



PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN SWITZERLAND

December 2011

This Phase 3 Report on Switzerland by the OECD Working Group on Bribery evaluates and makes 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 Working Group on 16 December 2011.

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EXECUTIVE SUMMARY

The Phase 3 Report on Switzerland by the OECD Working Group on Bribery in International Business Transactions (Working Group on Bribery) evaluates and makes recommendations on Switzerland's implementation and enforcement of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and related instruments (Anti-Bribery Convention). Phase 3 focuses on key Group-wide (horizontal) issues, particularly enforcement, consideration is also given to country-specific (vertical) issues arising from progress made since Switzerland's Phase 2 evaluation in 2004, or issues raised by changes in the domestic legislation or institutional framework of Switzerland.

Switzerland has made progress in its enforcement actions since the Phase 2 evaluation, with the conviction, in the last twelve months, of one natural and one legal person in two cases of foreign bribery falling within the scope of the Convention. Switzerland also exemplifies good practice in the context of confiscation of the instrument and proceeds of corruption: since 2008, the Office of the Attorney-General (OAG) has confiscated 163 million Swiss francs and USD 32 million in relation to bribery of foreign public officials. The Working Group also congratulates Switzerland for its effort to respond to requests for mutual legal assistance and considers that these efforts provide a significant contribution to enforcement actions against foreign bribery in other jurisdictions. The Working Group notes, however, that the number of convictions remains low, and wonders whether in the context of companies, this is not due to difficulties in applying provisions on the criminal liability of legal persons. The Working Group welcomes the record fine and compensation ordered in Switzerland against Alstom under the Criminal Code provisions on bribery of foreign public officials and considers that the sanctions in this matter are effective, proportionate and dissuasive. Nevertheless, the Working Group considers that in practice sanctions do not always appear sufficiently dissuasive, as evidenced in the penalties ordered against an individual convicted for bribery of foreign public officials. The Group is equally concerned about the lack of a systematic approach allowing for the exclusion of companies convicted of bribery from public procurement or official development assistance contracts.

The Working Group welcomes improvements in the legislative framework in Switzerland. In January 2011 a new Code of Criminal Procedure entered into force, introducing a single prosecutorial model for the whole of Switzerland. At the same time, the Swiss legislature introduced a general obligation for the majority of federal officials to report allegations of crimes in office, including foreign bribery, as well as a framework to protect federal officials that report in good faith. The Group recommends that Switzerland consider expanding the scope of these provisions to apply to officials from federal agencies that are not subject to this law (for example, SERV and FINMA) and encourage the cantons to consider the introduction of similar measures for their personnel, when they do not already exist. In the same context, the Group takes into account projects at federal and cantonal levels to train administrative officials on the offence of bribery but nevertheless notes the very low level of detection and reporting of transactions that could constitute bribes paid to foreign public officials and recommends that Switzerland reinforce its efforts in this regard. The Group is pleased to note the existence of draft legislation defining the framework for reporting and whistleblower protection in the private sector, and recommends that it be adopted as soon as possible.

The Working Group notes with interest the extension of external auditing requirements to a larger number of categories of legal entities and also notes the efforts to consult and train auditors and accountants on the issue of the detection of fraud associated with bribery. In general, the Group notes that Switzerland has made significant efforts, in partnership with professional associations and civil society, to raise awareness in the business, accounting and auditing sectors. In this regard, the Working Group encourages Switzerland to undertake even more focused awareness raising with SMEs, on internal control mechanisms to prevent the payment of bribes to foreign public officials. In relation to external audit, the Group also recommends that Switzerland require external auditors to report allegations of foreign bribery to competent authorities outside of the company. In addition, the Group considers that, given the importance of the country in the international economy and the number of influential Swiss companies, Switzerland should undertake a regular review of its policy in relation to small facilitation payments.

The report and its recommendations reflect findings of experts from Austria and Hungary and were adopted by the Working Group on Bribery. Switzerland will submit a written report on the implementation of all recommendations within two years. The Phase 3 report is based on legislation and other materials provided by Switzerland, as well as the information obtained by the evaluation team during the three-day on-site visit to Bern from 28 to 30 June 2011, during which the evaluation team met representatives from the federal and cantonal administrations, the private sector and civil society.

A. INTRODUCTION

1. The on-site visit

1. From 28 to 30 June 2011, a team from the OECD Working Group on Bribery in International Business Transactions (the Working Group on Bribery) visited Bern as part of the Phase 3 evaluation of Switzerland's implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Convention), the 2009 Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions (2009 Anti-Bribery Recommendation) and the 2009 Recommendation of the Council on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions (2009 Tax Recommendation). The Phase 2 evaluation of Switzerland was conducted in December 2004. The written follow-up report for Phase 2 was presented to the Working Group in 2007. The purpose of the on-site visit was to assess implementation by Switzerland of the Convention and the 2009 Recommendations, focusing essentially on developments since 2007.

2. The evaluation team was composed of lead examiners from Austria and Hungary as well as members of the Secretariat.¹ In preparation for the on-site visit, the Swiss authorities provided the Working Group with answers to the Phase 3 questionnaires. The authorities also produced the texts of laws and regulations, case law and various publications, official or otherwise, useful for this purpose and the examiners consulted the reports of the Group of States against Corruption (GRECO) and the Financial Action Task Force (FATF) on Switzerland. During the visit, the team met with representatives of the Swiss public and private sectors as well as civil society and the media.² Swiss government representatives decided to attend the panels organised with the private sector, civil society, academics and the legal profession. In accordance with the Phase 3 procedure government representatives did not intervene, and participants did not object to their presence.³

3. The Swiss authorities went to great effort to ensure the successful conduct of the on-site visit, preparing a detailed programme of interviews and facilitating consultation with all the requested participants. The team appreciated in particular the willingness of the Swiss authorities to provide information on enforcement action in the case of allegations of transnational bribery. Before and after the on-site visit, they responded to all requests for information. This cooperative spirit produced constructive discussions on exemplary practices as well as on aspects posing potential problems for implementation of the Convention and the 2009 Recommendations. The evaluation team is also grateful to all participants in the on-site visit for their cooperation during the discussions.

¹ Austria was represented by Dr. Sylvia Thaller, Prosecutor, Ministry of Justice, Criminal Law Section, and Dr. Erika Reinweber, Tax Expert, Large Business Audit and Income Taxation. Hungary was represented by Dr. Zoltán Péter, Prosecutor, Office of the Prosecutor General, and Dr. Béla Kátai Tóth, Tax Inspector, National Taxation and Customs Administration. The OECD Secretariat was represented by Dr. Frédéric Wehrlé, Principal Administrator Anti-Corruption, and coordinator of the Evaluation and Leah Ambler, Legal Analyst, both of the Anti-Corruption Division of the Directorate for Financial and Enterprise Affairs.

² See the list of participants, in Annex 2.

³ See paragraph 26 of the Phase 3 Procedure, which provides that the evaluated country may attend, but should not intervene, during the course of non-government panels.

2. Outline of the report

4. This report is structured as follows: Part B examines Switzerland's efforts to implement and enforce the Convention and the 2009 Recommendations having regard to group-wide (horizontal) issues identified by the Working Group for evaluation in Phase 3, with particular attention on enforcement efforts and results, as well as country-specific (vertical) issues arising from progress made by Switzerland on weaknesses identified in Phase 2, or issues raised by changes in the domestic legislation or institutional framework of Switzerland; and Part C sets out the Working Group's recommendations and issues for follow-up.

3. Economic situation

a) Economic structure

5. Switzerland ranks fifth in the world in terms of gross domestic product (GDP) per capita. Around 70% of GDP comes from the service sector, while industry accounts for 28%. The key sectors are chemicals, capital goods and banking.⁴ The preponderance of small and medium-sized enterprises is a feature of the Swiss economy: more than 99.7% of firms have fewer than 250 full-time employees; they generate nearly two-thirds of Swiss GDP, the remaining third coming from multinationals.

b) International trade

6. Among parties to the OECD Convention, Switzerland is one of those most closely linked to world markets. Swiss enterprises engaging in foreign direct investment (FDI) employ some 2.4 million people in their subsidiaries and production sites abroad and constitute a major employer in Switzerland. The main FDI sectors are industry (38% of the total in 2009) and services (62%). Europe is the primary destination for FDI (nearly half the total), followed by the Americas (38.2% at end 2009) and Asia (8.7%).⁵ The share of external trade in GDP is one of the highest in the world. The European Union is a key factor here: 68% of Switzerland's trade is with the EU. The country's other main trading partners are the United States (nearly 8% of trade in 2010), China (3.6%), Japan (2.6%), and India (1%). Of the total of around 300,000 enterprises registered in Switzerland, 36,000 export their goods and services, and 98% of them are SMEs.⁶

4. Cases of bribery of foreign public officials

a) Switzerland's exposure to transnational bribery

7. There are three risk factors in Switzerland. First, the country's small size and hence its small domestic market make international trade and foreign investment of vital importance for many of the country's enterprises, thereby increasing the risk that they will be exposed to foreign bribery. According to preliminary results of a survey conducted by the Swiss Institute for Entrepreneurship (SIFE) and presented during the on-site visit, 40% of Swiss SMEs operating abroad are confronted with bribery of public officials⁷. Second, with 320 banks operating in Switzerland in 2010, the size of the Swiss financial centre and the volume of capital flows pose a significant risk of infiltration by tainted funds. Lastly, the country's attractive tax regime has encouraged multinationals to locate their corporate headquarters in Switzerland or

⁴ OECD, Economic Survey of Switzerland, 2009

⁵ Source: Swiss National Bank, direct investments 2009.

⁶ Source: Swiss Federal Customs Administration, 2010, and Business Network Switzerland (OSEC), 7 April 2011

⁷ The survey was addressed to 2,781 enterprises; 510 responded.

establish branches there. For example, in 2011 around 130 multinationals were headquartered in the canton of Geneva, while nearly 800 other multinational companies operating in Geneva had their head offices abroad.⁸ Beyond the attractive tax regime, multinationals may decide to set up in Switzerland because of its central position in Europe and its proximity to North Africa and the Middle East.

b) Switzerland's approach in cases of transnational bribery

(i) Number of investigations concerning the crime of bribing foreign public officials

8. It is not possible to know the exact number of investigations opened in Switzerland involving the crime of bribing foreign public officials, as the cantons, which also have jurisdiction over the crime under certain conditions (article 24 (1) CPC) alongside the federal Office of the Attorney General (OAG), are under no legal obligation to report data on this issue to the Confederation. According to figures provided by the Swiss authorities, 40 investigations had been opened by the OAG for bribery of foreign public officials since 2005. These figures exclude some 30 OAG investigations related to the United Nations "Oil for Food" programme.⁹ Of the 40 cases under way, 31 were under investigation at the time of the Phase 3 evaluation, and 16 of these also involved charges of money laundering. In addition, the cantonal authorities have opened eight cases, seven of them in Geneva and one in Zug, although, according to the prosecutor who presented that case to the examiners, it was not yet clear whether it involved transnational bribery or rather *gestion déloyale* (mismanagement) or breach of trust. There may be other cases under way in the six cantons that did not respond to the SECO survey on this question.¹⁰

9. Most of the investigations by the federal judicial authorities were opened between 2008 and 2011, with the oldest one, concerning Alstom, dating to 2004.¹¹ Nearly all were targeted at individuals; only two involved legal persons. One investigation, opened in relation to two companies in the Alstom Group and which also involved individuals, was concluded in November 2011, after the Swiss subsidiary of the Group did not oppose a conviction by summary punishment order, and the proceedings against the parent company were dismissed, in relation to the company's conduct that had a connection with Swiss territory.¹² The other investigation was closed as a result of the winding up of the company.¹³ Some of the investigations concerned cases where funds belonging to companies headquartered abroad were placed under the control of third parties located in Switzerland for use in bribing foreign public officials. In this context, the OAG also pursues bribery from the viewpoint of other crimes related to corruption (for example, mismanagement (*gestion déloyale*) and forgery of documents (*faux dans les titres*)). Thus, of the thirty or so cases under way at the OAG at the time of the Phase 3 evaluation, six did not involve charges

⁸ Figures provided at the Geneva economic promotion site: <http://ge.ch/dares/promotion-economique/accueil.html> (in French).

⁹ The "Oil for Food" programme, in effect from 1996 to 2003, allowed Iraq to sell oil in exchange for humanitarian assistance which the country needed because of the sanctions imposed after its invasion of Kuwait in 1990. The regime had in effect subverted the programme by conditioning the right to buy Iraqi oil on secret payment of commissions. In all, more than 2,200 companies from 66 different countries were accused of corruption, for an estimated amount of US\$1.8 billion.

¹⁰ Responses of Switzerland to the Phase 3 questionnaire and supplementary questions.

¹¹ Opened on 9 December 2004, the proceedings were suspended on 13 October 2006 due to insufficient evidence and reopened on 16 October 2007 following the discovery of new facts.

¹² In this case, apart from the criminal proceedings against two companies in the group, separate proceedings were also opened in relation to Alstom's Compliance Manager for suspected bribery of foreign public officials; this proceeding, as well as other proceedings against individuals in connection with this matter were still ongoing at the time of the Phase 3 evaluation of Switzerland, notably for passive corruption.

¹³ In this last case, however, the funds intended to pay bribes were confiscated.

of transnational bribery. As during the Phase 2 examination of Switzerland, it is primarily the reports transmitted by the Money Laundering Reporting Office-Switzerland (MROS) and foreign requests for mutual legal assistance that lead to the opening of an investigation in Switzerland.

(ii) *Convictions for bribery of foreign public officials*

10. At the time of the Phase 2 review, there had been only one, relatively atypical, conviction for bribery of foreign public officials: it involved payment of a bribe by a Yugoslav citizen to an Italian customs officer to obtain a stamp falsely testifying that he had entered Italy. At the time of the Phase 3 evaluation, three new convictions had been issued (two at the cantonal level and one at the federal level). No transnational bribery case has yet been tried by a cantonal or federal court; the convictions in all cases having been concluded by way of summary punishment order.¹⁴ Two of the three convictions related to natural persons, the third penalised, as discussed above, the Swiss subsidiary of the Alstom Group.

11. Of the two convictions of natural persons handed down since the Phase 2 examination, only one involved bribery of foreign public officials in international business, as set out in the Convention; the other case was not covered by the OECD Convention as it involved a payoff to a German police officer posted at a Swiss border post (Basel-Badischer Bahnhof) to obtain a stamp on a form declaring departure from Switzerland. The conviction falling within the scope of the Convention, issued in late 2010 by the judicial authorities of Geneva, concerned the payment of bribes to intermediaries to ensure that foreign diplomatic representatives chose to stay in hotels run by the accused (see box 1 in Annex 4 for a summary of the case). At the end of 2011, Alstom Network Schweiz AG (a Swiss subsidiary in the Alstom Group) was convicted of not having taken all necessary and reasonable organisational precautions to prevent bribery of foreign public officials in Latvia, Malaysia and Tunisia (see box 2 in Annex 4 for a summary of the case).¹⁵

12. According to most of the prosecutors present at the on-site visit, the low number of convictions to date is due primarily to the difficulty of conducting investigations, as the procedures relating to transnational bribery are cumbersome, requiring numerous steps in the investigation process and analysis of voluminous documentation, and also to the fact that many of these procedures involve intermediaries and complex financial schemes that have ramifications in several countries. For this reason, investigations of this kind can take more than five years, as exemplified by a particularly complex investigation that led to the conviction of the Swiss subsidiary of Alstom. This conviction was the result of a long investigation by the OAG initiated in 2004 and reopened in 2007, and led to the opening of proceedings in Argentina, Brazil, Latvia, Poland, the UK and the US, in certain cases, following the spontaneous provision of evidence by the OAG. In the context of this investigation, the OAG prosecutors examined hundreds of contracts concluded all around the world. The prosecutors also reported that in several cases of transnational bribery with ramifications in Switzerland, enforcement action by foreign law enforcement authorities, especially following agreement with the parties to the proceedings, left the Swiss authorities unable to pursue the crime because of the principle of *ne bis in idem* (the "double jeopardy" rule). During the on-site visit, the OAG was disappointed that it was not involved in such approaches and that as a result its requests for mutual assistance were refused. The lead examiners also note that the OAG prosecutes other crimes linked to transnational bribery, such as money laundering or, as was the case with the UN Oil for Food program, violations of the laws implementing sanctions, particularly when it faces difficulties in proving bribery of foreign public officials.

¹⁴ In relation to summary punishment orders, see the section of the report on so-called 'special' procedures.

¹⁵ See 'Einstellungsverfügung' of 22 November 2011 (non-official translation in English: Order to dismiss proceedings) and 'Strafbefehl' of 22 November 2011 (non-official translation in English: Summary Punishment Order).

(iii) *Cases closed or dismissed*

13. It is not possible to determine the exact number of cases closed or dismissed in the country as a whole, as Switzerland does not have a mechanism for centralising this type of information. The only figure available is the number of investigations closed among those opened by the OAG during the period 2005-2010: of a total of 40 cases, eight were closed. On the basis of information supplied by the OAG, when orders for closure or dismissal are issued, this is usually on the basis of four factors: a lack of evidence; because the accused could not be held liable; because part of the investigation was being conducted abroad in the context of an out-of-court settlement and therefore invoked the principle of *ne bis in idem*; or in application of a provision of the SCC on 'Reparation', according to which 'when the defendant has compensated for the damage or made all efforts that could reasonably be expected to correct the wrong that was caused, the competent authority can waive prosecution, trial or punishment, if the conditions for a suspended sentence are satisfied (article 42 SCC), and if the public interest and the interest of the victim in prosecuting the defendant are insignificant' (Article 53 SCC).

14. Some of the cases also had to be closed for lack of evidence. For example, of the 36 OAG investigations relating to the United Nations Oil for Food programme, involving some 30 businesses headquartered in Switzerland, none resulted in a conviction for bribery of foreign public officials, as the necessary evidence could not be collected because certain countries refused mutual legal assistance (MLA). This does not mean that the companies involved were not punished: in 11 cases, sentences were handed down for violation of laws implementing sanctions. Confiscations totalling CHF 18.8 million (around €11 million) were ordered against the companies involved. Of the eight investigations closed by the OAG during the period 2005-2010 (apart from Oil for Food cases), one was closed because it was impossible to obtain evidence from abroad (but confiscations were ordered anyway). In another case, the OAG had to close the investigation because it was impossible to determine the beneficiary of the bribe (although confiscation was ordered). In the context of the proceedings against Alstom, the OAG, after having examined more than a dozen projects for electrical power plants and noting other partial contraventions of the internal compliance regulations, had to close these particular proceedings against Alstom, despite the extensive investigations, because no offence could be established that would justify a prosecution (article 319(1)(a) CPC or because no offence was committed due to the criminal conduct having occurred before the entry into force of the Swiss corporate criminal liability provisions on 1 October 2003 (article 319(1)(b) CPC).

15. Cases have also been dismissed in application of the *ne bis in idem* principle and on the grounds that they had already been decided by a foreign court or resolved by plea-bargaining abroad. As noted above, proceedings that were already well advanced had to be closed by the OAG after it found that other countries had concluded the cases involving the same facts, without the Swiss authorities having been consulted, which according to the OAG have the effect of nullifying what is sometimes a considerable investigation effort.

16. Finally, investigations involving suspected bribery of foreign public officials have been closed using the procedure set out in article 53 SCC, referred to above, which is based on 'Reparation' as a means of dismissing proceedings. This was the case for the investigation opened by the OAG into Alstom SA in France, based in France, which is the parent company of the Swiss subsidiary, Alstom Network Schweiz AG. In this matter, while recognising that the parent company was partially responsible, in its capacity as the Group headquarters, for the acts committed by its Swiss subsidiary, the OAG dismissed concurrent proceedings against the parent company. According to the OAG, it weighed the interests at stake and took into account the criticisms that could be made of the parent company, that it agreed to pay a sum of CHF 1 million (approximately €810,000) in 'Reparation', and noted the exemplary cooperation of the company throughout the investigations and the improvements made by the company to its compliance program in order to prevent corrupt acts in future (see box 2 in Annex 4 for a summary of the case).

Commentary:

The lead examiners appreciate the number of cases opened for bribery of foreign public officials at both the federal and the cantonal levels, and that during the last twelve months, two of these cases resulted in convictions, one of a legal person. They observe, however, that the number of convictions remains low at this stage – four since the entry into force in Swiss law of the offence of bribery of foreign public officials in 2000, and only two falling under the scope of the Convention. The examiners note in this context that application of the principle of ne bis in idem has led to the closing of several transnational bribery cases. They stressed the importance of consultation among the judicial authorities of different countries investigating cases involving the same facts. Such consultation, covered by article 4(3) of the Convention, is a horizontal issue for the Working Group.¹⁶

B. IMPLEMENTATION AND ENFORCEMENT BY SWITZERLAND OF THE CONVENTION AND THE 2009 RECOMMENDATIONS

1. The offence of bribery of foreign public officials

a) The offence of transnational bribery

17. No amendments have been made to the definition of the offence of bribery of foreign public officials since entry into force of article 322^{septies} of the Criminal Code (*Code pénal*, SCC) on 1 May 2000.

b) Questions identified as requiring particular follow-up by the Working Group

18. Three questions were identified during the Phase 2 evaluation as requiring particular follow-up by the Working Group: (i) the definition of foreign public official; (ii) the argument of conformity with "socially accepted practices "; and (iii) the question of "facilitation" payments.

(i) The definition of foreign public official

19. During the Phase 2 evaluation, the Working Group decided to follow-up, in light of evolving practice, in order to verify whether enforcement of article 322^{septies} SCC is consistent with a broad interpretation of the definition of the exercise of the official functions of a head of state; its application in cases involving solicitation by foreign public officials; and an application of the notion of foreign public official that includes heads of state and the country's highest authorities. This decision followed a ruling of the Federal Tribunal (TF) on a request for MLA and dealing with the issue of the official nature of intervention by a Head of State as well as the applicability of article 322^{septies} SCC in the case of solicitation by the official.¹⁷

¹⁶ Article 4.3. "When more than one party has jurisdiction over an alleged offence described in this Convention, the parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution".

¹⁷ Phase 2 Report on Switzerland, paras. 96-100.

20. Subsequently, several investigations opened by the OAG concerning cases where the public official expressly solicited payoffs, show that the interpretation given by the TF has not been retained by Swiss prosecutors. This was the case in a matter involving the president of the commission responsible for public procurement contracting of a foreign State who solicited payments, after which the suspect transferred several million Swiss francs to bank accounts of which the president was the beneficiary. Several proceedings are under way in relation to this case, including one seeking to confiscate the payments. Reflecting a broad definition of the exercise of official functions and of a foreign public official, the OAG proceedings against Alstom show a great diversity with respect to the foreign public officials involved but also to the functions exercised by them in the corrupt practices revealed: this case concerned involved bribes paid by Alstom consultants to three executives from the state energy company of Latvia, Latvenergo; to the son-in-law of former Tunisian President Zine el-Abidine Ben Ali; and to executives of the state-licensed TTPC of Malaysia, one of whom was also, at the time, a local politician in the constituent state of Perlis where a power station was to be built by Alstom.¹⁸

(ii) *The argument of conformity with 'socially accepted practices'*

21. According to article 322(2) SCC, "advantages authorised by department regulations and advantages of minor value in conformity with socially accepted practices shall not be considered undue advantages." During Phase 2, the Swiss authorities had explained that advantages would not be considered "in conformity with socially accepted practices" if their purpose was to induce a public official to breach his duties or to use his power of discretion. The Working Group questioned the usefulness of the second part of paragraph 2, noting that case law dealing with bribery of Swiss public officials did not seem to exclude completely the applicability of the paragraph to situations where bribes were paid to foreign public officials, and it therefore decided to monitor this issue in light of evolving practice.

22. A ruling of the Zürich cantonal tribunal confirms the interpretation given by Switzerland in Phase 2 (ruling of 16 November 2010, Obergericht Zürich, II. Strafkammer SB100547). According to that ruling, an advantage – even of low value – is neither permitted nor consistent with socially accepted practices if it induces a public official to commit behaviour contrary to his or her official duties or could influence his or her power of discretion. The case concerned a gift of 10 Swiss francs given to a police officer to induce him not to file a report on minor material damage following a traffic accident. The tribunal considered that the intent of the act was to induce the omission of an act in accordance with the official function of the officer, in violation of his duties, and consequently it held that the argument of conformity with "socially accepted practices" did not apply, maintaining that no payment, even of a small amount, could be considered as a socially accepted practice if it constituted a violation of an officials' duties or depended on his or her discretionary power. While the ruling concerned a domestic corruption case (article 322^{ter} SCC), the decision is applicable to article 322^{septies} (2) SCC to the extent that both offences contain the exception of 'socially accepted practices'.

¹⁸ For example, according to the Summary punishment order, in relation to Latvia, Alstom signed contracts with a consultant who then transferred approximately 70% of the amount that had been transferred to him under the contracts, to three executives from Latvenergo involved in two projects with a view to influencing, by the paying of bribes, the award of contracts for both projects in favour of two Swedish Alstom subsidiaries, and the elimination of difficulties in contract performance to Alstom's benefit. In Tunisia, Alstom was engaged as a subcontractor in major contracts commissioned by the Tunisian state electricity and gas company (STEG) as a result of the conclusion of consultancy agreements with, and subsequent payments to, two offshore companies controlled by the son-in-law of former Tunisian President Zine el-Abidine Ben Ali. According to the Summary punishment order, the former President's son-in-law was in a position to influence the contract awards. In Malaysia, Alstom subsidiaries transferred 'success fees' for the successful signing of delivery and maintenance contracts for gas turbines to intermediary companies owned by two leading executives of the state-licensed TTPC company. The payments were made to influence TTPC decision-makers to award contracts to Alstom. See Summary punishment order of 22 November, 2011, above note 15.

(iii) *'Facilitation payments'*

23. The notion of facilitation payments, intended to speed execution or ensure performance of administrative acts, does not exist in Swiss law. In Switzerland, in the context of the offence of foreign bribery, this notion must be examined in light of the act that the public official executed or omitted to execute, and whether he or she was induced to violate his or her duties or to exercise his or her power of discretion: in effect, the law, as it relates to transnational bribery, does not punish cases in which the advantage is granted to the agent or solicited by him or her in return for fulfilling his duties. The amount of the advantage is not important: an advantage paid to induce the agent to fulfil his duties is not covered by the law, regardless of the amount of the payment. Only cases where, through the granting of an advantage, the briber seeks to induce the public official to violate his or her official duties or exercise his or her discretion are prohibited by article 322^{septies} SCC, and that prohibition, as specified in the Zürich court ruling mentioned above, pertains regardless of the amount of the undue advantage¹⁹. This is not the case when it comes to domestic corruption (of Swiss public officials): here, articles 322^{quinquies} and 322^{sexties} SCC also criminalise situations where the advantage is granted to the public official to perform the duties of his position.

24. In Phase 2, Switzerland was criticised by the Working Group for the absence of any limit on the value of payments of this kind, and considered to be in contravention of the OECD Convention, which permits only "small" facilitation payments or, as stated in the commentary on the Convention, the payment of "small amounts" in exchange for a perfectly regular act. In response to those criticisms, Switzerland noted that the amounts paid to obtain such an act were necessarily "small amounts" and consequently acceptable facilitation payments, repeating here the argument developed in the Message of the Federal Council concerning approval of the Council of Europe Criminal Law Convention on Corruption.²⁰ In the absence of case law, the Working Group decided to monitor this issue in order to determine whether in practice the Swiss courts were applying the Swiss anticorruption law to advantages other than small facilitation payments.

25. Since then, there has been no relevant decision of a court to confirm or reject the position of Switzerland with respect to the coverage of small facilitation payments in Swiss law. Notwithstanding the lack of case law, a re-examination of Swiss policy concerning small facilitation payments could be considered. During the on-site discussions, a representative of a firm active in foreign markets spoke of a feeling, apparently widespread among Swiss SMEs, that the practice of making facilitation payments was inherent to commercial transactions with certain countries, and that it was up to the authorities of those countries and not to Swiss companies to ban them. The large companies present during the on-site visit indicated, for their part, that their internally adopted policies or ethical principles prohibited such payments (zero tolerance), while noting that these practices were still current in certain foreign markets. In this context, it is well to remember that the 2009 Recommendation underlines the corrosive effect of facilitation payments and encourages parties to the Convention to re-examine their policy in this area.

¹⁹ According to the Swiss authorities, the same argument applies to an act intended to speed execution of an administrative formality, provided such an act induces favourable treatment. As they put it, this behaviour, which constitutes a violation of the official's duties and his power of discretion, is covered by article 322 septies CP, even if it involves only a small facilitation payment.

²⁰ Phase 2 Report on Switzerland, paragraphs 22, 105 to 113, and commentary on paragraph 113; Message of the Federal Council concerning approval and implementation of the Council of Europe Criminal Convention on Corruption of 14 November 2004: FF 2004 6549, 6567.

Commentary:

The examiners welcome the broad treatment accorded by law enforcement authorities to the notion of foreign public official and his or her acts, and consider that this is an example of good practice. They also welcome the clarifications provided by the courts concerning the notion of "conformity with socially accepted practices". In relation to small facilitation payments, given the apparently widespread practice among Swiss SMEs of making such payments abroad and the weight that they represent in the Swiss economy, the examiners consider, consistent with the 2009 Recommendation, that Switzerland undertake to periodically review its policies and approach on small facilitation payments in order to effectively combat the phenomenon and encourage companies to prohibit or discourage the use of such payments in ethics programs or other internal policies.

2. The liability of legal persons

26. The liability of legal persons is governed in Swiss law by article 102 SCC. Upon entry into force of the revised general part of the Criminal Code, on 1 January 2007, that provision replaced, without substantive amendment, articles 100^{quater} and 100^{quinquies} SCC, which were incorporated into Swiss legislation on 1 October 2003.

a) Standard of liability

27. Article 102 SCC consists of two paragraphs, divided between subsidiary liability (article 102(1)), which is invoked when an individual perpetrator cannot be identified due to the ‘lack of organisation of the company’, and primary liability (article 102 (2)), which applies to a list of offences, including transnational bribery, when a company has not taken ‘all reasonable and necessary organisational measures to prevent such an offence’ (‘defective organisation’):

Art. 102. Liability

¹ If a felony or misdemeanour is committed in an undertaking in the exercise of commercial activities in accordance with the objects of the undertaking and if it is not possible to attribute this act to any specific natural person due to the lack of organisation of the undertaking, then the felony or misdemeanour shall be attributed to the undertaking. In such cases, the undertaking shall be liable to a fine not exceeding five million francs.

² If the offence committed falls under Articles 260^{ter}, 260^{quinquies}, 305^{bis}, 322^{ter}, 322^{quinquies} and 322^{septies}, paragraph 1 (...), the undertaking shall be penalised irrespective of the criminal liability of any natural persons, provided the undertaking can be held to have failed to take all reasonable and necessary organisational measures to prevent such an offence.

³ The judge shall set the amount of the fine according to the seriousness of the offence, of the lack of organisation, and of the damage caused and according to the economic capacity of the enterprise.

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

- a. private law legal persons;
- b. public law legal persons except for territorial corporations;
- c. companies;

d. sole proprietorships.

28. During the on-site visit, lawyers, prosecutors and judges were all agreed that cases of transnational bribery should be prosecuted under paragraph 2 and not under paragraph 1. The examiners however noted that, in the absence of guidelines or sufficient training in this area, prosecutors had difficulty in applying it, particularly with respect to the notion of ‘defective organisation’. In the absence of case law applying article 102(2) SCC to a case of foreign bribery (Alstom is the only matter in which this article was applied in relation to foreign bribery, and this was by way of a summary punishment order), there is still no jurisprudence from a competent tribunal which prosecutors from Offices of the Attorneys-General can rely on to determine exactly what would constitute organisational measures that are ‘reasonable and necessary’ to prevent bribery.

29. The first application of article 102(2) by the OAG in the Alstom summary punishment order could nonetheless serve as an initial point of reference for federal and cantonal law enforcement authorities: in this case, the OAG held the Swiss subsidiary liable after having considered that the compliance program in place was insufficient in both quantity and quality, taking into account a worldwide payroll of over 75,000 people. In particular, the OAG considered Alstom’s compliance unit to be:

‘understaffed and filled with employees with too little experience and/or training in compliance issues, and who furthermore did not have the power required to implement the ambitious ideas entertained for preventing corruption in the company on a daily basis. In these circumstances, the department could not perform sufficiently the supervisory function expected of it during the performance of the consultancy work, which by its very nature was very susceptible to corruption. The department’s failure to take appropriate action with respect to misconducting consultants and Alstom employees contributed further to the occurrence of the presently assessed cases of corruption.’²¹

Another application of article 102(2), this time by a tribunal, in a money-laundering case in April 2011, could also shed some light on this matter, depending on the outcome of the appeal now underway.

30. Concerning other standards of liability, the OAG representatives confirmed that the criteria of paragraph 1, according to which the offence must be committed ‘within an enterprise in the pursuit of commercial activities in conformity with its objectives,’ apply as well to paragraph 2. They specified that intermediaries and subsidiaries are considered to be ‘within’ an enterprise. This is illustrated in the OAG’s proceedings against Alstom: in this case, the Swiss subsidiary of the French Group, Alstom Network Schweiz AG, which had responsibility for the Group’s compliance procedure in ‘Power Systems’ and ‘Power Services’ in the electric power plant sector, was held liable for the foreign bribery in this case. In light of the rule whereby the activity must be in conformity with the objectives of the enterprise, the prosecutors insisted that, in order to invoke criminal liability, the activity must be viewed in the context of the lawful purpose of the enterprise's activities and the means available to it. The OAG representatives also explained that non-profit establishments (also covered by article 102(4)(a)) fall within the scope of article 102 SCC when they engage in a commercial activity.

b) *Application of the criminal liability of legal persons*

31. Only one company has been convicted of foreign bribery in Switzerland since the entry into force of the liability of legal persons in Swiss law. In the opinion of the OAG, this low number of convictions of legal persons was due more to law enforcement authorities being unaccustomed to using the provisions concerning corporate criminal liability than to any difficulty in enforcing them: until introduction of these

²¹ Summary punishment order, Art. 352 Swiss Code of Criminal Procedure, Bern, 22 November 2011, paragraph 15, above note 15.

provisions by legislators in 2003, the principle of *societas delinquere non potest* ('corporations cannot commit crimes') dictated legal reasoning and, according to the OAG prosecutors, it would be difficult for law enforcement authorities to adopt the habit of launching criminal investigations against legal persons as well. The potential for improvement is recognised by the OAG which held a training workshop on this issue after the on-site visit.

32. The Alstom Network Schweiz AG matter is an example of the successful application of the provision in article 102(2), introduced in 2003 that a company may be held liable irrespective of the criminal liability of natural persons – to date no individuals have been convicted under art. 322^{septies} in relation to the failure by Alstom's Swiss subsidiary to prevent the bribery in this case.²² The proceedings against the parent company, Alstom SA, in relation to projects involving bribery in Latvia, Malaysia and Tunisia were, on the other hand, dismissed. This was despite of the fact that the significant investigations by the OAG showed that the bribery on the part of the Swiss subsidiary had benefited the parent company and involved several other companies in the Group. As highlighted in the OAG press release, Alstom SA 'as the senior holding company is responsible in part for the organisational deficiencies identified'.²³ Having said this, the fact that the subsidiary of Alstom SA was required to pay an amount of CHF 36.4 million in compensation calculated on the basis of the profits to the entire Group as a result of the contracts obtained through bribery, at that the parent company had to pay CHF 1 million in 'Reparation, allowed the authorities to penalise, in a certain manner, the parent company. In this context, it is important to bear in mind that Annex I(C) of the 2009 Recommendation clearly states that 'Member countries should ensure that ... a legal person cannot avoid responsibility by using intermediaries, including related legal persons, to offer, promise or give a bribe to a foreign public official on its behalf.'

33. The other conviction for transnational bribery, contained in a summary punishment order (*ordonnance pénale*) in the Canton of Geneva, concerns the payment of bribes by the director of two hotels. In this case, the Geneva authorities did not prosecute the legal persons involved. The reason given, during the on-site visit, for not prosecuting these establishments was that there was no defective organisation involved, and that it would be difficult to prove that the legal persons had not taken all reasonable measures to prevent corruption on the part of the director. In the examiners' opinion, this case could illustrate the difficulty, which may exist in certain circumstances, in establishing proof of defective organisation (not to have taken all reasonable and necessary measures) for the prosecution of legal persons in Switzerland for the offence of foreign bribery. According to Annex 1 to the 2009 Recommendation, the payment of a bribe by a person with the highest level managerial authority (in this case, it was the director himself who paid it) can suffice to establish the liability of the legal person.

34. In the case of other offences, it is not possible to determine how many convictions have been handed down on the basis of article 102 SCC, as for the time being they are not placed on the criminal record and they do not appear in the statistics on criminal convictions published by the Federal Statistics Office. Switzerland provided information on three cases for which convictions were handed down, two of them concerning a service company and a financial institution (respectively) under article 102(1), and the third of a financial institution under article 102(2) which, at the time of the Phase 3 evaluation, was pending appeal to the Supreme Court of the Canton of Solothurn. The three cases are presented in Annex 4 to this report.

²² Proceedings are still underway against the former Compliance Manager of Alstom, as well as other individuals suspected to have been active in the payment of bribes or as financial intermediaries that benefited from such bribes.

²³ See the decision to dismiss criminal proceedings against the two Alstom companies of 22 November 2011, above note 15.

Commentary:

The examiners congratulate Switzerland on its first enforcement action against a legal person for the foreign bribery offence, seeing this as a strong signal from the Swiss authorities to companies about the risks of being exposed to criminal proceedings in Switzerland. While noting a recent increase in proceedings opened against legal persons for all offences, they observe, however, the low number of cases where corporate criminal liability provisions have been applied—for the offence of bribery of foreign public officials—since their introduction in Swiss law in 2003 and wonder whether this does not reflect a certain difficulty in applying these provisions, and in particular the notion of ‘defective organisation’. They consider that, in order to have a more systematic application by law enforcement authorities of corporate criminal liability, a clarification of the notion of ‘defective organisation’ is necessary, including by way of specific training.

3. Sanctions

a) Sanctions against natural and legal persons

(i) Sanctions against natural persons

35. Since Phase 2, the penalty incurred by individuals for the offence of foreign bribery has not changed: they are liable to a maximum penalty of imprisonment for five years or a fine, determined by the judge ‘according to the offender's guilt, taking into account his or her motives, prior history and personal situation’ (Article 63a SCC). In the absence of convictions by the courts, it is difficult to assess the practical application of this provision. In the only case falling within the scope of the Convention, the person was sentenced, by summary punishment order (*Ordonnance pénale*), to a three-year suspended fine of around €41,000 (CHF 49,500) and a fixed fine of around €10,000 (CHF 12,000), while the accused had a monthly net income of around €18,000 (CHF 20,000), the amount of the bribes paid was close to €90,000 (CHF 109,100), and the investigation had found that the commissions paid had resulted in a turnover of €1.2 million (CHF 1.5 million).²⁴ The penalty, even including the suspended fine, was less than the amount of the bribe, not to mention that both the turnover resulting from the bribe and the monthly income of the accused, were greater than the fine. In the opinion of the examiners, the penalties in this case do not seem effective, proportionate, or dissuasive. The level of penalties applied could reflect the fact that the prosecutor in charge of the case chose to proceed by means of a summary punishment order, after considering that the charges were not sufficiently serious to bring the accused before a court and taking into account other considerations such as the accused person's lack of criminal record²⁵ (see below the section of this report discussing so-called ‘special’ procedures).

(ii) Sanctions against legal persons

36. Pursuant to article 102(1) SCC, the maximum fine for an enterprise convicted of bribing foreign public officials is CHF 5 million (€4.1 million). The exact amount of the fine is fixed by the judge in accordance with the seriousness of the offence, of the lack of organisation and of the damage caused, and based on the economic capacity of the company (article 102(3) SCC). The conviction of the Swiss subsidiary of the Alstom Group is, at this time, the only example of the enforcement of this provision in practice in a case of transnational bribery. In this matter the OAG fined Alstom Network Schweiz AG CHF 2.5 million (€2,028,702)—corresponding to half the maximum penalty set out in the Criminal Code—after being found not to have taken ‘all necessary and reasonable organisational precautions to prevent bribery

²⁴ *Ordonnance de condamnation* (P/2962/2010), Canton of Geneva, p. 3.

²⁵ *Considérants en droit de l'Ordonnance de condamnation*.

of foreign public officials.’ To the knowledge of the lead examiners, this is the largest fine imposed on a company in application of article 102 SCC, to date. Alstom Network Schweiz AG was also ordered to pay a compensatory amount of CHF 36.4 million (€29.5 million) based on the estimated profits for the various companies in the Group derived from the contracts obtained in Latvia, Malaysia and Tunisia. The bribes in this case amounted to, respectively, €896,932, €7.7 million and €2.7 million (totalling approximately €9.8 million). A look at some judicial decisions concerning legal persons in cases not involving transnational corruption, related to money laundering shows that, when applying the provisions of article 102(3) SCC to a financial intermediary (see Annex 4, box 2), the court imposed a fine of CHF 250,000 instead of the CHF 2.6 million sought by the prosecutor from the Canton of Solothurn. In another case, involving lack of due diligence in financial operations (article 375^{ter} SCC; article 102 SCC) by a financial institution, the institution was punished by a fine of CHF 300,000, by means of a summary punishment order (see annex 4, box 2).

(iii) *Supplementary sanctions*

37. Article 67 SCC, in force since 2007, provides for a total or partial prohibition on the exercise of a professional activity by a person who has committed an offence in the exercise of this activity and who has been sentenced to imprisonment of more than six months or a fine of more than 180 fine-days (CHF 540,000 or €490,000). This provision has yet to be applied by Swiss courts in relation to foreign bribery. Another penalty in force since the Phase 2 report is publication of the judgment (article 68 SCC) if the public interest, the interests of the person harmed or of the complainant so require. There are no provisions in Swiss law prohibiting access to Swiss public procurement contracts by an enterprise convicted of corruption (see below, the section of the report addressing the question of public advantages).

b) Sanctions issued in the context of ‘special’ procedures (summary punishment orders and simplified procedure) and provisions on ‘reparation’

38. It was noted that in both cases of transnational bribery that resulted in a conviction in Switzerland, the OAG and the Geneva authorities opted for a summary punishment order instead of prosecuting a criminal trial. It was also noted that the criminal investigation into Alstom SA was discontinued in accordance with the article 53 SCC provisions on ‘Reparation.’ The simplified procedure, used more or less informally in the past, despite the absence of relevant legal provisions in the old federal law of criminal procedure and in the old cantonal procedure codes (with three exceptions: Basel-Country, Ticino and Zug), was introduced in 2011 into the new Swiss code of criminal procedure (article 358 ff CPC).

39. The summary punishment order, which most of the cantons used already before it was recently introduced in the new Swiss Code of Criminal Procedure, allows the prosecutor, under certain conditions set by law (article 352 ff CPC) to settle a case without bringing it before a court, if he or she considers that the charges in question do not merit a penalty of greater than six months’ imprisonment. The so-called "simplified" procedure allows for an accused to negotiate his or her sentence: among other conditions, in exchange for the accused person's recognition of the facts in the charges, the parties agree on a penalty. The summary punishment order carries a maximum prison sentence of six months (as opposed to five years for the simplified procedure).²⁶ The procedure for ‘Reparation’, according to the Federal Council in

²⁶ In the simplified procedure, the mutually agreed charges are transmitted to the court, which verifies that the accused recognises the facts and that the deposition is consistent with the file; the court does not examine any evidence, on the other hand it verifies the evidence examined by the prosecutor. If the legal conditions are met, the court treats the charges as a judgment. In principle, it is up to the accused to launch plea bargaining, and he is free to accept or reject the arrangement proposed by the prosecutor. With the penal order, the prosecutor proposes a sentence to the accused and, if the accused does not oppose it, it is treated as a final judgment. If the accused opposes the proposed judgment, the case then reverts to a court.

its Message at the time of the introduction of this provision in the Swiss Criminal Code, consists of an exemption from liability once the defendant has made all efforts that could be reasonably expected to compensate the wrong.²⁷

40. In relation to provisions on ‘Reparation’ (art. 53 CC), these operate to exempt the defendant from prosecution, trial or punishment when he or she makes all reasonable efforts to rectify the wrong committed, and when the public interest and the interest of the injured party in bringing a prosecution are insignificant.²⁸ Compensation of the damage does not lead to an exemption from liability unless the legal conditions are fulfilled. In the first instance, the conditions for a suspended sentence need to be satisfied;²⁹ in addition, the public interest and the interest of the victim in the criminal prosecution must be insignificant.³⁰ In the proceedings against the parent company of the Swiss subsidiary Alstom Network Schweiz AG, the OAG decided to dismiss the proceedings under article 42 SCC after having concluded that Alstom SA had minimal liability, because it had agreed to repay the damage and had taken corrective measures, and that the public interest in the criminal prosecution was insignificant given that the Swiss subsidiary had already been convicted.³¹

41. Such procedures have undeniable advantages for law enforcement authorities, in that they streamline procedures and reduce costs. The use of such procedures in transnational bribery matters is not isolated to Switzerland: these procedures exist in several Parties to the Anti-Bribery Convention in various forms and have sometimes proved useful in these countries, as reflected in the Comparative Table of Enforcement Data collected from the 38 Parties to the Anti-Bribery Convention.³² However, the use of these procedures does raise some questions, in the absence of documents or guidelines setting out a framework for law enforcement authorities and due to the fact that the final decision is sometimes confidential, as is the case for summary punishment orders which are issued without public debate, they are put in writing and are only accessible to ‘interested persons (article 69(2) CPC), or indeed, to interested persons, when ‘the applicant demonstrates an interest, worthy of protection, in the information and that there is no overriding private or public interest in opposition to the request,’ according to a decision of the Federal Tribunal that also applies to decisions to dismiss proceedings (TF BGE 134 I 286 S. 287). Unless the cantonal or federal OAG decides otherwise, as was the case for the proceedings against Alstom which

²⁷ Message concerning the modification of the Swiss Criminal Code, 21 September 1998 (FF 98.038): www.fr.ch/saspp/files/pdf19/message_cf_ncp.pdf (in French).

²⁸ Article 53 CC (Reparation): When the defendant has compensated the damage or taken all efforts that could be reasonably expected to rectify the wrong that he or she has caused, the competent authority will desist from prosecution, from bringing the matter to a trial or from punishment: a) if the conditions for suspension sentence are satisfied (article 42) and b) if the public interest and the interest of the victim in a criminal prosecution of the defendant are insignificant.

²⁹ See: www.admin.ch/ch/f/rs/311_0/a42.html (in French).

³⁰ Article 53 CC.

³¹ In the Alstom matter, the criminal investigation into the parent company was dismissed under the provisions on ‘Reparation’ after the OAG had taken into account the fact that the investigation had shown that the group made significant efforts to develop the necessary regulations to prevent illicit payments, in particular bribes, in the framework of its corporate structure; that Alstom Network Schweiz AG was created with the goal of centralising payments to consultants and also with the objective of ensuring a better respect for compliance obligations; that the investigation did not bring to light evidence of a systematic use of ‘slush funds’; that the group had corrected its notable shortcomings by reinforcing the role of the Ethics & Compliance service; that Alstom SA had accepted to pay CHF 1 million in ‘compensation’ and that its Swiss subsidiary Alstom Network Schweiz AG had already been convicted by summary punishment order. See Summary Punishment Order, paragraphs 1.2.1 to 1.2.9, above note 15.

³² For the latest data, see the Comparative Table at page 17 of the 2010 Annual Report of the Working Group on Bribery: <http://www.oecd.org/dataoecd/7/15/47628703.pdf>.

led to an OAG press release and the temporary publication on the internet of the Summary punishment order and Order to dismiss proceedings.³³ In addition, for matters resolved by way of summary punishment order, under the provisions in article 353 CPC providing for the content of these orders, the OAG is not required to go into detail about the reasoning behind the decision, as illustrated in the summary punishment order issued in relation to the Swiss subsidiary of Alstom. In this case, Alstom Network Schweiz AG was fined CHF 2.5 million, half of the maximum fine; however the order is silent on the method for calculating the amount of the fine. In the view of the Working Group, Switzerland should, where appropriate and in conformity with the applicable procedural rules, make public in a more detailed manner, the reasons for using that particular procedure, as well as the basis for the decision and the sanctions that were ordered.

42. As the simplified procedure was introduced only recently across the entire country, its impact on sentencing has yet to be seen, especially in cases involving companies in which, according to doctrine, law enforcement authorities may use this procedure. In the absence of experience with this procedure, the Working Group is not able to express an opinion on the type of arrangements that might flow from it: its practical application should however be closely monitored by the Working Group, to ensure that its use is based on the principles of predictability and transparency.

Commentary:

The lead examiners note the record fine imposed in Switzerland against a legal person under provisions in the Criminal Code relating to bribery of foreign public officials and recognise that the prosecutions involving the Alstom Group demonstrate the willingness of the Swiss authorities to fight active bribery of foreign public officials. They consider that the sanctions in this case are effective, proportionate and dissuasive.

In light of the penalties imposed in the case involving a natural person convicted of transnational bribery in a canton, the lead examiners consider that, in the context of prosecutions of natural persons, criminal sanctions are not sufficiently effective, proportionate and dissuasive. For this reason, the examiners invite the Working Group to follow-up practice in this area.

The lead examiners note, on the other hand, that the use of special procedures and the mechanism for 'Reparation' is an innovative method for resolving cases and has contributed to Swiss enforcement action. In the view of the lead examiners, the law enforcement authorities should, where appropriate and in conformity with the applicable procedural rules, make public in a more detailed manner, the reasons for using that particular procedure, as well as the basis for the decision and the sanctions that were ordered. For these reasons, the lead examiners also recommend that the possibilities offered to the Office of the Attorney-General, (i) to dispose of cases involving the crime of bribing foreign public officials by way of summary punishment orders and (ii) to negotiate with the accused through the simplified procedure and (iii) the use of Criminal Code provisions on Reparation, should be the subject of follow-up by the Working Group, as practice evolves, in order to ensure the predictability and transparency of these three procedures. In addition, the examiners invite the Working Group to monitor the penalties applied, including by way of summary punishment order and simplified procedure.

³³ In the Alstom matter, the OAG made the orders available on the website of the OAG for two weeks after their entry into force.

4. Confiscation of the instrument and proceeds of bribery

43. As noted in the Phase 2 report, Switzerland takes a proactive approach when it comes to confiscation. Between 2008 and June 2011, sums totalling CHF 108.2 million and USD 32 million were confiscated by the OAG in connection with the bribery of foreign officials. This figure does not include the CHF 18.8 million confiscated in connection with the UN Oil for Food programme or the amounts confiscated by the cantons, nor the amount confiscated in the context of the Alstom matter. Confiscations have, to date, involved the advantages offered, directly by enterprises or through shell companies or mailbox companies, to officials (cash, transfers of funds or gifts) as well as the proceeds obtained through the bribe (or their equivalent). There has not been a conviction of those responsible for the bribe in the context of proceedings described above that resulted in confiscation of the advantages distributed or of the proceeds of the corruption. On the other hand, in the proceedings against the subsidiary of the French Alstom Group concluded in November 2011, Alstom Network Schweiz AG was required to pay a CHF 2.5 million fine, and repay the estimated profits of the corrupt transactions amounting to CHF 36 million (approximately €29 million), corresponding to the profits obtained from the contracts in Latvia, Malaysia and Tunisia. In relation to the actual bribes paid, as noted above, the decisions handed down on 22 November 2011 have not concluded the Alstom matter: at the time of Switzerland's Phase 3 evaluation, proceedings were still underway against natural persons suspected of passive bribery and against consultants.

44. If monetary amounts are often confiscated even without a conviction, this is because Swiss law allows judges to order confiscation of the instruments and proceeds of crimes even if no specific person can be held liable, "if such objects compromise ... morals or the public order" (article 69-71 SCC).³⁴ In addition, articles 376-378 CPC authorise the prosecutor to issue a confiscation order independent of a criminal proceeding. As with the confiscation of dangerous objects (article 69 SCC), the confiscation of assets (articles 70 ff SCC) is possible even when no specific person can be held liable, i.e. when the perpetrator of the crime cannot be identified, is deceased or not accountable, or has fled abroad and has not been extradited. In all cases, confiscation presupposes that the elements that constitute a crime have been satisfied – even if the guilt of its perpetrator has not been examined – and a link between the crime and the objects to be confiscated. In addition, when confiscation cannot be ordered in a criminal procedure, it must be ordered under the conditions mentioned. Moreover, the rules of procedure and articles 376 ff CPC must be followed. During the on-site visit, the prosecutors explained that these provisions allowed them to circumvent a foreign State's refusal to respond to a request for MLA from Switzerland, and often constituted an alternative strategy to prosecution of those responsible for bribery abroad in the absence of cooperation by the foreign authorities.

Commentary:

The lead examiners commend Switzerland's proactive approach in confiscating the instrument and proceeds of bribery of foreign public officials, as demonstrated in the significant confiscations ordered in the context of the Alstom matter, which they consider an example of good practice. The lead examiners recognise that confiscation may be more effective than prosecuting the persons responsible, who often reside abroad, in certain cases when it is impossible to bring to light the entire corruption scheme because of the explicit or implicit refusal of foreign countries to cooperate. They emphasise the importance of confiscation as a complementary measure to prosecution of the crime of transnational bribery, whenever this is possible, and not an alternative to it.

³⁴ Under article 70 CP, judges are required to order confiscation of assets that are the proceeds of the crime and, if their amount cannot be precisely determined, to proceed with an estimate. Article 71 CP allows for confiscation of a sum equivalent to the value of the assets when they are not available.

5. Investigation and prosecution of the offence of transnational bribery

45. At the time of the Phase 3 evaluation, Swiss criminal procedure was in the midst of great changes: the 29 codes of procedure (26 cantonal codes and three federal laws) which had until then coexisted were replaced as of 1 January 2011 by the new Swiss Criminal Procedure Code (CPC). Among the most striking changes in the new code is the choice of the single prosecution model for all Switzerland and disappearance of the examining magistrate (*juge d'instruction*) and the fact that henceforth parties will be able to negotiate an outcome in the context of the 'simplified' procedure.

a) Principles and methods of investigation and prosecution, resources and coordination

(i) Jurisdiction in cases of foreign bribery

46. As at the time of Phase 2, the Confederation has jurisdiction to prosecute transnational bribery cases when the crime has been committed for the most part abroad or in several cantons, without any evident predominance in one canton (article 24 (1) CPC). Where federal jurisdiction does not apply, prosecution is the responsibility of the cantons. In the opinion of the OAG prosecutors interviewed, because in many cases of transnational bribery the deeds take place predominantly abroad or across several cantons, prosecution of the crime falls first within federal jurisdiction. The data supplied by Switzerland show that the cantons are also active in prosecuting the offence: at the time of Phase 3, the cantons were prosecuting one out of six cases opened in Switzerland.

(ii) Rules governing criminal prosecution

47. As in the old codes of procedure, the CPC enshrines the legality principle (article 7 CPC, mandatory nature of prosecution): the public prosecutor must in effect pursue all criminals and seek out all the facts needed for their prosecution. Until entry into force of the CPC, some cantonal codes of procedure provided for a wide ranging application of the opportunity principle. The new code of criminal procedure has opted for a measured application of the opportunity principle, as previously recognised in the majority of cantons (article 8 CPC). The Attorney General's Office now oversees the procedure from beginning to end, and the examining magistrates (*juges d'instruction*) that existed in the Confederation and in several cantons have disappeared.

48. The law enforcement authorities have, in accordance with the Code of Criminal Procedure, the power not to prosecute in the following situations: when the offence is not such as to influence the setting of the penalty because of other offences with which the accused is charged; when a penalty of equivalent duration issued abroad must be added to the penalty incurred for the offence in question; when the guilt of the perpetrator and the consequences of the act are not significant; and when the perpetrator has made all the efforts that could reasonably be demanded of him or her to compensate the harm he or she has done and the public interest in prosecution is minimal (article 53 of the criminal code, "reparations"). There is one final situation where the prosecutor may decide not to proceed: this is when prosecution is delegated to a foreign authority or when proceedings have already been initiated abroad for the same set of facts.

49. The role of the offices of the Attorney-General (*parquet*) and the initiatives reserved to it by law at all phases of proceedings, including the possibility of resorting to a simplified procedure or issuing a conviction by summary punishment order, could raise concerns that undue considerations might enter into a proceeding involving the bribery of foreign public officials, and particularly when the prosecutor is placed under political authority. This issue has been settled at the Confederation level, where the prosecution office is no longer under the Department of Justice and Police but is subject to supervision by an ad hoc authority comprising magistrates, lawyers and experts elected by Parliament (articles 20, 23 and ff of the new law on organisation of the federal criminal authorities – LOAP – which came into force on 1

January 2011), and it has been or is about to be settled in several cantons in the course of reviewing the structure of their prosecution offices³⁵. On the other hand, in cantons where the prosecution service is still subject to the executive or the legislature because of the way its members are designated (appointment by the executive or election by parliament, in which case prosecutors must be affiliated with a political party in order to be elected), the approach of the prosecutors could include discretionary criteria potentially contrary to an effective fight against transnational bribery.

50. In the view of all the prosecutors interviewed, the risk of undue considerations is however tempered by several elements: first, because the CPC enshrined only a limited opportunity principle, and second, because the decision not to prosecute or to apply the simplified procedure cannot be taken on the basis of political reasons, as Swiss criminal authorities are, pursuant to article 4 (1) CPC, "independent in enforcing the law and subject only to the rules of the law". Moreover, under the simplified procedure, the competent tribunal may, in considering the case as a whole, verify that the proposed judgment is consistent with the established facts. Lastly, according to a representative of the Office of the Attorney General of the Canton of Geneva, the popular election of the Attorney General – Geneva is the only canton to apply this system – would shield its Attorney General from any political influence, even though the system for nomination requires affiliation with a political party in order to be elected, and it would thus preserve his or her independence.

Commentary

The lead examiners welcome confirmation by the Swiss judicial authorities that the national economic interest and political considerations do not enter into the decision to prosecute. They consider that, in the context of the new criminal procedure code, the question of the independence of the prosecution services can play a significant role in excluding such considerations and they recommend consequently that Switzerland encourage cantons where the Office of the Attorney General remains subject to a public authority, to ensure its autonomy in relation to such authority.

(iii) *Means of investigation and statutory limitations applicable to the offence of bribing foreign public officials*

51. The Phase 2 Report on Switzerland noted the wide variety of investigative means available to the judicial authorities both during the preliminary inquiry and throughout the actual investigation phase in cases of bribery of foreign public officials (lifting of bank secrecy, seizure and freezing of bank accounts, interception of communications, and use of undercover agents). The situation remains unchanged with entry into force of the CPC, which in fact introduces a new feature: it allows investigators, with a judicial warrant, to monitor banking relations in order to observe transactions and movements with certain accounts (article 284 CPC).

52. A fully computerised central criminal registry (*casier judiciaire*) known as "Vostra" is now available for prosecution authorities to ensure, among other things, that there will not be two investigations into the same facts. That registry contains convictions and pending criminal proceedings concerning individuals, including Swiss citizens convicted abroad. In future, this registry will also include convictions of companies and at the time of the Phase 3 examination Switzerland was working to develop the legal basis for such a registry, for which consultations are planned by the end of 2011. Moreover, in addition to criminal judgments, since 2009 the OFS has been publishing data on crimes recorded by the police, on the

³⁵ On this subject, see the Compliance Report on Switzerland adopted by GRECO in March 2010 (pp 4-5) [http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/GrecoRC1&2\(2009\)2_Switzerland_FR.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/GrecoRC1&2(2009)2_Switzerland_FR.pdf)

basis of harmonised data collection. However, only crimes handled by the police are taken into account, not those handled by the prosecution services.

53. In conducting their inquiries, prosecutors and police officers, as was noted in the Phase 2 report, have quite long limitation periods of 15 years. According to the prosecutors interviewed, the same limitation period will be applicable to investigations of companies, however on the basis of another interpretation, as article 102 SCC defines a new offence (defective organisation), the limitation period would instead be three or seven years, depending on the case, rather than the limit applicable to the offence of bribing foreign public officials.³⁶ Since the on-site visit, a summary punishment order issued by the OAG and subsequently enforced against a financial institution, in which the prosecutor applied the statutory limit for the underlying crime, has confirmed the prosecution's approach according to which article 102 is a standard of attribution to the original offence and not a new offence of defective organisation (*Ordonnance pénale* of the OAG of 15 July 2011, see Annex 4, box 2).

54. During the on-site visit, prosecutors were on the whole satisfied with the means of investigation available to them by law, which they deemed adequate in light of the many means of proof required in complex cases of international bribery. What criticism there was concerned the limited possibility of recovering the high costs involved in large-scale inquiries. Representatives of the OAG mentioned, in this context, the legal maximum for court costs, which is set by law at CHF 100,000 (around €80,000) (article 73 LOAP). The recently concluded Alstom case, involved six years of investigations and multiple jurisdictions. The OAG was able to recover CHF95,217 (€77,387) in procedural costs.

(iv) *The resources available for investigations*

55. During the Phase 2 examination of Switzerland, the Working Group decided to conduct follow-up, as practice evolves, in order to verify that the federal authorities had available the means needed to prosecute the offence of bribery effectively. Eight years after the Confederation acquired these new powers, the situation as described by governmental and nongovernmental participants in the discussion panels appears ambivalent.

56. While attribution of these powers was immediately followed by an increase in OAG personnel, it has since had to put activities on hold because of nationwide budgetary constraints. These problems in applying the reform granting new powers to the Confederation have had an impact on the conduct of investigations. It was in response to these problems that the OAG undertook in 2007 to concentrate its efforts and its staff training on the more complex and larger-scale economic crimes, including transnational bribery and mutual legal assistance in such cases. A new unit was created to handle economic crime and transnational bribery (WIKRI), comprising seven prosecutors and assistant prosecutors for economic crimes (including transnational bribery). As early as 2002 a specialised unit for international mutual assistance had been created; at the time of the on-site visit, it had seven prosecutors and assistant prosecutors.

³⁶ Concerning the prosecution of businesses, there is a doctrinal dispute over the nature of article 102, as a standard of attribution or a new offence, which affects application of statutory limitation periods. If article 102 is considered a standard of attribution to the original offence, the statutory limitation applicable to it also applies to prosecution of the enterprise. Thus, it will be 15 years in the case of transnational bribery. On the other hand, if article 102 is considered to constitute a new offence of "defective organisation" within an enterprise, it still has to be defined: if it is a *sui generis* offence, the statutory limit would be seven years (article 97 (1) CPP), while if it is a misdemeanour, defined as an offence punishable by a fine (article 103 CP), the limit will be three years. See A. Macaluso, "L'Ordonnance pénale comme mode de clôture des procédures dirigées contre l'entreprise selon le CPPS", *Jusletter*, 2 May 2011 ; B. Perrin "La responsabilité pénale de l'entreprise en droit suisse", *Corporate Criminal Liability*, M. Pieth, R.Ivory (eds), 2011.

57. This reform has not however yielded all the expected results. The media, civil society organisations and political circles are continuously citing the length of proceedings and the lower-than-expected number of criminal charges and judgments. While the OAG prosecutors interviewed dismissed the criticisms to the effect that the lack of convictions at the federal level is due primarily to inadequate resources, and pointed instead to the difficulties of gathering evidence abroad as the primary reason for the length of proceedings, they admitted that a greater number of prosecutors and financial analysts would allow more prosecutions for transnational bribery. The Federal Attorney General had stressed in a public interview in early 2011, in the newspaper *Sonntagszeitung* that the OAG needed more police officers and specialised personnel if proceedings were to be more effective.

58. On-site discussions with representatives of the cantonal prosecution services revealed a general satisfaction with the resources available for investigating crimes of this type, even without the degree of specialisation in transnational bribery found in the OAG: on average, the cantons of Basel-City, Bern, Geneva and Zug have seven or eight prosecutors, backed by investigators and financial analysts often organised as a specialised brigade to handle economic crimes.

(v) *Cooperation and coordination among federal and cantonal criminal justice authorities*

59. As noted in the Phase 2 report, the possibility of concurrent criminal investigations by the Confederation and the cantons and among the cantons themselves requires cooperation and coordination. Case law is clarifying the situations that arise from the sole jurisdiction of the cantons: it serves as guidelines for the law enforcement authorities.³⁷ When an offence is detected by a cantonal authority, it can also consult the OAG, which has a special office to decide questions of jurisdiction; in case of conflict, it is up to the Federal Criminal Tribunal to decide. Federal and cantonal law enforcement authorities also consult the Vostra registry regularly to avoid concurrent proceedings. In order to ensure unity of doctrine, a database known as "Jivaro" allows law enforcement authorities to obtain and exchange information on criminal cases handled, and to raise technical or procedural questions in order to benefit from the viewpoints and experience of law enforcement authorities affiliated with the system. At the time of the on-site visit, more than 90% of the Swiss law enforcement authorities had joined the "Jivaro" system.

60. As proceedings initiated at the federal level often have ramifications in the territory of one or more cantons, the Confederation can ask for MLA (article 44 CPC). When the cantons have jurisdiction, inter-cantonal cooperation, based on the same rules, can be readily pursued according to the cantonal prosecutors interviewed: a prosecutor may himself or herself carry out an investigation or search on the territory of another canton.

Commentary:

While they appreciate the availability of specialised human and technical resources for criminal prosecution purposes, the lead examiners are concerned at the low number of convictions for the offence of bribing foreign public officials, ten years after Switzerland enacted the offence. Given the limited number of indictments and convictions, they recommend that Switzerland periodically review the resources available to law enforcement authorities in order to effectively combat bribery of foreign public officials, especially in the context of the new code of criminal procedure. With respect to the statutory limitation periods applicable to cases of transnational bribery committed by legal persons, the examiners also recommend follow-up by the Working Group, as case law evolves, in order to verify continued application of the 15-year limit for prosecuting legal persons.

³⁷ In money-laundering issues, for example, a federal tribunal ruling decided that acts involving concealment of the criminal origin of funds, if they take place in Switzerland, are under cantonal jurisdiction.

6. Money laundering

a) *Standards of liability and judicial enforcement*

61. The legal provisions for punishing money laundering associated with the bribery of foreign public officials have not changed since the Phase 2 evaluation of Switzerland. Pursuant to article 305^{bis} SCC, the act of laundering money in connection with foreign bribery is punishable when the principal offence has been committed abroad and when it is also punishable in the State where it was committed (principle of dual criminality).

62. Recent jurisprudence has clarified the law regarding dual criminality when the predicate offence is bribery. In a ruling of 21 October 2010 on laundering of the assets of a corrupt Italian official, the federal tribunal gave an extensive interpretation to article 305^{bis}(3) SCC, holding that, in the case where the predicate offence is committed abroad, it is sufficient for the crime to consist of acts generically punishable in Switzerland at the time they were committed in order to apply article 305^{bis} SCC: thus, concrete dual criminality is not necessary (*Arrêt* 6B-900/2011). In this case, although the Italian official had indeed been sentenced in his own country for accepting bribes, his conviction followed an agreement reached between him and the Italian criminal authorities (*patteggiamento*) and that agreement did not clearly establish the offence. The Federal Tribunal, in finding the predicate offence of bribery, referred to the minutes of the Italian proceedings to find that certain sums deposited by the official in Switzerland came from bribes, for which finding there was never any official confirmation from the Italian justice authorities.

63. Federal courts have also clarified the notion of proceeds of crime under Swiss law. In its ruling GB-221/2010c of 25 January 2011, the TF examined whether the benefit obtained by the briber through a tainted contract could be considered as "assets originating from a criminal offence" in the meaning of article 305^{bis}(1) SCC and could therefore be confiscated. In principle, the TF accepted this argument of the OAG. The TF ruled that the benefit to the briber must have a natural and adequate link of causality with the act of bribery, without necessarily being the direct and immediate consequence thereof. In the case at hand, the mayor of an Italian town had been bribed in connection with a thermal power plant that was about to be shut down. As it was not certain that the power plant was closed as a result of the bribery, the link of natural causality was not sufficiently established.

64. The number of convictions of perpetrators of the money laundering offence in article 305^{bis} SCC has risen sharply since Phase 2, to around 160 a year on average over the period 2005-2010. It is difficult to determine which of those convictions were issued for money laundering in connection with national or transnational bribery, as Switzerland was not in a position to provide such figures. As in Phase 2, the prosecutors that participated in the on-site visit explained that, in cases of money laundering associated with transnational bribery, it was often difficult to prove the criminal origin of the funds, especially when the predicate offence of bribery had been committed abroad. In this context, the examiners noted the shorter statutory limitation period applicable to money laundering (seven years) compared with that applicable to transnational bribery (15 years), except in cases of aggravated laundering, where the time limit is also 15 years.³⁸ Without enough time, the Swiss magistrates might not always be able to find sufficient evidence of the criminal origin of "dirty" funds placed in Switzerland.

b) *Detection and reporting of suspicions of money-laundering linked to transnational bribery*

65. The most important source of information on transnational bribery for the OAG is the reports transmitted by the Money Laundering Reporting Office (MROS): of the 32 cases of transnational bribery

³⁸ Pursuant to article 305 bis (2) CP, a case is deemed serious when the offender belongs to a criminal organisation or to a gang formed to systematically launder money, or makes money-laundering his or her trade.

under investigation by the OAG at the time of the on-site visit, 24 originated with the MROS. The examiners found that the number of MROS reports concerning suspicions of national or transnational bribery (574 reports between 2005 and 2010) exceeded the number of cases opened by the OAG: the authorities explained this difference by the fact that several reports may relate to the same case of bribery.

66. Since 2009, the FINMA (Swiss Financial Market Supervisory Authority) has been the oversight authority for financial service providers, including with regard to anti-money laundering legislation. In Phase 2, the Working Group had recommended that Switzerland raise the awareness of supervisory authorities about the importance of utilising the full range of available sanctions so as to ensure more dissuasive punishment of money-laundering in connection with transnational bribery (Recommendation 3e). Since then, more use has been made of summary punishment order and new administrative penalties have been introduced to punish more effectively financial intermediaries that fail in their legal duty of due diligence.³⁹ As well, the notion of financial intermediaries has been extended to include "domicile companies", which may be legal persons, companies, foundations, trusts, fiduciary firms and other entities that do not engage in commercial or manufacturing activities in Switzerland or in any other country (*Ordonnance* of 18 November 2009 on financial intermediation activity exercised as a profession). Since its creation, the FINMA has intervened 46 times with banks because of indices of due diligence failings. The supervisory board for the banking due diligence agreement (CDB) imposed more than 30 sanctions between 2009 and 2011. During the on-site visit, FINMA representatives declared that none of their actions had been directly due to failings with respect to transactions connected to foreign bribery. In the Working Group's opinion, FINMA's proactive stance with financial intermediaries and the broad range of sanctions available satisfy Recommendation 3(e) from Phase 2.

Commentary:

The lead examiners congratulate Switzerland for its actions in detecting and punishing money-laundering, and for expanding the scope of sanctions available to the new supervisory authority, the FINMA. To achieve more effective prosecution of money-laundering in connection with the offence of bribing foreign public officials, when it does not amount to aggravated money laundering under article 305^{bis} (2) SCC, the examiners recommend that Switzerland consider establishing a statutory limitation period that allows sufficient time for investigation and prosecution of such cases.

7. Accounting rules, external audit and corporate compliance programmes

a) Accounting standards

67. In the Phase 2 evaluation of Switzerland, the Working Group, while not formulating a specific recommendation, observed that Swiss companies were subject to minimal rules with respect to the keeping of accounts and that the scope of the legal obligation to keep business accounts varied greatly depending on the company's legal nature. Since then, Recommendation X.A from the 2009 Recommendation reinforces the obligations of article 8 of the Convention concerning accounting standards and recommends that companies be required to disclose all elements that constitute contingent liabilities in their financial statements.

³⁹ Exercise of an activity without authorisation, recognition, license or registration is henceforth punished by a penalty of up to three years' imprisonment or a fine. The penalty for non-respect of FINMA decisions has been doubled and is now CHF 100,000. The FINMA may publish its decisions with the corresponding personal data and may confiscate the gains acquired. Cf. art. 34- 35, 44 and 48 LFINMA.

68. At the time of the Phase 3 examination, accounting requirements had not changed fundamentally. In the opinion of the accounting profession interviewed, the situation should however improve in the near future, as the federal authorities were working at the time of the Phase 3 evaluation on a reform of accounting law that would institute uniform accounting rules for all companies constituted under private law and would enhance corporate transparency. Consistent with the practice established by the Working Group, draft legislation is not taken into account in country evaluations. However, if the draft law is in fact adopted, individual companies, partnerships and legal persons recorded in the commercial registry will be required to keep accounts in accordance with precise rules (article 957 (1) and articles 958 ff of the draft Code of Operations (CO)).⁴⁰ Stricter provisions would be applied to large companies⁴¹ and for groups of companies (article 961 ff draft CO); when certain conditions are met, the company will be required to prepare its financial statements according to a recognised accounting standard (e.g. Swiss GAAP RPC or IFRS), and those statements must reflect the true economic situation of the company (the principle of "fair representation").

b) External audit

69. In Phase 2, the Working Group noted certain shortcomings in the then-applicable company audit regime, in particular the absence of proper standards to ensure the qualification and independence of the auditors. Since then, Recommendation X.B (ii) of the 2009 Recommendation calls upon parties to the Convention and professional associations to maintain adequate standards to ensure the independence of external auditors. Recommendation X.B (i) urges member countries to consider whether requirements on companies to submit to external audit are adequate.

70. Since Phase 2, external audit in Switzerland has been overhauled. The new legislation on external audit, consisting of the 2007 law on audit supervision (which came into force in September 2007) and an amendment to the pertinent articles in the CO (Swiss Code of Operations, which came into effect in January 2008) has redefined the qualifications of auditors and has provided detailed regulations governing the independence of the audit body, in order to prevent conflicts of interest. It has established a new Federal Audit Oversight Authority (FAOA) which ensures, through a licensing system, that audit services are provided only by sufficiently qualified professionals.⁴² Moreover, the audit bodies of public corporations (those that are publicly traded, those that have bonded debt or whose assets or sales represent at least 20% of the assets or sales of a group of companies that is publicly traded or has bonded debt) are subject to supervision by this authority. Such supervision allows the authority to conduct on-site inspections of the company in order to verify the work of the audit body.

71. The audit provisions have been supplemented and expanded. Regardless of their legal form, all public corporations, commercial corporations, associations and foundations⁴³ that exceed certain thresholds similar to those already in use in the EU are now subject to a comprehensive ("ordinary") external audit of

⁴⁰ Individual companies, associations and foundations that are not required to register in the commercial registry need to keep accounts only on their revenues and expenditures and their equity situation (article 957 (2) draft CO).

⁴¹ A company is defined as large when it exceeds the following thresholds: CHF 20 million for total assets, CHF 40 million for sales and an annual average of 250 full-time employees. The strictest rules concern the annual accounts (balance sheet, statement of earnings, annex) and the obligation to prepare a cash flow table and annual report.

⁴² As part of this mandate, the FAOA has reported around 40 cases to law enforcement authorities. These were cases where individuals had performed audit work without an authorisation from the FAOA.

⁴³ At the request of the supreme body of the foundation, the supervisory authority may exempt a foundation from the need to appoint an audit body if the total of its balance sheet for two successive fiscal years is less than CHF 200,000, if the foundation does not solicit public donations, and if the audit is not necessary to reveal the exact state of the foundation's capital and earnings (*Ordonnance* concerning the audit body of foundations, SR 211.21.3).

their annual accounts. A "restricted" external audit, based on hearings, analytic control operations and appropriate detailed verifications, applies to small commercial companies and foundations. Only very small companies can forego external audit – those that employ no more than 10 persons, associations that do not meet the turnover threshold for ordinary audit, and certain foundations.⁴⁴

72. Since 2008, with entry into force of the new audit law, the issue of bribery and fraud has become of much greater importance to the auditor than it was during the Phase 2 examination, as the mechanisms for reporting shortcomings have been changed: whereas in an ordinary audit, if the audit body finds a serious violation of the law or the statutes or if the Board of Directors fails to take adequate measures after written warning from the auditors, the audit body will so advise not only the Board of Directors but also the general meeting of shareholders, where such organs exist (article 728c (2) CO). Thus, a serious breach of the law, which includes any criminal violation such as bribery, must be reported simultaneously and not only in a subsidiary way (as under the old law) to the general meeting. In the past, the shareholders' meeting was informed only in a subsidiary manner. Several training courses of the *Chambre Fiduciaire* (the Swiss college of auditors and accountants), as well as several issues of the *Chambre's* specialised magazine, *L'expert comptable suisse*, have alerted the profession to the new legal requirements of article 728 CO, and to the fight against transnational bribery.

Commentary:

The lead examiners welcome the modernisation of the audit system. In order to complement the system already in place, they recommend that Switzerland, pursuant to Recommendation X.B (v), should consider requiring external auditors to report suspected acts of bribery of foreign public officials to competent authorities independent of the company, such as law enforcement or regulatory authorities and, where appropriate, ensuring that auditors making such reports reasonably and in good faith are protected from legal action. The examiners also recommend to the Swiss authorities, in the context of the current legislative move to reform accounting law, that they continue their efforts to encourage disclosure by companies, in order to improve the prevention and detection of bribery of foreign public officials in accordance with Article 8 of the Convention and Recommendation X.A of the 2009 Recommendation

c) Compliance and ethical programmes of companies and internal controls

73. Under different provisions in Swiss legislation, a compliance programme can have some legal value when it comes to the bribery offence. As noted earlier in this report, with the introduction in 2003 of corporate liability, the criminal liability of companies can be engaged if they have not taken all reasonable and necessary organisational measures to prevent the offence of bribery, as evident in the conviction of the Swiss subsidiary of the Alstom Group in the proceedings concluded in November 2011 after the OAG found that the Group's compliance system had not been implemented with the persistence required to avoid corrupt acts.⁴⁵ There are also other rules that enable States Parties to the OECD Convention other than Switzerland to request the accounts of Swiss companies in cases where their domestic legislation has been violated. Swiss companies have learned about this at their cost in recent years. In order to forestall proceedings opened against them by the American authorities, who charged them with having violated the Foreign Corrupt Practices Act, Panalpina and ABB undertook to pay US\$82 million and US\$58 million, respectively, to the American authorities. Nor are SMEs exempt: an automotive subcontractor in Fribourg paid a fine of US\$5 million to the same US authorities for an alleged case of corruption in China,

⁴⁴ A foundation's waiver of an external audit does not release it from its obligation to present its accounts to the supervisory authority (see <http://www.admin.ch/ch/f/rs/2/211.121.3.fr.pdf>).

⁴⁵ See Summary punishment order.

apparently dating from 2009⁴⁶. This legal situation obliges companies to take a close look at their organisation and examine their bribery prevention measures.

74. The Phase 2 report indicated that, in the private sector, it was mainly large companies operating internationally that took into account the risks of corruption and had in place programmes to avoid it. According to companies and representatives of *Economiesuisse* (the principal Swiss business federation) interviewed during the on-site visit, this tendency has continued in recent years: the number of corruption cases involving some of the best-known Swiss companies has had an impact on corporate attitudes, leading them to institute measures to try to prevent bribery by their agents or employees. The Panalpina code of conduct, published in 2008 following suspicions of bribery in its Nigerian operations, addresses in detail the issue of bribery, putting forward a clear and detailed policy in this area, including in relation to so-called 'facilitation' payments. This momentum for change is confirmed by the literature: of the 100 largest publicly-traded Swiss companies, the number that has adopted ethical principles rose by 27% over a three-year period, from 42 in 2005 to 69 in 2008.⁴⁷ At the time of Switzerland's Phase 3 evaluation, it was expected that the conviction of Alstom Network Schweiz AG for bribery of foreign public officials by the Swiss federal law enforcement authorities would increase the awareness of Swiss companies of the risk of exposure to prosecutions in Switzerland.

75. As during Phase 2, SMEs seem to be lagging much further behind in their prevention practices. Discussions with *Economiesuisse* confirmed that implementing a compliance programme remained a challenge for SMEs. This observation also emerges from a survey conducted by the Swiss Entrepreneurship Institute (*Institut suisse pour l'entreprenariat*, SIFE), showing that the majority of Swiss SMEs active abroad had no measures in place for preventing bribery. Because of the limited means of SMEs, this is a horizontal issue that affects not only Switzerland. Discussions with trial judges, however, suggest that the "reasonable" nature of the measures demanded by article 102(2) SCC will lead to consideration of the size of the enterprise and its financial constraints.

d) *Audit of internal control systems*

76. One innovation in the legislative provisions introduced in 2008 concerning audit is the inclusion in the law of the obligation for the audit body, in the context of ordinary audit, to verify the existence of an internal control system (ICS). As was explained by the auditors interviewed, however, the scope of such control differs from the standard set by the Committee of Sponsoring Organisations of the Treadway Commission (COSO), in that it does not require the external auditor to verify that the control system also targets compliance with applicable laws and regulations.⁴⁸ According to those auditors, it is the larger companies, in particular those that must observe the provisions of the US Sarbanes-Oxley Act, that have in place an elaborate internal control system that covers observance of laws and regulations, including those on bribery.

⁴⁶"*Pluie d'amendes sur les sociétés suisses aux USA*" ("Torrent of fines on Swiss companies in the USA"), *La Liberté*, 18 November 2010.

⁴⁷ Fondation Ethos, *Codes of Conduct - Best Practice of the largest listed companies in Switzerland* (Geneva, 2009).

⁴⁸ By this rule, the ICS is a process designed to provide reasonable assurance concerning achievement of objectives with respect to (a) effectiveness and efficiency of operations, (b) reliability of financial reporting, and (c) compliance with applicable laws and regulations. In Switzerland's case, control by the audit body is confined to the reliability of financial reporting.

Commentary:

The lead examiners are pleased to see that the most important Swiss companies have developed and are applying ethics and compliance programmes, and they encourage those that have not yet done so to consider implementing such mechanisms. They recommend that the Swiss authorities continue their efforts, in cooperation with business associations, to encourage companies, in particular SMEs, to develop internal control and compliance mechanisms.

8. Tax measures to combat bribery

a) Non-deductibility of bribes

77. Since the Phase 2 report there has been no change in the way in which Swiss tax authorities treat bribes. Swiss tax law recognises concurrent federal and cantonal jurisdiction in relation to taxation of individual incomes and the profits of legal persons: pursuant to that rule, both levels of administration are obliged to verify whether certain expenses are deductible.

b) Detection and reporting of suspicions of bribery of foreign public officials

78. During the Phase 2 evaluation, the Working Group found that the applicable tax secrecy rules could pose constraints on the transmission of information from the tax authorities to the law enforcement authorities, and it recommended that Switzerland "review disclosure rules to ensure that officials discovering suspicious facts report them to the competent law enforcement authorities". Subsequently, the 2009 Tax Recommendation recommended the establishment of an effective legal framework and to "provide guidance to facilitate reporting by tax authorities of suspicions of foreign bribery detected in the performance of their duties, to the appropriate domestic law enforcement authorities."

79. The procedural aspects governing reporting of criminal violations to the competent authorities have evolved since the Phase 2 report on Switzerland. As of 1 January 2011, the federal personnel law (LPers), which establishes a general duty of federal officials to report crimes and offences that are encountered in the exercise of their official function (including bribery of foreign public officials), applies to federal taxation officers. At the cantonal level, several cantons, including Geneva, also have legislation requiring taxation officials (by virtue of tax law, administrative law or other laws) to report suspected felonies and misdemeanours. It was in fact a report filed by the Geneva tax administration, after detecting suspect payments during controls undertaken following a warning from the federal administration of suspicions of VAT fraud, that led the Geneva law enforcement authorities to investigate a hotel director, who was subsequently sentenced for bribery of foreign public officials (see box 3 in Annex 4, summarising the case).

80. In the other cantons, where there is no legal provision expressly establishing a duty to report to the competent criminal authority, according to a circular issued in 2007 by the Swiss Federal tax Administration (FTA), officials can file reports provided they have obtained prior consent from the senior taxation authority. According to representatives of the tax administrations of Bern and Vaud met during the on-site visit, the fact that officials of these cantons are subject to tax secrecy prohibiting them from spontaneously sharing information with the criminal authorities does not constitute a barrier to reporting, as the public interest in criminal prosecution takes precedence over the maintenance of tax secrecy, pursuant to a ruling of 31 January 2000 of the Federal Tribunal which recalls that "if serious violations are discovered during controls by the taxation authority, that authority must report them to the competent criminal authority."

c) *Guidance for taxpayers and taxation officials*

81. During the Phase 2 examination, the Working Group determined that the taxation authorities lacked adequate means to discover bribes. Consequently, it recommended that Switzerland proceed with "drafting of a circular for federal and cantonal tax authorities specifying the nature and tax aspects of the foreign bribery offence, so as to encourage detection of acts of bribery abroad." Recommendation I (ii) on taxation measures recommends that taxpayers and tax authorities should be given indications on the type of expenses deemed to constitute bribes to foreign public officials.

82. The 2007 FTA circular mentioned above specifies, from the criminal and taxation viewpoint, the expenses that constitute bribes to foreign public officials, and gives some concrete examples⁴⁹. It also clarified the procedures to be followed in a tax audit, with explicit reference to the "Bribery Awareness Handbook" of the OECD Committee on Fiscal Affairs. The circular also recalls, as noted above, the procedure to follow when reporting cases of corruption that the tax authorities become aware of in the exercise of their functions to the law enforcement authorities (reporting after obtaining consent from the senior authority). FTA officials and representatives from the cantons of Bern, Vaud and Geneva, as well as legal and accounting professionals met during the on-site visit, all seemed aware of the contents of the circular, which is also accessible to taxation officers and taxpayers on the FTA website.⁵⁰

83. With the exception of the case reported to the Geneva law enforcement authorities, no irregularity relating to possible foreign bribery had been detected by the taxation authorities at the time of Phase 3. According to representatives of the cantonal offices of the attorney general, the means available to the tax administrations, particularly at the canton level, do not readily allow the detection of bribes, as the mechanisms for concealing them are complex. On this point, discussions with the cantonal and federal tax administrations did not reveal any proactive policy of in-depth audits in sectors where the payment of commissions to foreign officials is common practice. Discussions also showed the absence, at the Federal and cantonal levels, of specific training for tax officials on the subject of bribery. Nevertheless, the non-deductibility of payments to public officials (domestic and foreign) is explicitly included in training provided by the FTA. It is impossible to go beyond hypothesising about the reasons for the low level of bribe detection by tax administrations, but it may be that the absence of a proactive policy, together with insufficiently detailed training for officers, undermines their ability to combat this type of crime effectively. The examiners were advised in this context of the federal government's initiative, within the Interdepartmental Working Group on Combating Corruption (IDWG Corruption), to include the bribery issue in training for taxation officers as of 2012.⁵¹

d) *Administrative assistance and information sharing in tax matters*

84. Administrative assistance for tax purposes granted by Switzerland is governed by double taxation treaties (DTT). On 13 March 2009 Switzerland withdrew its reservation to article 26 of the OECD Model Tax Convention. Since that time it has moved swiftly to update its treaty network for exchanging information on the basis of the international exchange standard.⁵² As well, the Federal Council decided to take up the optional language from paragraph 12.3 of the commentary on article 26 of the Model Tax

⁴⁹ Circular 16 of 13 July 2007: www.estv.admin.ch/bundessteuer/dokumentation/00242/00380/index.html?lang=fr

⁵⁰ According to FTA representatives present at the on-site visit, the circular is part of training for federal officers.

⁵¹ For details on this initiative, see the IDWG Corruption report (Bern, 2011), pp. 13-14 : <http://www.news.admin.ch/NSBSubscriber/message/attachments/22789.pdf>

⁵² Cf. the Phase 1 Peer Review Report on Switzerland from the Global Forum on Transparency and Exchange of Information for Tax Purposes: [http://www.oecd.org/document/47/0,3746,en_21571361_43854757_48079087_1_1_1_1.00&en-US\\$01DBC.html](http://www.oecd.org/document/47/0,3746,en_21571361_43854757_48079087_1_1_1_1.00&en-US$01DBC.html)

Convention (sharing of tax information by taxation authorities with other law enforcement agencies and judicial authorities on certain high-priority matters such as corruption) in the negotiation of new or revised DTTs. This is in line with Recommendation I(iii) of the 2009 Tax Recommendation. At the time of the on-site visit, there were 11 revised DTTs in force and most of them, such as those with France, Luxembourg, Mexico and Sweden, contained a clause repeating the language of paragraph 12.3.⁵³ To facilitate mutual administrative assistance, a special unit has been created within the FTA, the *Service de l'assistance administrative et de l'exécution de l'entraide judiciaire* ("Administrative and mutual legal assistance service"). In operation since the end of 2010, this unit handles requests for administrative assistance sent by Switzerland or by foreign states on the basis of DTTs, in order to facilitate prompt exchanges of information.

Commentary:

The lead examiners welcome the progressive inclusion in bilateral tax treaties of the text contained in paragraph 12.3 of the commentaries on article 26 of the OECD Model Tax Convention. The examiners also welcome introduction of a reporting obligation for federal tax officials and publication of the circular specifying the approach to be followed by cantonal officials who, under cantonal legislation, are not subject to such an obligation. The examiners note, however, that with the exception of the Canton of Geneva, there is no provision requiring tax officials to detect and report transactions that might constitute bribes. They observe, in this context, that there is no proactive policy for detection, such as through on-site inspections, and that tax officials are not sufficiently aware of and trained in the offence of transnational bribery. The examiners recommend that Switzerland: 1) reinforce awareness in the federal and cantonal tax administrations with respect to hidden commissions, detection techniques, and the procedure to be followed in reporting to law enforcement authorities; 2) take appropriate measures to reinforce the intensity and frequency of official on-site inspections of companies susceptible to bribery of foreign public officials; and 3) encourage cantons that do not yet have reporting obligations for their tax officials, to consider putting in place such measures.

9. International cooperation: mutual legal assistance in criminal matters

85. The procedural aspects of mutual legal assistance (MLA) in criminal matters have essentially remained unchanged since the Phase 2 report on Switzerland. MLA is governed primarily by multilateral or bilateral treaties. In all, Switzerland has signed more than 70 treaties dealing in more or less detail with international cooperation in criminal matters. Apart from Europe, the strongest ties have been forged with the Americas, then Asia and Oceania. On the other hand, Africa is virtually absent from the scene. The examiners note that relations with such important states as China and India are not yet governed by a treaty. In the absence of a treaty, domestic law applies, specifically the federal law on mutual international criminal assistance (EIMP).

a) Swiss responses to foreign requests for mutual assistance

86. Swiss law enforcement authorities receive many requests from foreign law enforcement authorities relating to investigations of foreign bribery cases with ramifications in Switzerland. According to statistics from the Federal Office of Justice (FOJ), the number of MLA requests concerning all types of corruption has risen since 2006 (when statistics by type of offence were first produced) to nearly a hundred per year. Swiss cooperation in response to such requests is governed by domestic law, and includes assistance in the field, as illustrated by the searches conducted in Switzerland in 2008 involving several

⁵³ As to the other DTTs that do not contain the optional language of paragraph 12.3, this reflects the fact, according to the Swiss authorities, that the treaty partner did not agree to include such a clause.

sites of the Alstom Group in response to an MLA request from France: the French and Swiss authorities suspected illicit payments to foreign public officials through a Swiss affiliate of the Group, which was suspected of having channelled bribe payments through the Group's branches abroad. More than 50 officers of the Federal Judicial Police, various cantonal police forces and several French police officers participated in those searches⁵⁴. As a result of the MLA obtained in this process, important evidence was discovered that led to the extension of the investigation, initially opened in relation to unidentified individuals, to Alstom Network Schweiz AG and Alstom SA France.⁵⁵

87. Switzerland denies very few MLA requests: when a request does not meet the conditions for granting MLA, Switzerland informs the requesting authority, in detail, and invites it to supplement its request so that it can be executed. In fact, the OAG has not rejected a single requests concerning transnational bribery since 2006. Switzerland has also streamlined its appeals procedures, a matter of concern to the Working Group during the Phase 2 examination, when it recommended that Switzerland consider measures to simplify those procedures. Whereas appeals are handled in first instance within three months, which is the average processing time under the old law, the handling of appeals in second instance has been reduced to 10 days, compared to 30 days previously. Moreover, with a view to limiting access to appeals courts (Federal Tribunal) the law allows such recourse only in a limited number of cases deemed particularly important, such as when there are reasons to suppose that the foreign procedure violates fundamental principles or contains other serious flaws. The TF issues a decision on this notion of "important cases" promptly (generally within two weeks) and has produced a very strict jurisprudence on the matter.⁵⁶ The prosecutors interviewed during the on-site visit said they were satisfied with the reduction in appeals.

88. Foreign requests generally give rise to investigations in Switzerland, on the basis of which Switzerland moves promptly to prosecute. Furthermore, Switzerland readily shares the progress of its investigations with foreign authorities through spontaneous transmissions (article 67a EIMP). This is in line with Recommendation XIII(i) of the 2009 Recommendation, which recommends that member countries cooperate with foreign authorities through 'such means as the sharing of information spontaneously'. According to official statistics, 23 transmissions of this type concerning all types of corruption were sent between 2006 and 2010. It was on the basis of such transmissions that the United Kingdom undertook proceedings in 2010 against a British affiliate of Alstom, suspecting it of having played an important role in the payment of some £81 million (around €92 million) in bribes to foreign officials between 2004 and 2010. The Swiss authorities will also take the initiative to consult their foreign counterparts to determine whether Switzerland or the foreign authority is best placed to prosecute, in order to avoid invoking the principle of *ne bis in idem*. For example, the examining team was told of a case that was opened by the OAG and the judicial authority of another country member of the OECD Convention, where the OAG suspended its proceedings to await a judgment from the other country.

b) *Swiss requests for mutual assistance*

89. Switzerland has also requested MLA from foreign authorities in relation to some ongoing investigations. An example is a case that was being pursued by the Canton of Zug at the time of the on-site visit, involving a trading company dealing in raw materials and chemical products that was suspected of having bribed foreign public officials to obtain government contracts in Central Asia. Investigations in

⁵⁴ Cf. the report of the OAG on this cooperation: www.admin.ch/aktuell/00089/?lang=fr&msg-id=20806

⁵⁵ Cf. OAG Press release on the conclusion of criminal proceedings against Alstom, 22 novembre 2011.

⁵⁶ For example, in a ruling of 9 April 2009, the TF held that an appeal concerning a decision to provide a foreign authority with documentation on bank accounts did not constitute a particularly important case, and declared the appeal inadmissible.

Switzerland had revealed that a portion of the alleged bribes had been paid to offshore companies with accounts in Switzerland and then transferred to accounts abroad, in Lithuania, Latvia, Turkey and the United Arab Emirates. To pursue the investigation, Switzerland sent MLA requests to the relevant Central Authorities asking them to produce the documents needed to identify the recipients of the funds. In the case leading to the conviction of the Swiss subsidiary of Alstom, the OAG sent requests to no fewer than 16 countries, including France.⁵⁷ In total, according to official statistics, Switzerland has sent out more than 130 MLA requests since 2006 (8 during the first quarter of 2011) concerning suspected acts of all types of corruption.

90. When Switzerland has been the requesting state it has encountered difficulties in securing cooperation with certain countries, including some parties to the OECD Convention that practice settlement negotiations, as they do not always inform Switzerland in time, of the proceedings they have initiated or even of arrangements made through plea agreements or other non-prosecution agreements. Obtaining MLA from countries that are not parties to the Convention can be even more difficult, considerably lengthening investigation times and leaving Switzerland with no choice but to close certain cases, as noted earlier in this report.

c) *Restitution of the proceeds of bribery of foreign public officials*

91. The Phase 2 report noted Switzerland's proactive policy of returning stolen assets. Since then, Recommendation XIII(i) of the 2009 Recommendation calls upon States Parties to the Anti-Bribery Convention to cooperate with foreign authorities in investigations concerning cases of corruption in international business transactions through such means as recovery of the proceeds of bribery of foreign public officials.

92. The system introduced by Switzerland has produced positive results overall: during the last 15 years it has allowed Switzerland to recover more than CHF 1.7 billion (around €1.35 billion) in connection with bribery of foreign public officials.⁵⁸ Switzerland has found, however, that the system can reach its limits in cases where the states concerned do not cooperate or do not have the capacity to cooperate in response to MLA requests. Switzerland has adopted a new law – the law on restitution of illicit assets (LRAI) which came into force on 1 February 2011 – to strengthen the legal framework in this area. The LRAI is subordinate to the Law on Mutual Legal Assistance in Criminal Matters: it establishes the procedures for freezing, confiscating and recovering the assets of politically exposed persons (PEP) or their entourage, when an MLA request is unsuccessful because of shortcomings in the requesting state in which the PEP exercises or has exercised a public function. One of the innovative elements of this law is the presumption of illegality of assets in cases where the enrichment of the PEP is manifestly exorbitant and the degree of corruption of the state or the PEP in question is known to be high.

Commentary:

The lead examiners commend Switzerland for its efforts to respond to incoming MLA requests, including its move to limit possible appeals against such requests: they note that, according to the figures provided, Switzerland has fulfilled a large number of requests concerning cases of corruption. Switzerland is thereby contributing significantly to the prosecution of such crimes abroad. The examiners also commend Switzerland for the proactive policy of its law

⁵⁷ The evidence discovered during the investigation was also the object of spontaneous exchanges of information with 8 countries, with the aim of initiating proceedings abroad.

⁵⁸ From 2006 to 2010 Switzerland handed over sums in six cases: 1) 2006: US\$40 million to Nigeria; 2) 2007: US\$34 million to Taiwan; 3) 2008: US\$74 million to Mexico; 4) 2008: €926,700 to Italy; 5) 2009: US\$7 million to Nigeria; 6) 2010: US\$20 million to Taiwan.

enforcement authorities in undertaking their own investigations and in prosecuting on the basis of information received from foreign authorities, sharing with them the results of procedures, and coordinating with them to determine which authorities – Swiss or foreign – are best placed to prosecute, in order to avoid prosecutions or convictions for the same facts. The examiners note as well Switzerland's proactive policy in the recovery of assets linked to bribery of foreign public officials. They recommend that Switzerland produce more detailed statistics on MLA requests received, sent and rejected so as to identify more precisely the proportion of those requests that concern bribery of foreign public officials, laundering of the proceeds of foreign bribery, and assets seized, confiscated and returned in the context of MLA, and that it invite the cantons to provide the necessary data to the Central Authority.

10. Awareness raising in the public and private sectors and reporting of acts of corruption

a) Awareness raising in the public and private sectors

93. In Phase 2, the Working Group recommended that Switzerland expand its efforts to raise awareness in the private sector, paying particular attention, in cooperation with the relevant economic players, to SMEs operating internationally, and to pursue awareness raising efforts within the public administration, focusing on cantonal and federal employees who could play a role in detecting and reporting acts of bribery of foreign public officials.

(i) Awareness of federal and cantonal officials

94. Since Phase 2, Switzerland has established the IDWG Corruption, designed to place corruption squarely at the centre of interagency debate. This group, for which the Federal Department of Foreign Affairs provides the secretariat, brings together all federal offices involved (including the federal law enforcement authorities) as well as representatives of the cantons, the private sector and civil society, to define mutually agreed policies. The group has organised workshops, for example on bribery in development assistance and on whistle-blowing, to alert the appropriate offices to the issue and to define common strategies. The group is supposed to report to the Federal Council on its activities and, as needed, to formulate recommendations for combating corruption. The first report of the IDWG was published in April 2011.

95. Other awareness-raising initiatives have been taken at the federal level, for example through training for personnel (compulsory training courses for OAG prosecutors and financial experts were held, respectively, in 2009 and 2011; training is being offered to personnel of the SECO and the Development and Cooperation Directorate as well as to all new recruits in the diplomatic and consular service). Various federal departments also have webpages through which officials as well as the general public can keep informed of the transnational bribery issue, and where various legal documents concerning Switzerland's obligations under the OECD anti-bribery instruments are posted.

96. These initiatives testify to the willingness of the Swiss authorities to confront bribery. The examiners, however, note that they still tend to focus primarily on domestic corruption, rather than transnational bribery. This is the same for the cantons.⁵⁹ In the examiners' opinion, transnational bribery should be more closely integrated into current training at the federal and cantonal levels. Such training could be supplemented with the distribution of more information to federal and cantonal institutions, such

⁵⁹ An IDWG survey in 2010-11 showed that fewer than half of survey participants had alerted their personnel to cross-border corruption and only a few cantons had gone further by instituting training in corruption issues; on this point it was not clear whether the training also addressed bribery of foreign public officials.

as guidance on the implementation of international conventions and on the provisions of domestic law⁶⁰. In September 2011, the IDWG took a first step toward meeting the objective of a more systematic training approach by hosting a workshop for around a hundred participants from federal offices as well as the training managers of various federal departments, in order to identify the courses and modules already addressing this question and to make this experience and documentation available to other federal offices.

(ii) *Awareness raising and assistance to companies*

97. Since Phase 2, the federal authorities have continued their efforts to raise awareness among companies, frequently involving professional associations and civil society, in order to create synergies.⁶¹ For example, the authorities have published a new version of the brochure, "Preventing Corruption – Information for Swiss Businesses Operating Abroad", in close collaboration with *Economiesuisse* and Transparency International Switzerland (TI).⁶² This brochure is available on several federal government websites as well as in Swiss embassies and the Swiss Business Hubs (tasked with facilitating Swiss SMEs' access to foreign markets). It has also been widely distributed to some 30,000 business members of *Economiesuisse*, which since 2008 has offered its own brochure on Switzerland's obligations under the OECD Convention.

98. At the same time, the federal authorities (SECO) as well as the OSEC have organised meetings with the business community, such as the workshop held in 2010 with TI and the Swiss-China business chamber on the topic "Corruption in China: a risk for Swiss SMEs?", and an information meeting for SMEs that SECO organised in 2009 in partnership with the Swiss Institute for Entrepreneurship (SIFE) of HTW Chur. Businesses are also informed of the offence through the posting online of documents such as the 2009 Recommendation and its Annex II, available on the SECO website. These initiatives have supplemented the workshops organised by professional associations and civil society: workshops of TI Switzerland, fraud detection seminars organised by the accounting and audit profession in the context of the new audit legislation, and conferences such as the one hosted by the law faculty of Geneva in September 2010 on international bribery.

99. Since 2006, Swiss overseas missions (including the OSEC business network) have been tasked with supporting Swiss companies by informing them of Swiss anticorruption legislation and local practices. Any person joining the diplomatic and consular service receives specific training in transnational corruption, including a discussion of the behaviour to adopt when there are suspicions of bribery or when a Swiss firm believes itself the victim of solicitation by a foreign official. These measures are in line with Recommendation VII of the 2009 Recommendation, which urges all countries "to raise awareness of their public officials on their domestic bribery and solicitation laws with a view to stopping the solicitation and acceptance of small facilitation payments".

100. Generally speaking, all nongovernmental participants in the discussion panels welcomed the efforts of the federal authorities and private initiatives to raise awareness; some participants suggested that

⁶⁰ See the letter sent in early 2011 to some 35 000 employees of the federal administration informing them of the new legislation, as well as the brochure published by the Federal Office of Personnel entitled "Preventing Corruption and Whistleblowing" [www.news.admin.ch/NSBSubscriber/message/attachments/22247.pdf]. See, too, the report by the IDAG Corruption (p.15) which notes that, while in many cantons employees are informed of the body authorised to receive information from whistleblowers and the procedure to follow, very few cantons have introduced special measures to raise awareness of these issues (training courses specifically addressing corruption issues).

⁶¹ Awareness raising activities at the cantonal level have been more limited. A survey of 20 cantons between November 2010 and January 2011 showed that cantons participating in the survey had not conducted any awareness raising campaigns among businesses relating to bribery in Switzerland or abroad: IDWG Corruption report.

⁶² www.seco.admin.ch/dokumentation/publikation/00035/00038/01711/index.html?lang=en

there was now a plethora of corruption awareness activities targeted at companies, lawyers and compliance officers. It was found, however, that there were still great training needs on the part of SMEs as well as among future business leaders, as revealed in a 2010 survey of 1800 students across all disciplines in Swiss colleges and universities.⁶³ In the examiners' opinion, consideration of corruption risks should be more solidly anchored in higher education programmes as well as in training for business managers. Further activities to raise awareness among SMEs should also be explored.

Commentary:

The lead examiners welcome the Swiss authorities' efforts, through IDWG and other public agencies, to raise awareness in the private sector and among accountants and auditors, as well as in the public sector, since the Phase 2 review. They encourage Switzerland to persevere with those efforts, and in particular by an even more targeted awareness raising for SMEs and an intensified focus on the issue of transnational corruption in the training courses and modules for federal and cantonal employees who could play a role in detecting and reporting acts of bribery.

b) Reporting suspicions of transnational bribery

(i) Reporting of suspicions of transnational bribery by employees at the federal and cantonal levels

101. At the time of Phase 2, neither the federal law governing the public service nor the law on federal criminal procedure imposed a general reporting obligation for federal employees. The situation was similar in several cantons. The Working Group consequently recommended establishing a formal obligation for any federal authority, civil servant or public official, including those in charge of export credits, to report to the competent authorities any indications of a possible act of bribery and to engage consultations with the cantons so as to encourage them to institute a similar obligation in cantonal legislation where such an obligation was currently lacking. Subsequently, the 2009 Recommendation called for measures to facilitate reporting by public officials, directly or indirectly through an internal mechanism, to law enforcement authorities of suspected acts of bribery, adding that such measures should be accompanied by protection from discriminatory or disciplinary action for public and private sector employees who in good faith report such suspicions.

102. Since the Phase 2 Recommendation, the situation has improved within the federal public service: a general duty to report crimes and offences that are actionable ex officio (including bribery of foreign public officials) internally or to the criminal authorities was introduced on 1 January 2011 in the LPers (article 22a). This provision is supplemented by a right to report any other irregularities to the Swiss Federal Audit Office, the body responsible for collecting reports from federal personnel. The law also contains measures to protect employees who report suspected crimes: under the new article 22a (5), 'no one shall suffer a professional disadvantage for having in good faith reported a violation (...) or for having testified as a witness.' Finally, an employee dismissed for whistle-blowing pursuant to these rules can be reinstated (article 14 (1.D) LPers). These rules apply as well to employees of the federal taxation administration. There is also a reporting duty for the staff of the audit supervisory authority, established by article 24 (3) of the law on audit supervision which provides that 'when, in the pursuit of its official duties, the supervisory authority becomes aware of violations, it shall so inform the competent criminal prosecution authorities.' In parallel to these federal developments, cantonal legislation has also been

⁶³Survey conducted by SIFE and *Centre de recherche en politique économique* (FoW) of Chur University [??]. Although the students polled seemed aware of the corruption problem, only one in five knew that bribery of foreign public officials was a crime in Switzerland and 80% considered that corruption would always exist as a by-product of doing business.

reinforced and, at the time of Phase 3, a majority of cantons had a general obligation to report crimes and offences.⁶⁴

103. The amendments to federal legislation and progress at the cantonal level allow Switzerland to respond in large measure to the Phase 2 Recommendation and to meet the requirements of the 2009 Recommendation. It must be noted, however, as the federal authorities stressed during the on-site visit, that the new federal provisions do not cover certain decentralised federal entities whose staff are not subject to the LPer, in particular the Swiss Financial Market Supervisory Authority and at the Swiss export risk insurance agency (SERV). In the examiners' opinion, Switzerland should consider steps to correct this situation as part of current legislative work. As well, to give substance to the recent amendments to federal legislation and the addition of the reporting obligation to the legislation of a growing number of cantons, more attention will have to be paid to training for federal and cantonal employees. That training should include explicit instruction on the obligation to report cross-border corruption. The on-site discussions showed that, generally speaking, when awareness campaigns about the obligation to report corruption have been conducted, as at the federal level, they have viewed the issue only from the angle of domestic (Swiss) corruption and employee integrity, while ignoring cross-border bribery.⁶⁵

(ii) *Reporting indications of transnational bribery detected during audits*

104. In Phase 2 the examiners recommended that Switzerland consider establishing an express obligation for auditors to report to the prosecution authorities any evidence of possible corrupt practices by the entities whose accounts they audit in the event that the entities' executive bodies, after being duly advised, refrain from taking action. Since then, the 2009 Recommendation declares that signatories to the Convention should consider requiring the external auditor to report suspected acts of bribery to competent authorities, such as law enforcement or regulatory authorities.

105. New legislative provisions came into force on 1 January 2008 (article 728c CO). Although they have not created a duty for auditors to report cases of corruption to the prosecution authorities, they do require the auditor to advise the board of directors and the general meeting simultaneously (and not only in a subsidiary manner as was the case under the old law) of serious violations of the law or the statutes or if the board of directors fails to take adequate measures after a written warning from the audit body – at least when such bodies exist. During the written follow-up of Switzerland in 2007, the Working Group took note of the provisions detailed above, then about to come into force, and concluded that Switzerland had implemented the Recommendation from Phase 2.

106. In theory, the audit body may, in certain cases, report to the judicial authorities when it becomes aware of criminal acts, including bribery. In fact, although the law has not created an obligation to report to the prosecution authorities, the auditor is empowered to report such facts to those authorities with the prior consent of the competent authority (article 321 (2) SCC on the waiver of professional secrecy). The on-site discussions revealed, however, that in practice the auditors are unlikely to avail themselves of this possibility, as auditors consider that it is not their role to report such matters to the justice authorities. It

⁶⁴ The cantons of Argovia, Basel-City and Basel-Country, Bern, Geneva, Glaris, Jura, Neuchâtel, Nidwald, Obwald, Uri, Schaffhausen, Schwyz, St-Gall, Ticino, Thurgovia, Valais, Vaud, Zug, and Zurich

⁶⁵ See the letter addressed to some 350,000 employees of the Federal administration informing them of the new legislation, as well as the brochure of the Federal Office of Personnel 'Whistleblowing and the Prevention of Corruption' [www.news.admin.ch/NSBSubscriber/message/attachments/22247.pdf] (in French)]. See also the IDAG Corruption report that notes (p. 15) that, while the employees of the administration in several cantons the employees are informed of the competent authority for making reports and the procedure to follow, only a few cantons have put in place special awareness-raising measures (trainings focused specifically on the issue of bribery).

was explained that, if the company's governance bodies failed to act, the auditor would immediately resign, a move that would no doubt awaken the interest of the judicial authorities, starting with the OAG.

107. Lastly, with establishment of the FAOA and its role in supervising the external auditors of public companies, it has powers that can help detect transnational bribery. As noted earlier in this report, the FAOA must advise the prosecution authorities of violations detected or brought to its attention in the course of an inspection. Since it began activity in 2008, the FAOA has not however found any case where the external audit firm had closed its eyes to cases of fraud or corruption in the company audited. On the other hand, several instances were cited where the external auditors failed to prove that they had gone sufficiently into depth on the question of fraud during performance of their engagement. In each of these cases, according to FAOA representatives interviewed, the FAOA ordered corrective measures. The FAOA representatives assured the examiners that if they detected fraud linked to corruption, the prosecution authorities would be immediately notified.

(iii) Reporting of suspicions of transnational bribery by whistleblowers

108. During the Phase 2 examination of Switzerland, the Working Group had recommended that Switzerland examine ways of ensuring effective protection for employees who in good faith report suspicions of corruption, so as to encourage them to report without fear of reprisals. Subsequently, the 2009 Recommendation calls on parties to the Convention to ensure that appropriate measures are in place to protect from discriminatory or disciplinary action public and private sector employees who report in good faith and on reasonable grounds to the competent authorities suspected acts of bribery of foreign public officials (Recommendation IX (iii)).

109. As indicated above, the obligation to report crimes and offences as well as the right to signal irregularities apply to the majority of federal employees since 1 January 2011. Around 20 cantons have also included such an obligation for their agents in their legislation. These legislative measures have been accompanied, in some cases, with mechanisms to facilitate the anonymous reporting of suspected corruption. For example, the federal financial comptroller's office now has a whistle-blowing hot line. At the cantonal level, only Zürich had instituted a central unit for receiving reports of bribery at the time of the on-site visit. In the other cantons, suspicions are usually transmitted via the normal channels (the personnel office, for example) or to the cantonal finance comptroller's office. While cantonal law offers some protection to whistleblowers, the IDWG Corruption report noted that there had been no targeted communication about such protection.

110. When it comes to the private sector, the Phase 2 report observed that whistleblowers were subject to various legal obligations of discretion that represented a barrier to reporting. A draft of the amendment to the CO, providing "protection for workers reporting reprehensible deeds" was put to consultation in December 2008. Criticised both by business circles that did not want regulation and by organisations demanding more effective protection for whistleblowers, the draft was followed by a supplementary proposal, consultation on which was wrapped up in early 2011, calling for compensation equivalent to 12 months' salary in case of dismissal. According to the Swiss authorities, a bill could be presented to Parliament in 2012 although, at the time of the on-site visit, nothing had yet been decided as to its exact content and the chances for its adoption, given the controversy evoked by the whistle-blowing issue in Switzerland. If the proposal as put to consultation were to be adopted by Parliament, private sector employees who become aware of acts of corruption would henceforth be able to report them to their employer or, in urgent cases or where the employer fails to act, to the competent public authority, with the possibility of disclosing the reprehensible deeds to the media or the organisations concerned, in case of official inaction.

Commentary:

The lead examiners note with satisfaction the introduction into legislation of a general obligation for the majority of federal employees to report suspicions of crimes and offences that are actionable ex officio, including cross-border bribery, as well as a provision to protect persons who in good faith report such acts to the federal authorities. They also applaud the fact that more and more cantons are instituting such an obligation for their employees. The examiners also welcome the gradual generalisation of mechanisms to encourage reporting by whistleblowers in the public service, including at the cantonal level.

To improve the system and give substance to the policies now in place, the examiners recommend that Switzerland: 1) consider expanding the reporting obligation to employees of federal entities not covered by the federal personnel law, in particular those of the Swiss Export Risk Insurance and of FINMA; 2) encourage the cantons that have not yet adopted such measures to consider instituting them; and 3) inform federal employees explicitly of their obligation to report all instances of corruption, including bribery of foreign public officials, and encourage the cantons to do the same for their own employees subject to such an obligation or for whom there are internal reporting mechanisms.

The examiners are also pleased to note the legislative proposals defining the right of reporting and the protection of whistleblowers in the private sector. They recommend prompt adoption of an appropriate regulatory framework to protect private sector employees from any discriminatory or disciplinary action when they report suspicions of bribery of foreign public officials in good faith and on reasonable grounds.

11. Public advantages

a) Official development assistance

111. In Switzerland, aid projects are approved and supervised by the SDC and the SECO. The two administrations have adopted a preventive approach for excluding corruption in their projects whereby, since 2008, any government or private organisation receiving development funds or obtaining commercial contracts from the Confederation must sign an anticorruption clause that allows financing to be suspended or cancelled if corrupt practices are discovered at any stage of tendering and executing the contract.⁶⁶ This declaration is accompanied by project management measures to prevent corruption during execution (internal control includes among other things financial audits, verification of internal controls within partner companies, control of blacklists established by development banks, monitoring by local offices). A typology of corruption risks and guidance for evaluating projects, have been prepared.⁶⁷ The two administrations have also instituted an internal mechanism for reporting suspicions of bribery involving the programmes or projects they carry out; if the internal investigation confirms the suspicions, they are required, as of 1 January 2011, to report them pursuant to article 22 a of the LPers.

⁶⁶ A new version of this clause was about to be introduced in SDC contracts at the time of the Phase 3 examination: "The parties undertake, in the context of this contract, not to grant or to accept directly or indirectly any advantage of any kind. Any act of corruption or any illicit act shall constitute a breach of this contract and shall be grounds for its cancellation and/or any other measure pursuant to applicable law. The parties shall inform each other of any case of corruption detected."

⁶⁷ Cf. the "Anti-Corruption Handbook" of SECO, detailing the procedures to be followed by employees to prevent corruption in SECO projects: www.seco-cooperation.admin.ch/themen/00960/01032/index.html?lang=fr.

112. While welcoming the measures taken pursuant to the 1996 Recommendation of the OECD Development Assistance Committee, the examiners note that no procedure for limiting access to financing for companies already convicted for foreign bribery has been put in place. For example, the anticorruption clause contained in DDC contracts imposes no obligation on the bidding company to declare whether it has been convicted for such offences; nor do the SECO evaluation directives contain any reference to a conviction as grounds for disqualifying the bidder. The only measures in existence are the possibility of one or the other administration, on the basis of appropriate standard clauses, to terminate the contract with the beneficiary of a project tainted by bribery.⁶⁸ These measures appear to fall short of Recommendation IX (i) of the 2009 Recommendation, which calls for suspending eligibility for contracts financed by official development assistance for companies convicted of bribing foreign officials.

Commentary:

The lead examiners are pleased that the Swiss Agency for Development and Cooperation (SDC) and the State Secretariat for Economic Affairs (SECO) have reinforced their measures to prevent and avoid corruption in the award of public funds. The examiners regret however that there are no systematic mechanisms for suspending from competition for contracts funded by official development assistance companies determined to have bribed foreign public officials in contravention of national laws. The examiners therefore recommend that Switzerland take the necessary steps to allow such suspension.

b) Export credits

113. Since 2007, the Swiss Export Risk Insurance (SERV) has been responsible for providing export risk guarantees. All SERV insurance policies require confirmation that neither the exporter nor any of its employees or agents has bribed or will bribe foreign public officials, that they do not appear on the blacklists of development banks, and that they are not currently facing charges, and have not in the previous five years been convicted, of foreign bribery⁶⁹. An enhanced due diligence inquiry will be conducted (to verify the anticorruption policy of the customer and its affiliates, as well as corrective and preventive measures taken by the firm, the identity of persons acting for the account of the applicant, and the amount and object of commissions paid in general and, in particular, concerning the matter covered by the insurance application) if the declaration cannot be signed, in case of bribery or suspected bribery, or when the amount of the transaction exceeds CHF 10 million and the country of destination scores below 4 on the Corruption Perceptions Index, CPI. No insurance may be provided if ‘the export transaction in question violates any Swiss or foreign laws’ (article 13 (2) of the Swiss Export Risk Insurance Law). According to the general conditions of insurance, in case of breach of obligations compensation is denied and all compensation paid must be reimbursed.

114. Discussions with SERV revealed that its staff is satisfied in general with existing procedures. As the issue of registration in the *casier judiciaire* of convictions concerning companies is under consultation, there is still no mechanism for verifying the conviction of a company for bribing public officials. Nor is there a systematic application of the existing procedures in relation to the consequences for an exporter or for an applicant, if he or she is the subject of bribery allegations or convictions, either before or after the approval of the contract, as the SERV approach is to proceed on a case-by-case basis. For example, in its responses to the OECD questionnaire on measures taken to combat bribery in officially supported export

⁶⁸ At the time of the on-site visit, no partner had been excluded for transnational bribery: a case of suspected bribery and embezzlement in a project being executed in Bangladesh by an NGO was subjected to an audit by the SDC to verify the suspicion that its managers had granted advantages to local public officials.

⁶⁹ Cf. the anticorruption declaration for exporters:
www.serv-ch.com/fileadmin/serv-dateien/Ethik-Umwelt/f/Prevention_de_la_corruption_exportateur.pdf

credit transactions of November 2010, Switzerland referred to audits under way concerning two industrial groups that had been convicted of transnational bribery and that were still under criminal investigation (pages 16-18). During the on-site visit, however, SERV indicated that subsequently, having considered these cases, it had decided to maintain cover on the basis of enhanced due diligence and the requirement for a supplementary declaration from the applicant's compliance department to the effect that neither the companies themselves nor any person acting on their behalf had engaged in or would engage in bribery in the course of the transaction. One of these cases related to insurance for Alstom, recently convicted for bribery after a long investigation initiated in 2004 and reopened in 2007 by the OAG. After the conviction of Alstom, SERV clarified that none of Alstom's projects that were the subject of this conviction had been insured by SERV. In the absence of active verification measures on the part of SERV, the dissuasive nature of the anticorruption mechanism is in practice limited. According to SERV, the commitment of bidders to respect Swiss anticorruption provisions and the threat of exclusion are dissuasive factors for companies involved in exporting.⁷⁰ In the examiners' opinion, a criminal registry of legal persons, creation of which was planned at the time of Phase 3, could prove a useful instrument for verifying whether the exporter has been convicted of bribery or has taken appropriate corrective measures following such a conviction, as recommended in the 2006 Recommendation.

Commentary:

The lead examiners commend Switzerland, as a country adhering to the 2006 Recommendation on bribery and officially supported export credits, for having implemented the requirements contained in that Recommendation. They recommend that SERV apply a more systematic approach to enhanced due diligence and to the consequences for an exporter or for an applicant if he or she is the subject of bribery allegations or convictions either before or after the approval of the contract, in order to better apply the 2006 Recommendation in practice. The examiners also invite the Swiss authorities to institute as promptly as possible a criminal registry of legal persons in order to ensure the availability of information on companies convicted pursuant to article 102 SCC.

c) Public procurement

(i) Exclusion from public procurement contracts for companies guilty of bribery of foreign public officials

115. The Phase 2 report had found that Swiss procurement legislation, comprising 27 cantonal and federal laws, did not contain a general rule relating to the conditions under which an awarding authority could exclude a bidder, nor any explicit reference to a conviction for bribery as grounds for exclusion. Taking note of the authorities' plans to amend public procurement legislation, the report recommended that consideration be given, in the context of that reform, to excluding from public procurement any company convicted of bribing foreign public officials. At the time of the written follow-up, observing that legislative processing was still underway, the Working Group considered that the Recommendation from Phase 2 had yet to be implemented. Since then, Recommendation XI (i) of the 2009 Recommendation urges that laws and regulations should permit authorities to suspend from competition for public procurement contracts enterprises determined to have bribed foreign public officials in contravention of national laws.

116. The preliminary version of the amendment to the Public Procurement Act (PPA) put to consultation in 2008 showed progress on two fronts: first, it unified procurement law, at least in part, at the national level, and second, it included a three-year disqualification from procurement for firms guilty of

⁷⁰ Ibid., page 2.

bribing.⁷¹ Although it was approved by the majority of business associations, the principle of partial unification of the law was rejected by nearly all the cantons, thus obliging the federal authorities to abandon the project and to await revision of the WTO Agreement on Government Procurement of 15 April 1994 (of higher rank and containing provisions to guarantee integrity in public procurement) to resume the legislative work, including the issue of excluding firms guilty of bribery from competing for public procurement contracts. Thus, at the time of Phase 3, the legal framework governing public procurement in Switzerland had not fundamentally changed. In light of the authorities' decision to await revision of the WTO agreement before proceeding with the reform of public procurement law, it must be expected that legislative work will not resume before 2012.

(ii) *Transparency in public procurement*

117. As stated in Recommendation XI (iii) of the 2009 Recommendation, it is important to ensure that public procurement transactions are as transparent as possible, for only in this way can their integrity be guaranteed. As noted above, the WTO Agreement constitutes the basis for the law governing the award of contracts in Switzerland. That agreement contains minimal rules, implementation of which is governed by the PPA for federal procurement contracts and by the legislation of each canton for cantonal procurement contracts. While the agreement sets the framework for national law, in Switzerland, with its 27 public procurement regimes, the transparency of procedures is problematic, particularly for bidders, who have trouble keeping informed of public needs.

118. Since 2011, the federal government and all the cantons have been using the Internet platform www.simap.ch for publishing their notices relating to public procurement. Whereas previously, to obtain an idea of all the calls for tender launched in Switzerland, companies had to consult the Swiss Official Gazette of Commerce and 26 official cantonal notice boards, this platform has now become the official publication site for public procurement. Its use is free and it offers an overview of award procedures conducted by the Confederation and the cantons; access is also provided to the public and substantiated notification of awards. At the time of Phase 3, this tool was expected to improve the transparency and fairness of the treatment accorded bidders.

Commentary:

The lead examiners note the introduction of Internet platform, testifying to the efforts under way to achieve greater transparency in public procurement. They also take note of the legislative proposals for excluding from public procurement enterprises guilty of bribery, even if those proposals have yet to materialise, for reasons independent of the Swiss authorities. The examiners welcome the assurances given to the effect that, once the WTO Agreement on Government Procurement has been revised, legislative work for transposing it into domestic law will take into account the exclusion from public procurement of companies convicted of bribery. The examiners invite the Working Group to monitor this question closely.

⁷¹ The report on the preliminary draft of the Act justified this exclusion by the fact that the OECD had "issued a recommendation on combating bribery in public procurement, according to which firms guilty of bribery on Swiss soil or abroad must be banned from all access to public procurement in Switzerland. The draft amendment of the law proposes, then, to require bid adjudicators to exclude firms guilty of bribery from procurement procedures or to revoke their awards" (cf. art. 25 ff and 56 AP-PPA).

C. RECOMMENDATIONS AND ISSUES FOR FOLLOW-UP

119. The Working Group on Bribery welcomes the continued efforts by Switzerland to implement the Convention, especially in relation to responses to requests for MLA in foreign bribery cases. In addition, Switzerland also has a proactive policy on the confiscation and restitution of the instrument and proceeds of corruption. The Working Group appreciates the number of criminal proceedings opened for bribery of foreign public officials, but nevertheless notes the low number of convictions for bribery of foreign public officials, of which only two cases fall within the scope of the Convention, since Switzerland joined the OECD Anti-Bribery Convention in 2000.

120. The Phase 2 Evaluation Report, adopted in 2004, included recommendations and issues for follow-up (as indicated in Annex 1 of this report). Of the eight recommendations considered to have been partially implemented at the time of the Phase 2 Written-Follow Up Report, in 2007, recommendations 3(b), (e) and 4(a) from Phase 2 have been fully implemented; recommendations 1(a), (b), 2(a), 3(c) et 4(b) remain partially implemented.

121. In conclusion, based on this report concerning Switzerland's implementation of the Convention and the 2009 Recommendation, the Working Group : (1) makes the following recommendations in Part 1 to reinforce the implementation of the Convention; and (2) will follow-up on the issues identified in Part 2. The Working Group invites Switzerland to submit a written report on all recommendations and follow-up issues within two years (i.e. in October 2013).

1. Recommendations of the Working Group

Recommendations for ensuring effective investigation, prosecution and sanctioning of foreign bribery

1. Regarding criminal liability of legal persons, the Working Group recommends that Switzerland clarify the concept of 'defective organisation' for law enforcement authorities, including by way of specialised training [2009 Recommendation, Annex I, D];

2. Regarding investigations and prosecutions, the Working Group recommends that Switzerland:

- a) encourage cantons where the Office of the Attorney General remains subject to a public authority, to ensure its autonomy in relation to such authority [Convention, Article 5; 2009 Recommendation, Annex I, D];
- b) periodically review the resources available to law enforcement authorities in order to effectively combat bribery of foreign public officials [2009 Recommendation, V and Annex I, D];

3. In relation to the use of special procedures and the mechanism for Reparation, the Working Group recommends that Switzerland, where appropriate and in conformity with the applicable procedural rules, make public in a more detailed manner, the reasons for using that particular procedure, as well as the basis for the decision and the sanctions that were ordered. [Convention, Article 3];

4. Regarding money laundering, the Working Group recommends that Switzerland consider establishing a statutory limitation period for money laundering in connection with the foreign bribery offence, when it does not amount to aggravated money laundering under article 305^{bis}(2) SCC, that allows sufficient time for investigation and prosecution of such cases [2009 Recommendation, III (ii)];

5. Regarding mutual legal assistance, the Working Group recommends that Switzerland produce more detailed statistics on MLA requests received, sent and rejected, so as to identify more precisely the proportion of those requests that concern bribery of foreign public officials, laundering of the proceeds of foreign bribery, and assets seized, confiscated and returned in the context of MLA, and that it invite the cantons to provide the necessary data to the Central Authority [Convention, Article 9; 2009 Recommendation XIV (vi)] ;

Recommendations for ensuring effective prevention and detection of foreign bribery

6. Regarding small facilitation payments, the Working Group recommends that Switzerland undertake to periodically review its policies and approach on small facilitation payments in order to effectively combat the phenomenon and encourage companies to prohibit or discourage the use of such payments in ethics programs or other internal policies. [Convention, Article 1, 2009 Recommendation VI];

7. Regarding accounting standards, external audit and corporate compliance programmes, the Working Group recommends that Switzerland:

- a) continue its efforts, including in the context of the current legislative move to reform accounting law, to encourage disclosure by companies, in order to improve the prevention and detection of bribery of foreign public officials [Convention, Article 8; 2009 Recommendation X. A (ii)];
- b) consider requiring external auditors to report suspected acts of bribery of foreign public officials to competent authorities independent of the company, such as law enforcement or regulatory authorities, and, where appropriate, ensuring that auditors making such reports reasonably and in good faith are protected from legal action [2009 Recommendation X. B (v)];
- c) continue its efforts, in cooperation with business associations, to encourage companies, in particular SMEs, to develop internal control and compliance mechanisms [2009 Recommendation X. C. (i) and (ii)];

8. Regarding tax measures to combat bribery of foreign public officials, the Working Group recommends that Switzerland:

- a) reinforce awareness in the federal and cantonal tax administrations with respect to hidden commissions, detection techniques, and the procedure to be followed in reporting to law enforcement authorities [2009 Recommendation VIII; 2009 Tax Recommendation II];
- b) take appropriate measures to reinforce the intensity and frequency of official on-site inspections of companies susceptible to bribery of foreign public officials [2009 Recommendation VIII; 2009 Tax Recommendation I. ii) et II.];
- c) encourage cantons that do not yet have reporting obligations for their tax officials, to consider putting in place such measures [2009 Recommendation VIII; 2009 Tax Recommendation II].

9. Regarding awareness of the offence of bribery of foreign public officials, the Working Group recommends that Switzerland to continue its efforts, in particular by an even more targeted awareness-raising for SMEs, and an intensified focus on the issue of transnational bribery in the training courses and modules for federal and cantonal employees who could play a role in detecting and reporting acts of bribery [2009 Recommendation III (i) and IX (ii)];

10. Regarding reporting of allegations of foreign bribery, the Working Group recommends that Switzerland:

- a) consider expanding the reporting obligation to employees of federal entities not covered by the federal personnel law, in particular those of the Swiss Export Risk Insurance and FINMA;
- b) encourage the cantons that have not yet adopted such measures to consider instituting them;
- c) inform federal employees explicitly of their obligation to report all instances of corruption, including bribery of foreign public officials, and encourage the cantons to do the same for their own employees subject to such an obligation or for whom there are internal reporting mechanisms [2009 Recommendation IX (i) and (ii)];

11. Regarding whistleblower protection, the Working Group recommends that Switzerland adopt promptly an appropriate regulatory framework to protect private sector employees from any discriminatory or disciplinary action when they report suspicions of bribery of foreign public officials in good faith and on reasonable grounds [2009 Recommendation IX (iii)];

12. Regarding public advantages, the Working Group recommends that Switzerland:

- a) take the necessary measures to put in place systematic mechanisms allowing for the exclusion of companies convicted of bribery of foreign public officials in violation of national law from public procurement contracts or contracts funded by official development assistance [2009 Recommendation XI (i)];
- b) to apply a more systematic approach to enhanced due diligence and to the consequences for an exporter or for an applicant if he or she is the subject of bribery allegations or convictions either before or after the approval of the contract, in order to better implement the 2006 Recommendation in practice [2006 Recommendation 1].

2. Follow-up by the Working Group

The Working Group will follow up the issues below as case law and practice develops:

13. The enforcement of corporate criminal liability by law enforcement authorities [Convention Article 2];

14. The possibilities offered to the Office of the Attorney-General, (i) to dispose of cases involving the crime of bribing foreign public officials by way of summary punishment order (article 352 ff SCC); (ii) to negotiate with the accused through the simplified procedure (article 358 ff SCC); and (iii) to use the Criminal Code provisions on 'Reparation' (article 53) in order to ensure the predictability, transparency and accountability of these three procedures [Convention, Article 3];

15. The penalties applied to natural persons convicted of the offence of bribery of foreign public officials, including by way of summary punishment order and simplified procedure, to ensure that they are effective, proportionate and dissuasive [Convention, Article 3.1];

16. The adequacy of human resources available to the federal and cantonal law enforcement authorities in the area of transnational bribery in the context of the implementation of the new Code of Criminal Procedure [2009 Recommendation, II and Annex I, D];

17. The continued application, by tribunals, of a 15-year limitation period to prosecutions of legal persons to allow an adequate period of time for the investigation and prosecution of the offence of foreign bribery [Convention, Articles 3 and 6];

18. That domestic law allows for the exclusion from public procurement of companies convicted of bribery of foreign public officials in violation of national law [2009 Recommendation, XI i)].

ANNEX 1

PHASE 2 RECOMMENDATIONS OF THE WORKING GROUP AND WRITTEN FOLLOW-UP

Phase 2 Recommendations in December 2004	2007 written follow-up
<i>Recommendations for action</i>	
1. With regard to awareness-building efforts to promote the OECD Convention and the offence of bribing a foreign public official under the anti-bribery provisions of Swiss law, the Working Group recommends that Switzerland:	
a) pursue and amplify its awareness-building efforts directed at the private sector, paying particular attention, in co-operation with the relevant economic players, to small and medium-sized enterprises operating internationally [Revised Recommendation, Articles I and V.C.i)].	Partially implemented
b) pursue its efforts to raise awareness within the public administration, paying attention in particular to cantonal and federal employees who could play a role in detecting and reporting acts of bribery [Revised Recommendation, Articles I and VI.ii)].	Partially implemented
2. With respect to other preventive measures, the Working Group recommends that Switzerland:	
a) pursue its efforts to ensure greater transparency in corporate accounts and the independence of auditing bodies, and encourage the Swiss Institute of Certified Accountants and Tax Consultants to complete promptly the on-going process of amendment of auditing standards [Convention, Article 8; Revised Recommendation, Article V.A.iii); Annex to the Revised Recommendation, paragraph 7].	Partially implemented
3. With regard to detection, the Working Group recommends that Switzerland:	
a) consider the establishment in federal legislation of a formal obligation for any federal authority, civil servant or public official, including those in charge of export credits, to report indications of a possible act of bribery to competent authorities, and engage consultations with the cantons so as to encourage them to institute a similar obligation in cantonal legislation where such an obligation is currently lacking [Revised Recommendation, Article I].	Fully implemented
b) proceed, in accordance with Switzerland's expressed position, to the drafting of a circular for federal and cantonal tax authorities specifying the nature and tax aspects of the foreign bribery offence, so as to encourage detection of acts of bribery abroad, and to review disclosure rules to ensure that officials discovering suspicious facts report them to the competent judicial authorities [Revised Recommendation, Article IV].	Partially implemented
c) examine measures to ensure effective protection for persons co-operating with enforcement authorities, and especially for employees who in good faith report suspected acts of bribery so as to encourage such persons to report them without fear of dismissal [Revised Recommendation, Article I; Annex to the Revised Recommendation, paragraph 6].	Partially implemented
d) given the important role of the auditing of accounts in detecting suspicious transactions related to the bribery of foreign public officials, consider extending mandatory reporting obligations for auditors contained in the draft bill to amend the Code of Obligations, by establishing an express obligation for auditors to report to the prosecutorial authorities any evidence of possible corrupt practices by the entities whose accounts they audit in the event that the entities' executive bodies, after being duly advised, refrain from taking action [Revised Recommendation, Article V iv)].	Fully implemented
<i>Recommendations to ensure effective prosecution of the offence of bribing foreign public officials and related offences</i>	
4. With regard to prosecution and sanctions, the Working Group recommends that Switzerland:	
a) pursue the efforts undertaken to bolster the effectiveness of the prosecution of offences relating to the bribery of foreign public officials, by considering measures to streamline the process of appeal with respect to mutual judicial assistance requests [Convention, Article 9; Revised Recommendation, Article I; Annex to the Revised Recommendation, paragraph 8].	Partially implemented

<p>b) in order to strengthen the overall effectiveness of sanctions for the offence of bribery of foreign public officials, consider, in the context of the amendment of the federal law on public procurement, the temporary or permanent disqualification from any public procurement of enterprises convicted of bribing foreign public officials, and consider a similar approach for export credits [Convention, Article 3.4; Revised Recommendation, Article II.v) and Article VI.ii)].</p>	<p>Partially implemented</p>
<p><i>Follow-up by the Working Group</i></p>	
<p>5. The Working Group will follow up on the issues listed below, in light of evolving practice, in order to check:</p>	
<p>a) with respect to the liability of legal persons, whether, taking into account the notion of defective organisation, the application of Article 100^{quater} of the Criminal Code provides for effective, proportional and dissuasive sanctions for foreign bribery [Convention, Articles 2, 3.1].</p>	<p>Not covered by the written follow-up procedure</p>
<p>b) whether, recognising the positive efforts undertaken, Switzerland continues to make available to the prosecutorial authorities of the Confederation the necessary resources to ensure the effective enforcement of the offence of bribery of foreign public officials [Convention, Article 5; Revised Recommendation, Article I; Annex to the Revised Recommendation, paragraph 6].</p>	<p>Not covered by the written follow-up procedure</p>
<p>c) whether enforcement of Article 322^{septies} of the Criminal Code by the judicial authorities leads to: (i) a broad interpretation of the definition of the exercise of the official functions of a head of state; (ii) its application in cases involving solicitation by the foreign public official; and (iii) an application of the notion of foreign public official that includes heads of state and a country's highest authorities [Convention, Article 1].</p>	<p>Not covered by the written follow-up procedure</p>
<p>d) the application of the notion of socially accepted practices, including the question of whether it is excluded from the scope of application of Article 322^{septies} of the Criminal Code in accordance with the opinion expressed by Switzerland [Convention, Article 1].</p>	<p>Not covered by the written follow-up procedure</p>
<p>e) whether, excluding the case of small facilitation payments, an official's acceptance of an improper advantage constitutes the basis for the offence of bribery [Convention, Article 1.1].</p>	<p>Not covered by the written follow-up procedure</p>
<p>f) whether the current basis for territorial jurisdiction, in light of the rule that the commission in Switzerland by a foreigner of an act of instigation, authorisation or complicity in the bribery of foreign public officials committed by a foreigner is deemed to take place abroad, is sufficiently effective to combat the bribery of foreign public officials [Convention, Articles 4.1, 4.4].</p>	<p>Not covered by the written follow-up procedure</p>

ANNEX 2

LIST OF DES PARTICIPANTS DURING THE ON-SITE VISIT

Federal administration	
Federal Department of Justice and Police (FDJP)	<ul style="list-style-type: none"> ▪ Federal Office of Justice: Criminal and civil law units ▪ Federal Office of Police: Federal Judicial Police (fedpol) Money Laundering Reporting Office (MROS) Office of the Attorney-General of Switzerland ▪ Mutual Legal Assistance Section ▪ Economic Crimes Section Federal Audit Oversight Authority (FAOA)
Federal Office of the Attorney-General	<ul style="list-style-type: none"> ▪ Mutual Legal Assistance Unit ▪ Economic Crime Unit
Federal Criminal Court (FCC)	
Federal Department of Economic Affairs (FDEA)	<ul style="list-style-type: none"> ▪ State Secretariat for Economic Affairs
Federal Department of Finance (FDF)	<ul style="list-style-type: none"> ▪ State Secretariat for International Financial Affairs (SIFA) ▪ Swiss Federal Audit Office (administered by the FDF) ▪ Federal Office for Buildings and Logistics (FBL) ▪ Federal Tax Administration (FTA) ▪ Federal Office of Personnel ▪ Swiss Financial Market Supervisory Authority (FINMA) (administered by the FDF)
Federal Department of Foreign Affairs (FDFA)	<ul style="list-style-type: none"> ▪ Political Division V ▪ Political Development and Multilateral Co-operation Division
Government agencies and Swiss public establishments	<ul style="list-style-type: none"> ▪ Swiss Export Risk Insurance (SERV)
Cantonal administrations	
Canton of Vaud	<ul style="list-style-type: none"> ▪ Cantonal Court of the Canton of Vaud ▪ Vaud Cantonal Police

	<ul style="list-style-type: none"> ▪ Cantonal Tax Administration
Canton of Neuchâtel	<ul style="list-style-type: none"> ▪ Office of Land Acquisition and Legal Affairs / Swiss Conference of Directors of Public Works, Planning and Environmental Protection ▪ Regional Court, Canton of Neuchâtel
Canton of Berne	<ul style="list-style-type: none"> ▪ Finance Department, Tax Administration ▪ Office of the Attorney-General
Canton of Geneva	<ul style="list-style-type: none"> ▪ Office of the Attorney-General, Section IV ▪ Cantonal Tax Administration, Audit Section
Canton of Zoug	<ul style="list-style-type: none"> ▪ Office of the Attorney-General
Canton of Basel-Town	<ul style="list-style-type: none"> ▪ Office of the Attorney-General
Private sector	
Private-sector enterprises	<ul style="list-style-type: none"> ▪ Representatives of enterprises engaged in international trade ▪ Representatives of SMEs engaged in international trade
Representative private-sector associations	<ul style="list-style-type: none"> ▪ Swiss Bankers Association (SBA) ▪ Economiesuisse, Competition Policy and Regulatory Affairs ▪ SwissHoldings
Legal profession	
Practitioners/Lawyers	<ul style="list-style-type: none"> ▪ Law firm of Schellenberg Wittmer (Geneva) ▪ Law firm of BCCC Attorney-at-Law (Geneva) ▪ Law firm of Kellerhals Anwälte, Zurich ▪ Haute École de Gestion, ARC, Neuchâtel, Institut de Lutte Contre la Criminalité Économique ▪ Law firm of Lachat Harari & Associés
Accounting and auditing professions	
Private agencies and professional associations	<ul style="list-style-type: none"> ▪ Swiss Fiduciary Chamber, SME Section ▪ Audit bodies
Civil society and universities	
Civil society	<ul style="list-style-type: none"> ▪ Transparency International ▪ Basel Institute of Governance ▪ Berne Declaration (BD)
Universities	<ul style="list-style-type: none"> ▪ Haute École de Gestion, ARC, Neuchâtel, Institut de Lutte Contre la Criminalité Économique ▪ Faculty of Law, University of Geneva ▪ Faculty of Law, University of Fribourg ▪ University of Applied Sciences HTW Chur, Swiss Institute for Entrepreneurship (SIFE)
Media	
	<ul style="list-style-type: none"> ▪ Radio Télévision Suisse – Télévision Suisse Romande

ANNEX 3

LIST OF ABBREVIATIONS

AMLA	Federal Law of 10 October 1997 on Combating Money Laundering in the Financial Sector
ATF	<i>Arrêt du Tribunal fédéral</i> – Federal Court judgement
CF	<i>Conseil fédéral</i> – Federal Council
CHF	Swiss francs
CO	Swiss Code of Obligations
CPC	<i>Code de procédure pénale</i> – Swiss Criminal Procedure Code
DTTs	Double-taxation treaties
EU	European Union
FAOA	Federal Audit Oversight Authority
FATF	Financial Action Task Force
FCP	Federal Criminal Police
FDF	Federal Department of Finance
FDFA	Federal Department of Foreign Affairs
FDI	Foreign direct investment
fedpol	Federal Office of Police
Fig.	Figure
FINMA	Swiss Financial Market Supervisory Authority
FINMASA	Financial Market Supervisory Act
FOJ	Federal Office of Justice
FTA	Federal Tax Administration
GDP	Gross domestic product
GRECO	Group of States against Corruption
IDWG CC	Interdepartmental Working Group on Combating Corruption
IMAC	Federal Law on International Mutual Assistance in Criminal Matters
LIFD	Federal Law of 14 December 1990 on Direct Federal Tax
LPers	Law on Federal Government Employees
LRAI	Law on the Restitution of Illegal Assets
OAG	<i>Ministère public de la Confédération</i> – Office of the Attorney-General of Switzerland
MROS	Money Laundering Reporting Office Switzerland
OSEC	Business Network Switzerland
para.	Paragraph
PPA	Public Procurement Act
SCC	<i>Code pénal</i> – Swiss Criminal Code
SDC	Swiss Agency for Development and Cooperation
SECO	State Secretariat for Economic Affairs
SERV	Swiss Export Risk Insurance
SIFE	Swiss Institute for Entrepreneurship
SME	Small and medium-sized enterprises
TC	<i>Tribunal cantonal</i> – Cantonal Court
TF	<i>Tribunal fédéral</i> – Federal Tribunal
TI	Transparency International
TPF	<i>Tribunal pénal fédéral</i> – Federal Criminal Court
WIKRI	Economic Crimes and Transnational Corruption Section

ANNEX 4

JURISPRUDENCE ON THE OFFENCE OF ACTIVE BRIBERY OF FOREIGN PUBLIC OFFICIALS, ON CORPORATE CRIMINAL LIABILITY, AND ON NON-DEDUCTIBILITY OF BRIBES FOR TAX PURPOSES

Box 1. JURISPRUDENCE ON THE OFFENCE OF ACTIVE BRIBERY OF FOREIGN PUBLIC OFFICIALS, INVOLVING A NATURAL PERSON

On 17 February 2010, the Tax Administration of the Canton of Geneva advised the cantonal Office of the Attorney-General of illegal payments that had been made by a director of several Geneva hotels. Following this report, a case was opened by the Geneva Office of the Attorney-General. The investigation showed that between 2003 and 2007, X – a Swiss national – had paid intermediaries cash commissions totalling CHF 109 100 (approximately EUR 90 000) so that foreign diplomatic representations would choose to stay in his establishments. Examination of the accounting records of the companies operating the hotels showed in particular that CHF 48 000 had been paid in 2006-07 so that representatives of Office XY would stay in these establishments; that CHF 27 100 had been paid between 2003 and 2007 so that customers from consulate XY and permanent mission XY would stay there; and that CHF 34 000 had been paid so that customers connected with mission XY would stay there. The investigation determined that the payment of these commissions had enabled the hotels in question to generate turnover of CHF 1.5 million (or approximately EUR 1.2 million).

When questioned by the Geneva law enforcement authorities, the defendant acknowledged having paid commissions to attract customers, while contending that the customers brought in by the commissions had not, in his opinion, been members of official representations. The prosecutor in the case deemed, however, that a review of the accounting documents in evidence clearly showed that the customers were in fact official representatives, that a 2009 letter clearly indicated that the accused habitually paid commissions to foreign officials and lastly, that it made little difference whether the intermediaries receiving the commissions did not work formally for the various foreign missions insofar as a purpose of the commissions was to attract diplomatic clientele. The Geneva law enforcement authorities also rejected the defendant's contention that the payment of commissions to foreign public officials was a recurring practice in the hotel industry. After taking account of the defendant's lack of a criminal record and his personal and economic circumstances, and considering that the deeds of which he was accused were not serious enough to take the accused to trial, X was sentenced by Summary punishment order to a suspended fine of CHF 49 500 (approximately EUR 41 000), three years' probation and a fine of CHF 12 000 (approximately EUR 10 000).

Source: Summary Punishment Order of the Attorney-General of the Republic and Canton of Geneva, 2 December 2010

Box 2. JURISPRUDENCE ON CORPORATE CRIMINAL LIABILITY

Case 1: Jurisprudence on the application of article 102(2) SCC to Alstom Network Schweiz AG and Alstom SA

In a summary punishment order issued by the Swiss Office of the Attorney-General (OAG) on 22 November 2011, Alstom Network Schweiz AG, acting for the Alstom Group, was found guilty of not having taken all reasonable and necessary organisational measures to prevent the payment of bribes to foreign public officials in Latvia, Malaysia and Tunisia, in relation to conduct that took place following the entry into force of article 102 of the Swiss Criminal Code in October 2003. The company was sentenced to a fine of 2.5 million Swiss francs (CHF) and a compensatory penalty of CHF36.4 million, calculated on the basis of the profits earned by the entire group through the contracts involving bribery. The company was also ordered to pay procedural costs amounting to some CHF95,000.

In a decision issued the same day, the OAG considered: that a conviction of the parent company, Alstom SA, in addition to that of Alstom Network Schweiz AG, was not justified, having noted that the investigation showed that the Group had made considerable efforts to develop the necessary regulations with a view to preventing the payment of illegal amounts, in particular bribes, in the context of its operations (the Group was nonetheless criticized for not having enforced these regulations with the requisite vigor); that the Alstom Network Schweiz AG company had been created with the aim of centralising payments to consultants and assuring a better respect for compliance obligations and that systematic use of 'slush funds' could not be established; and that the Alstom Group, after having recognised the organisational deficiencies in question, had rectified these by reinforcing the role of the Ethics & Compliance service, which now reports to the Board of the Group; and that Alstom SA paid, as reparation, a sum of CHF1 million to the International Committee of the Red cross (ICRC), for its projects in Latvia, Malaysia and Tunisia. In addition, the OAG considered that the public interest in prosecuting was insignificant, given that Alstom Network Schweiz AG had already been convicted by summary punishment order and ordered to pay a fine of CHF2.5 million (article 53 CP). Despite the order to dismiss proceedings, the two companies were ordered to pay procedural costs in the order of CHF90,000. The decisions handed down on 22 November 2011 did not, however, conclude the OAG's proceedings against Alstom, as proceedings are still underway against both individuals suspected of passive bribery, and consultants.

The criminal proceedings in this case were initially opened in 2004 against unidentified persons, were subsequently suspended in 2006, then reopened for suspected aggravated money laundering (article 305^{bis} SCC), bribery of foreign public officials (article 322^{septies} SCC) and mismanagement (article 158 SCC) against Alstom's Compliance Manager, in July 2009 the proceedings were extended to include Alstom Network Schweiz AG and Alstom SA for the suspected commission of an offence under article 102 SCC. This was the result of a preliminary analysis of important evidence that was seized in August 2008, from the headquarters of Alstom Network Schweiz AG in Baden.

The exhaustive criminal investigation by the OAG, between 2008 and 2011, notably focused on the activities of the Compliance Manager and, since July 2009, on the activities of the 'Power' and 'Power Services' companies operating in the electric powerplant sector. The investigations ultimately about 15 countries, which were the subject of mutual legal assistance (MLA) requests; the OAG also used a mechanism for spontaneously exchanging information with 8 countries, including France, the UK and the US. The criminal investigation revealed that consultants engaged by Alstom on the basis of contracts in Latvia, Malaysia and Tunisia, had paid a considerable part of their fees to foreign decision-makers, and thereby influenced them in favour of Alstom.

In the context of the proceedings against Alstom Network Schweiz AG and Alstom SA, the OAG in collaboration with the federal judicial police examined twelve electric powerplant projects covering all continents. It noted other violations of internal compliance regulations in this context, but was unable to prove any bribery occurring after the entry into force of article 102 SCC, despite extensive investigations. In relation to these projects, the proceedings against the two Alstom companies were dismissed without fine, and the two companies were ordered to pay procedural costs, after the OAG could not establish an offence that would justify prosecution (article 319(1)(a) CPC) or could not hold the companies liable for acts occurring before October 2003 (article 319(1)(b) CPC).

The decisions handed down in the Alstom matter are publicly available in English on the OAG website.

Source : Summary punishment order (non-official English translation), Bern, 22 November 2011; additional information provided by the Swiss authorities.

Case 2: Jurisprudence on the application of Article 102(1) to a commercial enterprise

On 28 June 2004, during a speed check on a Swiss motorway, a vehicle was clocked driving 162 km/h in a 100 km/h zone. A request for the driver's identity was sent to firm X, which owned the vehicle in question. The firm responded to the police that the vehicle had been hired by firm Y. The latter contended that the quality of the photographs taken by the radar precluded certain identification of the driver at the time of the facts. "Z", managing director of Y, explained that because of the large number of employees, he was not in a position to say who was driving the vehicle at the time of the speeding violation. He added that the company's vehicles were not all assigned to particular individuals, and that the vehicles did not have driver logbooks. The investigating magistrate on the case deemed the inability to ascertain which employee was driving a given company vehicle on a given day constituted defective organisation by the firm as defined in SCC, Article 100^{quater} (1) (henceforth Article 102(1)). The company was found guilty of grievous violation of the rules of the road and sentenced to a fine of approximately EUR 2 300.

Source: Revue fribourgeoise de jurisprudence, 2005, 59ff; see also, Journal des Tribunaux 2005, I, 558.

Case 3: Jurisprudence on the application of Article 102(2) SCC to a financial intermediary

On 11 February 2005, at a post office in the canton of Solothurn, Swiss Post paid out 4.6 million Swiss francs in cash (4 600 thousand-franc notes) to an investment company. The money had come in the previous day to that company's account and originated from a CHF 5 million investment by two Dutch clients. Noting this payment, a postal employee immediately contacted the internal section specialised in anti-money laundering. The section's expert checked only that the account in question had not been blocked and that sufficient funds were on deposit. The judge in the case deemed that the fact that the credibility of an unusually large transfer had not been checked before the transaction, as required by the anti-money laundering law, and the impossibility of attributing the violation to any single Postfinance employee constituted defective organisation under article 102(2) SCC. Swiss Post was therefore found guilty of violating the anti-money laundering law and ordered to pay a fine of CHF 250 000 (approximately EUR 205 000). The public prosecutor had called for a fine of CHF 2.6 million (approximately EUR 2.1 million).

Source: Press articles; Judgement of the Administrative Tribunal of Solothurn of 21 April 2011; appeal to the Supreme Court of the Canton of Solothurn pending at the time of Phase 3 Review of Switzerland.

Case 3: Jurisprudence on the application of Article 102(1) SCC to a financial institution

In connection with criminal proceedings initiated in Switzerland and the execution of a Brazilian request for mutual legal assistance, the Office of the Attorney General of Switzerland (OAG) discovered that Bank Y in Geneva had committed errors relating to the identification of beneficial owners when a banking relationship was established with Company X, in Panama, in December 2002. In 2005, the relationship with X was identified by the bank as presenting heightened risks insofar as assets in excess of CHF 25 million had been maintained. However, the bank's erroneous identification of the beneficial owners continued until July 2010, at which point the error regarding the identification of the beneficial owner was rectified.

Pursuant to a criminal order of 15 July 2011, the bank, in its capacity as a legal person, was convicted of insufficient diligence in financial transactions (Article 305^{ter} SCC) after it was established that the bank had 'failed to verify the identity of the beneficial owner with the diligence warranted by the circumstances,' and that this was attributable to poor organisation, the consequence of which was the impossibility of identifying a particular individual (Article 102(1) SCC). The OAG was found to have jurisdiction, rather than the Geneva Office of the Attorney-General, because some of the facts of the case had taken place abroad and some in Switzerland. Pursuant to the principle of non-retroactivity of the law, the OAG considered only those facts subsequent to 1 October 2003, the provisions on corporate criminal liability not having entered into force until that date. With regard to the statute of limitations and the liability of legal persons, the OAG did not deem that Article 102 SCC constituted the basis of an independent offence that should be characterised as a misdemeanour (offence punishable by a fine), for which the

limitation period would be three years. It determined that the limitation period of seven years, applicable to the offence of insufficient diligence in financial transactions (Article 305^{ter} SCC), should be taken as the basis for conviction of the legal person. The OAG set the amount of the fine imposed on Bank Y at CHF 300 000.

Source: Criminal Order of the Office of the Attorney-General of Switzerland, 15 July 2011.

Box 3. ENFORCEMENT OF THE NON-DEDUCTIBILITY OF BRIBES FOR TAX PURPOSES

Following two memoranda from the main VAT division of the Federal Tax Administration (FTA) to the tax authorities of the Canton of Geneva, each of which concerning a public corporation operating in the hotel industry which had booked vehicle expenses not justified for commercial use, the tax authorities of the Canton of Geneva filed tax-evasion charges in respect of direct federal tax and cantonal and municipal taxes.

In this connection, it conducted an extensive on-site audit of the books of the two corporations. It was while auditing entertainment expenses that it happened upon accounting vouchers bearing the names of diplomatic representatives of three foreign states. The cantonal tax administration questioned the directors of both companies and noted that the accounting vouchers related to 'illegal' payments intended to attract the business of the above-mentioned diplomatic representations. The payments were 'illegal' because they did not appear as rebates on the hotel invoices sent to the said domestic representations. These payments totalled CHF 109 100 and were spread over five years.

On this basis, the tax administration of the canton of Geneva corrected the profits of the companies involved in this case, disallowing the deduction of illegal payments. Furthermore, it fined the companies for tax evasion at a rate equal to 75% of the amount of taxes evaded. This fraction, which is normally set at 100% of taxes evaded, was reduced to 75% to reflect the companies' cooperativeness. The back taxes became payable in December 2009, at the same time as the fines. In February 2010, the tax administration reported the case to the public prosecutor (see Box 1). On 2 September 2010, the Attorney General of the Republic and Canton of Geneva issued a penalty order against the director of the two companies. In this order, it was noted that the director of both companies had been guilty of bribery of public foreign public officials under Article 322^{septies} of the Criminal Code. He was sentenced to a suspended fine of 150 fine-days (one fine-day being equal to CHF 330). In addition, he was ordered to pay an unsuspended fine of CHF 12 000. This order became enforceable.

Source: Switzerland's responses to requests for additional information.