparency rules of the CO.

⁹⁴ <https://www.admin.ch/opc/fr/federal-gazette/2019/5237.pdf>.

⁹⁵ <https://www.admin.ch/opc/fr/official-compilation/2019/3161.pdf>

In July 2019, the Confederation's Interdepartmental Co-ordinating Group on Combating Money Laundering and the Financing of Terrorism (CGMF) published a report on corruption as a predicate offence to money laundering⁹⁶. This study develops and updates the analysis performed in the "Report on the national evaluation of the risks of money laundering and terrorism financing in Switzerland" published in June 2015.

On 26 February 2020, the Federal Council Report was published following up on postulate 17.4204 Seydoux-Christe of 14 December 2017⁹⁷. Entitled "Supervision of Commodity Trading Activities from a Money Laundering Perspective", the report presents an analysis of the risk of money laundering and corruption in the area of commodity finance.

In a decision dated 12 December 2019 (ATF 6B_31/2019 intended for publication), the FT settled a very important doctrinal controversy concerning the qualification of corporate criminal liability. The question was whether Art. 102 CC enshrined a new (autonomous) offence, in which case it should be designated as an infringement because of the punishment (the fine) or whether it constituted a standard of attribution that created a form of participation in the offence committed within the company (criminal organisation, financing of terrorism, money laundering, active bribery of Swiss public officials, granting of an advantage, active bribery of foreign public officials and active private bribery). This dispute was very important from the point of view of the statute of limitations. In the case of an autonomous infringement, the statute of limitations would have been 3 years, whereas in the case of a standard of attribution, it would have followed the statute of limitations of the offence committed within the company (felony or misdemeanour). The FT considered that this was a standard of attribution and thus decided in favour of the opinion most favourable to prosecution.

At present, the OAG is instituting several proceedings against banks and financial intermediaries, in particular in the Petrobras complex of cases, for the provision of banking relationships or financial structures in the context of foreign bribery cases or money laundering.

In a case for aggravated money laundering and the predicate offence to foreign bribery, the FCC issued a judgment in ordinary proceedings on 8 October 2019 (SK.2018.73), sentencing a bank employee to 30 months in prison, 15 of which were unconditional, and 250 fine days at CHF 1 000/day, all with a two-year probation period. In addition, the confiscation of CHF 2 million was imposed on the bank employee. Initially, the OAG had opened a case for bribery of foreign public officials and money laundering. At the end of its investigation, it dismissed the case for bribery of foreign public officials. The bank employee was accused of setting up financial structures to launder the proceeds of corruption.

On a matter related to the Gunvor case, on 20 September 2019 the FCC convicted a financial intermediary for forgery for providing bank accounts and falsely recording the beneficial owner of several accounts on the bank's Form A (SK.2019.32). This conviction was imposed in the context of a simplified procedure. The sentence imposed was 14 months, with 170 days of pre-trial detention subtracted from the sentence, with the balance being suspended. In addition, a compensatory claim amounting to CHF 100,000 was ordered.

Text of issue for follow-up:

⁹⁶ <https://www.sif.admin.ch/sif/fr/home/finanzmarktpolitik/integritaet-des-finanzplatzes-.html>

⁹⁷ <https://www.efd.admin.ch/dam/efd/fr/dokumente/home/dokumentation/berichte/rohstoffhandel.pdf.download.pdf/RH-BE-f.pdf>

18. The Working Group will follow up the issues below as case law and practice develop, in order to check:

- (d) training and awareness-raising activities for judges and Offices of the Attorneys General as well as application of the “equivalence link” in foreign bribery cases.

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

Reference is made to the response to recommendation 6 above. For example, the OAG arranged, at one of its conferences for prosecutors, a presentation by the head of the DAPE and his deputy on the collaboration between the criminal authority and the tax authority.

Text of issue for follow-up:

18. The Working Group will follow up the issues below as case law and practice develop, in order to check:

- (e) future allocation of resources to police forces supporting foreign bribery investigations.

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

Only two **cantons** (JU, TI) have expressed an interest in a regular assessment of resources with, if necessary, the introduction of adjustments. Lack of experience makes it almost impossible to identify precise resource requirements for foreign bribery cases (NE, VD).

Text of issue for follow-up:

18. The Working Group will follow up the issues below as case law and practice develop, in order to check:

- (f) number of foreign bribery cases discontinued and number of acquittals at federal and cantonal level.

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

Reference is made to the response to recommendation 7(g) above. It should be remembered that that there have been no acquittals by a court in a case involving bribery of a foreign public official.

Text of issue for follow-up:

18. The Working Group will follow up the issues below as case law and practice develop, in order to check:

- (g) that investigations and prosecutions conducted by the OAG and the cantonal Offices of the Attorneys General are not influenced by the considerations listed in Article 5 of the Convention.

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

It should be remembered that the OAG is an independent authority. It was clearly established in the GRECO evaluation that this independence was genuine and that no authority that was part of an executive or legislative body was able to give it instructions in a case. The OAG ensures that its cases are not influenced by considerations of national economic interest, the possible impact on relations with another State, or the identity of the natural or legal persons under accusation. The proceedings undertaken against the company Gunvor or within the scope of the IMDB complex are a perfect illustration of this independence.

Text of issue for follow-up:

18. The Working Group will follow up the issues below as case law and practice develop, in order to check:

- (h) implementation of the reorganisation of investigations within the OAG and any repercussions this has on foreign bribery cases.

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

The reorganization of the OAG in 2016 has now proved its worth. The WIKRI division, which is active in prosecuting money laundering, foreign bribery and international economic crime in the broadest sense, has three experienced prosecutors, specialised in each of these areas, who are responsible for ensuring the uniformity of legal interpretation within the OAG, but also for co-ordinating the various proceedings or leading the task forces set up to deal with large complexes of cases (e.g. Petrobras).

These prosecutors also represent the OAG in international organisations relevant to their field of activity (OECD, FATF). Apart from the change of the head of the WIKRI division in March 2019 and the replacement of the head of the foreign bribery section in November 2019, the WIKRI division has not undergone any further reorganisation. As indicated in the response to recommendation 8(a) above, staff numbers in the WIKRI division have been further increased very recently.

Text of issue for follow-up:

18. The Working Group will follow up the issues below as case law and practice develop, in order to check:

- (i) evolution of the internal organisation and structural operation of the OAG in the management of foreign bribery cases.

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

The OAG considers its internal organisation to be very well suited to the challenges of prosecuting foreign bribery. It is able to deal with large case complexes (e.g. Petrobras) and has enabled prosecutors to bring charges in several important cases, either using ordinary proceedings or simplified procedure, or issue summary punishment orders, in accordance with the rules of the CPC. Accordingly, the OAG continues to investigate many foreign bribery cases and provides very important services in the field of passive mutual legal assistance. Despite the fears that punctuated the re-election of the Attorney General, the scope given to prosecutors has enabled them to continue their investigations and maintain their freedom of action.

For example, less than a month after the re-election of the Attorney General, the summary punishment order relating to the company Gunvor was notified and made public. On 20 September 2019, still in the Gunvor case complex, the FCC convicted a financial intermediary for forgery for providing bank accounts and falsely recording the beneficial owner of several accounts on the bank's Form A (SK.2019.32). This conviction was imposed by way of a simplified procedure. The sentence imposed was 14 months, with 170 days of pre-trial detention subtracted from the sentence, with the balance being suspended. In addition, a compensatory claim amounting to CHF 100,000 was ordered. As part of the Petrobras complex case, a natural person was indicted on 21 October 2019 before FCC, under a simplified procedure, and a legal person and a natural person were also sentenced, on 4 October 2019 and 15 November 2019 respectively (for more information see the response to recommendation 9(b) above).

Judgment SK.2019.32:



SK_2019_32
anonym.pdf

On 8 October 2019 the FCC issued a judgment in ordinary proceedings (SK.2018.73) sentencing a bank employee to 30 months in prison for aggravated money laundering (proceeds of corruption), 15 of which were unconditional; and 250 fine days at CHF 1 000/day, all with a two-year probation period. In addition, the confiscation of CHF 2 million was imposed on the bank employee.

Text of issue for follow-up:

18. The Working Group will follow up the issues below as case law and practice develop, in order to check:

(j) application of mitigating factors in foreign bribery cases.

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

Reference is made to the response to recommendation 9(d) above.

Text of issue for follow-up:

18. The Working Group will follow up the issues below as case law and practice develop, in order to check:

- (k) implementation of the new system of sanctions that came into force on 1 January 2018, including level and types of penalties imposed on natural and legal persons convicted of the offence of bribery of a foreign public official, including in self-reported cases.

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

The implementation of the new system of sanctions is still too recent for any conclusions to be drawn, in particular for a specific offence. Overall, and in terms of all offences, it should already be noted at this stage that, under the new law on sanctions, the suspended financial penalty continues to be the most frequently imposed sentence, combined in 70% of cases with a fixed fine⁹⁸. The recidivism rate has remained stable, demonstrating a high sensitivity to this sentence in Switzerland.

Text of issue for follow-up:

18. The Working Group will follow up the issues below as case law and practice develop, in order to check:

- (l) measures taken by Switzerland to ensure that the level of evidence required to establish the existence of a prior offence as set out in Article 102(2) CC does not prejudice the autonomy of criminal proceedings against a legal person from those against a natural person, including cases where no natural person has been prosecuted or convicted.

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

Reference is made to the two cases in which the OAG sentenced companies for the underlying offence of bribery of foreign public officials (Gunvor and SV.15.0787), which are presented in the responses to recommendations 7(d), 9(a) and 9(b) above.

Text of issue for follow-up:

18. The Working Group will follow up the issues below as case law and practice develop, in order to check:

- (m) liability of parent companies in practice in cases of foreign bribery committed by subsidiaries.

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

The OAG has no notable developments to report in this area.

⁹⁸ See Fink/Staubli, Tiefe Rückfallraten nach Geldstrafen, in: Plädoyer 5/19, p. 36 ff.

