

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
WORKING GROUP ON BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS**

SWITZERLAND: PHASE 4 REPORT

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EXECUTIVE SUMMARY

This Phase 4 report by the OECD Working Group on Bribery in International Business Transactions evaluates and makes recommendations on Switzerland's implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The report details Switzerland's specific achievements and challenges in this regard, including with respect to the implementation of measures to combat foreign bribery, as well as the progress made by Switzerland since its Phase 3 evaluation in December 2011.

Since that evaluation, Switzerland can pride itself on the significant rise in the number of prosecutions and convictions for foreign bribery: six natural persons and five legal persons were convicted in five cases. A large number of foreign bribery cases were under investigation at the time of writing this report. The Working Group would like to draw attention in particular to the significant level of enforcement by the Federal Office of the Attorney General that is having an impact at a national and international level. Nevertheless, Switzerland is expected to step up its foreign bribery enforcement efforts. The Working Group will be particularly vigilant in this respect, given that several court decisions may have favoured a restrictive interpretation of both the offence and corporate liability. In relation to concluded cases, the Working Group regrets that the sanctions imposed are not effective, proportionate or dissuasive as provided for in the Convention, particularly in relation to legal persons, and that this is likely to alter the dissuasive effect of these convictions. Finally, concluded cases should be published and their content disclosed to the fullest extent possible, to make authorities' law enforcement efforts better known, and render them more predictable and transparent. This is all the more important in view of the fact that the vast majority of concluded foreign bribery cases have, to date, been resolved outside of court using procedures that do not necessarily involve a judge. The Working Group also commends Switzerland for its proactive policy on seizure and confiscation and its use of firmly established practice in this field that produces results. It further notes Switzerland's active involvement in mutual legal assistance (MLA) and its adoption of practices, such as proactive MLA, to further improve co-operation. Therefore, it supports the reform of Swiss law on MLA currently underway in order to formalise proactive MLA and foster even more timely and effective international co-operation.

Regarding detection, the Working Group commends the key role played by the MROS, the Swiss Financial Intelligence Unit, in detecting foreign bribery and would like to see it continue. It notes that lawyers, notaries, accountants and auditors are not in a position to contribute to such detection because they are not subject to the anti-money laundering framework, in contrast to what is required by international standards. Finally, the Working Group regrets the absence of a legal and institutional framework to protect whistleblowers in the private sector and calls for prompt reforms in this field.

The report and its recommendations reflect the findings of experts from Austria and Belgium and were adopted by the Working Group [on 15 March 2018]. The report is based on the legislation, data and other documents supplied by Switzerland, and research conducted by the evaluation team. The report is also based on information obtained by the evaluation team at its on-site visit to Bern in September 2017, during which the team met representatives of the Confederation and the cantonal administrations, the private sector, the media, civil society, parliamentarians and academics. Switzerland will submit an oral report to the Working Group within one year (March 2019) detailing the adoption of appropriate legislation to protect private-sector employees from any discriminatory or disciplinary action who report suspicions of bribery of foreign public officials (Recommendation 1(a)). Within two years (March 2020), Switzerland will submit a written report to

the Working Group on the implementation of all recommendations and on its efforts to implement the Convention.

INTRODUCTION

1. In March 2018, the OECD Working Group on Bribery in International Business Transactions (the Working Group) completed the fourth evaluation of the implementation by Switzerland of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the Convention) and the 2009 Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions (the 2009 Recommendation) and associated instruments.

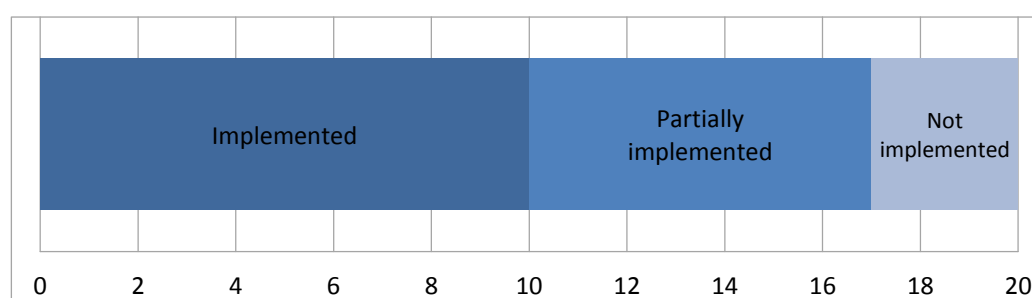
1. Previous evaluations of Switzerland by the Working Group

2. Monitoring implementation and enforcement of the Convention and related instruments takes place in successive phases through a rigorous peer-review monitoring system. The monitoring process is subject to specific agreed-upon principles. The process is compulsory for all Parties and provides for on-site visits (as of Phase 2), including meetings with non-government actors. The evaluated country has no right to veto the final report or its recommendations. All OECD Working Group on Bribery evaluation reports and recommendations are systematically made public on the OECD website. Switzerland's previous full evaluation – Phase 3 – dates back to December 2011. The Working Group evaluated the implementation of the Phase 3 recommendations in 2014. At the time of this evaluation, the Working Group concluded that ten of the recommendations had been implemented, seven had been partially implemented, and three had not been implemented even in part (see Figure 1 and Annex 5).

Previous evaluations of Switzerland by the Working Group

2000: [Phase 1 Report](#)
 2005: [Phase 2 Report](#)
 2007: [Phase 2 Follow-Up Report](#)
 2011: [Phase 3 Report](#)
 2014: [Phase 3 Follow-Up Report](#)

Figure 1 – Implementation by Switzerland of Phase 3 Recommendations (2014)



2. Phase 4 process and on-site visit

3. Phase 4 evaluations focus on three key cross-cutting issues – enforcement, detection and corporate liability. They also address progress made in implementing outstanding recommendations from previous phases, as well as any issues raised by changes to domestic legislation or the institutional framework.¹ The goal of Phase 4 is a tailor-made approach, taking into account each country's unique situation and challenges, and reflecting its achievements. For this reason, issues

¹ [See Phase 4 evaluation procedures.](#)

which were not deemed problematic in previous phases, or which did not appear to be problematic in this evaluation, do not appear in this report.

4. The evaluation team for this Phase 4 evaluation of Switzerland comprised examiners from Austria and Belgium, as well as members of the OECD Anti-Corruption Division.² Pursuant to the Phase 4 process, after receiving Switzerland's responses to the Phase 4 questionnaire and supplementary questions, the evaluation team conducted an on-site visit to Bern on 19-22 September 2017. The team met representatives of the Swiss public sector, including law enforcement authorities and the judiciary; the private sector, including business organisations and companies; lawyers and auditors; and civil society, including non-governmental organisations (NGOs), academia and the media.³ The evaluation team would like to express its appreciation to the participants for their openness during discussions. It would also like to thank the Swiss authorities, especially the State Secretariat for Economic Affairs (SECO), for arranging the on-site visit. The evaluation team also commends the representatives of the Office of the Attorney General (OAG) for being so generous with their time during the on-site visit.

5. This report relates to the implementation of the Convention and associated instruments by Switzerland, a federal State comprising 26 cantons whose official name is the Swiss Confederation. The cantons are regarded as sovereign communities and have jurisdiction in all matters that do not come under the jurisdiction of the Confederation. Jurisdictions are shared in the fields of policing and justice and in economic and social matters. The cantons have jurisdiction over not only their own laws and regulations but also those of the Confederation (including the Code of Obligations and the Criminal Code). One of the difficulties encountered by the examiners during the evaluation lay in obtaining exhaustive information on cantons' enforcement efforts in foreign bribery cases. There is no legal requirement upon the cantons to communicate that information to the Confederation. With the help of the Swiss Conference of Prosecutors (CPS), the authorities provided the examiners with information from the cantons of Geneva, Zurich and Zug and noted that no other canton dealt with bribery-related matters (see Section B.2). It was not possible to verify that information. The evaluators thank the representatives of the cantons of Bern, Geneva, Neuchâtel, Vaud, Zug and Zurich for taking part in the on-site visit.

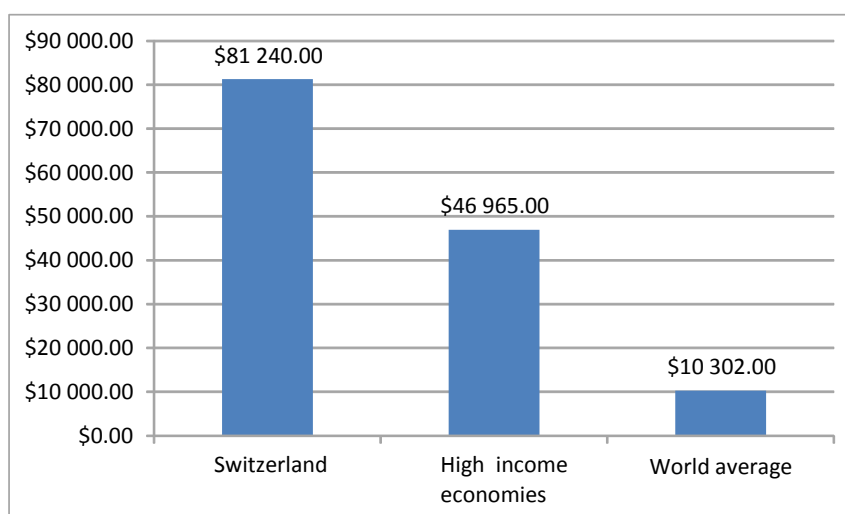
3. The economic situation and foreign bribery risks

6. According to the World Economic Forum, Switzerland is the most competitive country in the world, and the World Bank ranks it 31st out of 190 countries in its *Doing Business 2017* report. Direct democracy in Switzerland and the frameworks that the State lays down in respect of economic operators contribute to political stability and sound economic growth. Switzerland is classed as a high-income country by the World Bank. Out of the 217 economies in the World Bank rankings, it ranks seventh for gross national income per inhabitant and 20th for gross national income. Income per capita in Switzerland is almost double the average for high income countries and is eight times higher than the average for the 217 economies covered by the World Bank data (see Figure 2).

² Austria was represented by **Dr. Christian Manquet**, Ministry of Justice, and **Mrs. Silvia Thaller**, Public Prosecutor's Office. Belgium was represented by **Mr. Philippe De Koster**, Director of the Financial Intelligence Processing Unit, and **Mr. Hugues Tasiaux**, Head of Service, Central Anti-Corruption Office (Federal Police). The OECD was represented by **Ms. Catherine Marty**, Coordinator of the Phase 4 Evaluation of Switzerland and Legal Analyst, **Ms. Leah Ambler**, Legal Analyst, and **Ms. Claire Leger**, Legal Analyst, all from the Anti-Corruption Division, Directorate for Financial and Enterprise Affairs.

³ See Annex 2 for a list of participants.

Figure 2. Per capita income: Switzerland, high and average income countries (USD, 2016) [Source: World Bank]



7. The stock of Switzerland's outward foreign direct investment (FDI) – excluding from resident Special Purpose Entities (SPEs) – stood at USD 1.025 billion at end-2015, or 153% of the country's GDP, whereas the average world and EU values were only 33% and 60% of GDP respectively. According to OECD statistics on outward FDI held by Switzerland at end-2015, including investments by resident SPEs, the main destinations were the United States (18%), Luxembourg (12%), the Netherlands (11%), Ireland (6%) and the United Kingdom (5%). In total, 99% of businesses in Switzerland are SMEs (defined as businesses employing fewer than 250 people). Close to 70% of Swiss SMEs are engaged in cross-border activity as exporters, suppliers or investors.⁴ In 2014, SMEs accounted for 68% of jobs in Switzerland. At an international level, SMEs accounted for the vast majority of active businesses in 2013.⁵

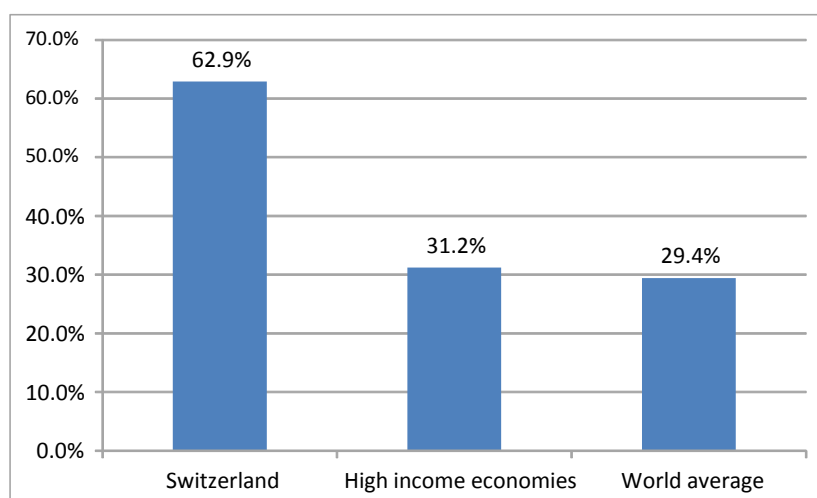
8. The Swiss economy is world-class and faces risks of foreign bribery in several respects. In particular, it is highly export-oriented. In 2015, exports accounted for 62.9% of GDP compared to the average figure in high income economies of 31.3%. Switzerland's major export markets are the European Union (43.4% of total exports), followed by the United States (10.6%), Hong Kong (8.7%) and India (7.4%). Switzerland is a founding member of the European Free Trade Association.⁶ Relations between Switzerland and the European Union are governed by a set of bilateral agreements or arrangements entered into over the years between Switzerland and the European Communities, which later became the European Union.

⁴ See Crédit Suisse (2014) [here](#).

⁵ See “[Structure of Swiss SMEs in 2014](#)”, Federal Statistics Office.

⁶ The European Free Trade Association (EFTA) is an intergovernmental organisation to promote free trade and economic integration to the benefit of its four member States: Iceland, Liechtenstein, Norway and Switzerland.

Figure 3. Total exports: Switzerland, a high income country, and the global average (% of gross national income, 2015) [source: World Bank]



9. Switzerland has a leading, and sometimes dominant, position in a number of the economic sectors that not only play a key role in its economy but also expose it to relatively acute risks of foreign bribery. First, Switzerland's position as a financial centre is very important to the national economy. In 2016, the sector contributed 9.1% of GDP.⁷ Around two-thirds of banks are foreign or also operate internationally, clearly demonstrating how firmly embedded the Swiss financial centre is on the international scene.⁸ With its huge diversity of providers of specialist financial services, one of its strengths is wealth management (the volume of private foreign funds it manages amounts to around 26% of the global market in foreign wealth management). As a result of its economic and financial weight and its own specific features, the Swiss financial centre is therefore prone to greater risk of use for criminal purposes, particularly through money laundering, including the laundering of foreign bribery. The Swiss authorities share that view. The Federal Attorney General's Office (OAG) noted that, on 31 December 2016, it was conducting over 70 investigations into money laundering where the predicate offence was foreign bribery.

10. Several **multinational businesses** have a registered office in Switzerland, and Switzerland has one of the world's highest ratios of multinationals to inhabitants. These businesses (defined as businesses with a registered office in Switzerland and as Swiss subsidiaries of foreign multinational businesses) account for a significant share of Swiss GDP (35%) and provide work for around 25% of the total active population. Because of their activities, they are exposed to a greater manifest risk of bribery in international trade. These include sectors that are highly prone to foreign bribery such as pharmaceuticals, which in 2016 accounted for 12.2% of global exports of pharmaceutical products,

⁷ [Key figures on Swiss financial centre](#), October 2017.

⁸ The information on the banking sector in this paragraph is contained in "[Rapport sur l'évaluation nationale des risques de blanchiment d'argent et de financement du terrorisme en Suisse](#)" [Report on the national evaluation of the risks of money laundering and terrorism financing in Switzerland] published by the Interdepartmental Working Group co-ordinating measures to combat money laundering and the financing of terrorism (GCBF) in June 2015. It also recognises that the threats associated with foreign bribery and membership of a criminal organisation are increasingly areas of vulnerability because of their greater complexity, making detection and enforcement more difficult.

ranking Switzerland as one of the major international exporting countries in the sector, and commodities trading, which generates over 3% of Swiss GDP. Business conducted in Switzerland primarily involves raw materials that do not physically enter or leave Switzerland.⁹ Business categories include agricultural products, stone and metals, and energy products. On the global scale, Switzerland is home to some of the world's largest trading companies as well as many medium-sized firms. Around one third of the global oil trade is conducted from Switzerland. The risk of corruption is particularly high in this sector because of the players involved (State-owned enterprises, foreign public officials), very high potential gains, secrecy surrounding the actual sales, and the absence of specific regulations or international rules governing such transactions. These risks are acknowledged by the Swiss authorities,¹⁰ and have been clearly identified by *Public Eye* in several of its publications¹¹ and reported extensively in the media.¹² The OAG has also said that it is conducting several criminal proceedings for foreign bribery in this sector. These proceedings were still under investigation at the time this report was being finalised.

11. Switzerland is home to a large number of “**letterbox**” or “domiciliary” companies. The main feature of domiciliary companies is that they do not conduct any operational activities: they do not perform any trading, manufacturing or other activity that is exploited commercially. Domiciliary companies are extensively used for wealth management purposes by wealthy clientele. Between 2004 and 2014, 38.1% of corruption cases involved domiciliary companies.¹³

12. Some of the risks outlined above may affect Switzerland's capacity to enforce satisfactorily some of the Convention's requirements. Any weakness in the Swiss anti-money laundering system makes it vulnerable to the proceeds of corruption in the economy. The capacity to meet the demands of international co-operation also poses a special challenge given the importance of the Swiss financial centre and that it is highly solicited in this field. The efforts made by the Swiss authorities since Phase 3 to identify more clearly the risks facing Switzerland in terms of financial crime and foreign bribery in particular should be underlined.¹⁴ Nevertheless, the Swiss authorities should make further efforts to tackle and improve risk management in this area. As this report shows, the Swiss authorities

⁹ According to the Swiss Trading and Shipping Association (STSA), there are over 500 businesses active in commodities trading, and they employ over 10 000 people, principally in Geneva, in Zug Canton and near Lugano.

¹⁰ [Rapport de base; Matières premières \(2013\)](#) [Core report: Raw materials] and [Rapport de l'état de la mise en œuvre des recommandations émises par le Conseil fédéral \(2015\)](#) [Report on the status of implementation of the recommendations made by the Federal Council].

¹¹ See <https://www.publiceye.ch/fr/themes-et-contexte/commerce-et-matieres-premieres/matieres-premieres/role-de-la-suisse/>.

¹² “[Les accords secrets de Glencore au Congo](#)” [Glencore's secret agreements in Congo], 6 November 2017 and “[Une vidéo volée accuse Gunvor de corruption au Congo](#)” [Stolen video accuses Gunvor of bribery in Congo], 12 September 2017.

¹³ See the “Rapport sur l'évaluation nationale des risques de blanchiment d'argent et de financement du terrorisme en Suisse” [Report on the national evaluation of the risks of money laundering and terrorism financing in Switzerland] above.

¹⁴ The Interdepartmental Working Group on Combating Corruption (GTID) has continued its work to spread information on and raise awareness of the risks of bribery and corruption abroad and has held workshops on combating corruption in specific industries in Switzerland (in the defence industry in 2010, commodities trading in 2011 and arms trading in 2017).

should take action that includes more sustained enforcement and measures to prevent foreign bribery in those sectors that are identified as being at greatest risk.¹⁵

4. Foreign bribery cases

13. The outcome of enforcement action in Switzerland since the entry into force of the Convention at Cantonal and Federal level is as follows: **nine natural persons** (including three for complicity in foreign bribery) and **six legal persons** (including one under the simplified procedure, see Section B.4.) have been convicted for foreign bribery. At the time this report was completed, one case resolved by simplified procedure (involving a legal person) was still pending.

Cases concluded since the Phase 3 evaluation

14. At the time of the Phase 3 evaluation, adopted in December 2011, three convictions for foreign bribery had been given against natural persons (one by the cantonal courts and two by the federal authorities), and the OAG had convicted a legal person, the Swiss subsidiary of the Alstom group. In September 2017, the date of the on-site visit for the Phase 4 evaluation, the number of convictions for foreign bribery in Switzerland had risen since Phase 3, both against natural persons (+6) and legal persons (+5) in five cases. Cases resolved by summary punishment order and simplified procedure since Phase 3 are set out in Annex 1 to this report.

Ongoing cases at the time of Phase 4

15. Where the OAG is concerned, 28 investigations for foreign bribery and foreign bribery-based money laundering were ongoing at 31 December 2012; 33 at 31 December 2013 and 39 at 31 December 2014. The authorities indicate that from 2015 onwards foreign bribery and money laundering procedures were differentiated. There was a total of 138 procedures in 2015 (58 for foreign bribery and 80 for foreign bribery-based money laundering) and 137 procedures in 2016 (65 and 72, respectively). Between 1 January 2011 and 31 December 2016, 21 criminal proceedings related to foreign bribery were opened in Geneva, most of which were still at the investigation stage at the time of writing. In Zurich between 2012 and 2014, two proceedings against three natural persons were opened, one of which has been closed. In Zug Canton between 2009 and 2013, one set of proceedings was brought against two natural persons and closed. This was the only information made available by cantons; the authorities stated that it was exhaustive.

16. Article 1(4)(a) of the Convention defines a foreign public official *inter alia* as an official of a public international organisation. Switzerland currently hosts 25 public international organisations.¹⁶ The issue (not addressed in the previous evaluation phases) of Switzerland's powers to prosecute bribery of public officials of international organisations based in Switzerland was raised during the

¹⁵ This includes the commodities trading sector which should be the subject of tailored, binding regulation. Increased attention should be paid to the risk posed by domiciliary companies. At the time of finalising this report, the Swiss authorities indicated that a detailed study evaluating the risks linked with legal persons and trusts had been adopted at the end of 2017. The evaluators were not able to review this study. Finally, some professions that are still outside the scope of anti-money-laundering regulations in Switzerland when they are engaged in activities nevertheless covered by the standards of the Financial Action Task Force (FATF) should be regulated appropriately (see Section A.3.).

¹⁶ FDFA, [International organisations in Switzerland](#).

on-site visit. Indeed, the strong presence of international organisations in Switzerland presents a specific risk of corruption. The authorities were unanimous in recognising their jurisdiction in this area. The OAG representatives referred to two ongoing cases of foreign bribery concerning officials of international organisations based in Switzerland.

Cases closed or not brought

17. There is no way of knowing exactly how many instances there are of proceedings that are closed or are not brought nationwide, because Switzerland does not centralise such information. In Zurich, one of the two sets of proceedings opened between 2012 and 2014 was closed in 2014 due to the lack of response received to an MLA request. In Zug Canton, the only set of proceedings opened between 2009 and 2013 was closed when the benefit could not be identified and it proved impossible to verify the circumstances of the alleged offence (see Section B.1.). The number of cases of foreign bribery closed by the OAG is as follows: 2 (against 3 natural persons) in 2012; 10 (against 13 natural persons) in 2013; 4 (against 3 natural persons) and 1 against 1 legal person in 2014; 3 (against 3 natural persons) and 1 (against 1 legal person) in 2015; and 4 (against 4 natural persons) in 2016. The Working Group notes the significant number of closed foreign bribery cases, particularly in relation to the number of investigations under way, and those resolved, and is concerned that the number could rise following some case law developments that do not establish conditions conducive to the prosecution of natural and legal persons in Switzerland (see Section C.1.). However, it emphasises the good practice demonstrated by the OAG in spontaneously forwarding information on closed cases to the States concerned (see Section B.6.). The authorities noted that the difficulty in determining and proving the status of a foreign public official (particularly in the context of activities carried out by companies whose public status was not immediately clear) and in obtaining mutual legal assistance are obstacles to prosecution. Other reasons given for closing cases include acquittals abroad and application of the *ne bis in idem* principle. Additionally, in the *Odebrecht-CNO Case*, the proceedings against the company Braskem were closed after it had been called to account in the United States for the bribes that were the subject of the Swiss investigations. The Swiss authorities explained that the rise in the number of decisions not to bring proceedings (93 in 2015 and 158 in 2016) followed the introduction within the OAG of a streamlined system for handling reports and complaints from private individuals (see Section B.3.) and the greater formality that it entails.

Cases closed following reparation (Article 53 CC)

18. According to the Phase 4 Questionnaire, between 2010 and 2014, the OAG closed 7 sets of proceedings associated with Alstom and 2 sets of proceedings associated with Siemens pursuant to Article 53 CC. Equivalent claims had been made and confiscation measures executed in all of those proceedings. Two cases against two legal persons were closed under Article 53 CC since Phase 3. They are set out in Annex 1 to this report.

Commentary

Switzerland can take pride in the significant rise in the number of prosecutions and convictions of natural and legal persons for foreign bribery since Phase 3. In particular, five legal persons have been convicted in the past four years and the number of open investigations has significantly increased. The examiners also wish to emphasise the more sustained level of enforcement by the OAG, which is beginning to produce results.

The examiners nonetheless take the view that, although Switzerland has made significant progress, the total number of concluded cases could be higher still given the size of the highly export-

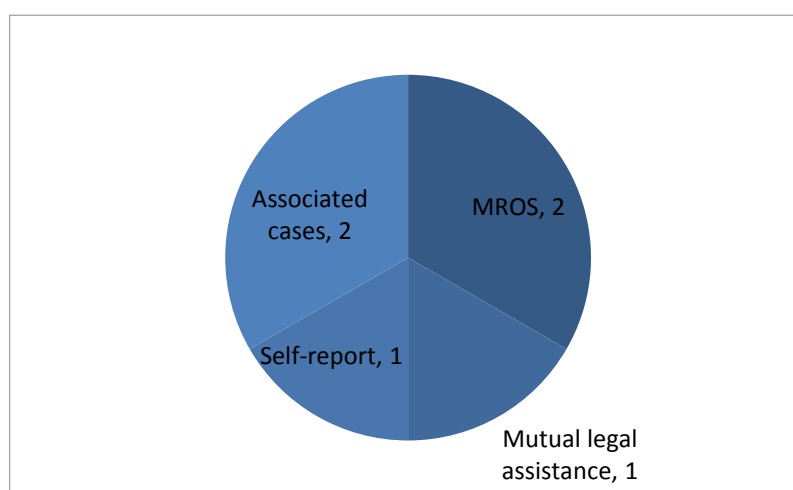
oriented Swiss economy and the risks inherent in some of its business sectors. They consider that Switzerland should be able to demonstrate a higher level of enforcement, including against Swiss businesses operating in business sectors that are very exposed to the risk of foreign bribery.

The examiners recommend that the Working Group follow up on closed foreign bribery cases. They recommend that Switzerland collect exhaustive statistics on the number of such cases at cantonal and federal levels.

A. DETECTION OF THE FOREIGN BRIBERY OFFENCE

19. The Swiss prosecution authorities state that the most frequent source of information leading to criminal proceedings for international corruption is the Money Laundering Reporting Office Switzerland (MROS). The second such source is international mutual legal assistance. In some cases, the evidence collated during ongoing cases triggers new cases (*Construction 1 Case* and *Construction 2 Case*). In just one case in this report, a company self-reported and, in another, a Swiss company reported a competitor company suspected of paying bribes. Examination of the sources of detection (cases that had been resolved at the time of writing) shows that too few of those sources play a part in detecting foreign bribery, essentially due to the absence of a legal framework (governing whistleblower protection and reporting obligations for some professionals such as lawyers, auditors and accountants) or because they are very much outliers in terms of their contribution (compared to the detection potential that the Working Group has acknowledged that such professionals have in other countries party to the Convention).

Figure 4: Sources of Detection of foreign bribery cases concluded since Phase 3¹⁷



A.1. Whistleblower protection

20. In Phases 2 and 3 (Recommendation 11), the Working Group recommended that Switzerland implement the 2009 Recommendation IX(iii). At the time of the written follow-up, a bill was under discussion in Parliament. In view of the fact that no law was in force, the Working Group deemed the recommendation not implemented. At the date of the on-site visit, no cases of foreign bribery had been brought to the attention of the cantonal Offices of the Attorneys General or the OAG by a whistleblower. At the time of writing, the authorities referred to a report in December 2017 made by an official at the Federal Department of Foreign Affairs (FDFA) through the Department's dedicated whistleblower hotline. The authorities state that they have forwarded the information to the OAG.

¹⁷ The *Banknotes Case* is included here although, at the time of writing, the decision had not yet entered into force.

21. Whistleblowers are a valuable source of information on foreign bribery, and effective safeguards should be provided for in law and established in practice to encourage them to speak out. The situation in Switzerland is critical in this respect. The views expressed during the on-site visit revealed almost universal mistrust of whistleblowers in Switzerland. In addition to the legal constraints considered below, the evaluation team heard extremely entrenched opinions on this matter that point to strong, deep-rooted cultural resistance to people who report suspicions of wrongdoing. Journalists referred to a still very strong culture of secrecy at several levels of Swiss society that inhibits reporting. Civil society representatives considered that discrimination against whistleblowers was still too much of a reality in Switzerland.¹⁸ Whistleblowers therefore report in a hostile environment, including where labour law is based on the statutory principle that an employee owes a duty to his or her employer (according to the authorities, in the event of disclosure to the authorities or the public, that principle is subject to a plethora of derogations established in case law). In reality, whistleblowers expose themselves to criminal prosecution or retaliatory measures if they make a report, as case law has consistently demonstrated in cases involving reported suspicions of financial offences.¹⁹ In one foreign bribery case (*Oil Company Case*), company executives who alerted the company board of suspicious payments in more than one foreign country were allegedly dismissed or moved to another role (in exchange for compensation) following their reports. In a message to the boards of the company and its parent (this information was published in the press), the firm of auditors responsible for auditing the company's accounts wrote about the actions of "*several whistleblowers inside and outside the company*" and the fact that some of them left the company after making their reports. Management took no remedial action following the reports. The whistleblowers supported the investigation that was conducted subsequently by the Attorney General of Geneva. This case illustrates the key role of whistleblowers in detecting foreign bribery. It also illustrates the role played by auditors in such detection.

Inadequate legal framework for reporting

22. The legal framework protecting whistleblowers in Switzerland continues to be inadequate. Where the public sector is concerned, it needs to be improved and to apply unreservedly to all Swiss officials at federal and cantonal levels. Following the entry into force of the amendments made to the Federal Personnel Act (LPers, Article 22a) on 1 January 2011 and the relevant cantonal provisions,²⁰ most Swiss officials, although subject to obligations of official secrecy, are required to report crimes and offences (Article 320 CC). That requirement is accompanied by a general prohibition on retaliation (LPers, Article 22a(5)). In this context, whistleblowers must report directly to their

¹⁸ "Jugés déloyaux, ils sont traités de délateurs, importunés, traînés en justice ou congédiés" [Deemed disloyal and treated as snitches or nuisances, they are hauled before the courts or sacked], Transparency International Suisse "[Whistleblowing](#)", 2013.

¹⁹ See the case involving Mr. Falciani and the FCC ruling of [27 November 2015](#) that found him guilty of aggravated disclosure of economic intelligence and convicted him *in absentia* to a five-year custodial sentence. Other cases illustrate the diligence of the OAG and the Supreme Court of Zurich which have handed down convictions for breaching banking secrecy following reports of financial offences (see the *Hildebrand* and *Elmer cases*). In Geneva, an IT worker at the Geneva office of the Panamanian legal firm Mossack Fonseca was arrested in June 2016 for revelations in connection with the *Panama Papers case*. The Geneva OAG confirmed it had brought criminal proceedings for unlawful data access following a complaint of criminal activity by Mossack Fonseca.

²⁰ The cantons of Aargau, Basel-Stadt and Basel-Landschaft, Bern, Geneva, Glarus, Jura, Neuchâtel, Nidwalden, Obwalden, Uri, Schaffhausen, Schwyz, St. Gallen, Ticino, Thurgau, Valais, Vaud, Zug and Zurich have incorporated an obligation for their officials to report such offences into cantonal law.

supervisors, to the criminal prosecution authorities or to the Swiss Federal Audit Office (Government oversight body). Where a whistleblower is dismissed for reporting an irregularity in good faith, the law provides for the possibility of reinstatement or reassignment to a suitable post. However, the law does not provide for specific remedies for victims of retaliation other than dismissal, nor for sanctions against those who retaliate. According to the Swiss authorities there are directives on the protection of whistleblowers against forms of retaliation, such as harassment. The evaluation team did not see these directives. In the public sector, whistleblowers have been subject to prosecution for violation of official secrecy as a result of their disclosures.²¹ The real threat of criminal liability has a deterrent effect on reporting. The authorities state that they can, in any event, assert their rights in legal proceedings.²² The Working Group is not aware of the current status of legal protection afforded to cantonal officials who report foreign bribery.

23. Switzerland has no legislation to protect whistleblowers in the private sector. Private sector employees are subject to several legal obligations of secrecy, including the duty of care and loyalty (Article 321a(4) CO); commercial secrecy (Article 162 CC); professional secrecy for certain professions (Article 321 CC); bank secrecy, which is binding under certain circumstances (Article 47 LB); and secrecy for those in the accountancy profession, referred to as “duty of discretion” (Article 730b(2) CO) (see Section D.1.). In principle, if an employee wants to make a report, s/he must first give his employer the opportunity to react to the information and resolve the matter internally. If the employee contacts a body or a person outside the company, then, under case law, protection is only available where the interests of third parties or the general interest take precedence over the legitimate interest of the employer, and where the authority “continues to take no action” or is unable to take action in a timely manner. The same case law states that “the employee must also maintain confidentiality in relation to criminal or administrative offences committed by his employer unless there is an overriding interest to disclose”.²³ The examiners are of the view that these criteria are imprecise especially because they are subject to the discretion of the court on a case-by-case basis.

Limited draft bill

24. A draft bill (begun in 2013 then revised) amending the Code of Obligations (CO) aims to codify the case law referred to above by providing that reports of “irregularities” in the private sector are consistent with the duty of loyalty in certain limited circumstances. In particular, an initial internal report to the employer which, when the employer fails to act, is followed by a report to the competent public authority, and finally, in the event that the competent authorities fail to act, to the media or to “organisations whose statutory role covers the reported facts”. The only safeguards proposed are: a derogation from the duty of loyalty; and compensation equivalent to a maximum of six months’ salary in the event of dismissal following a report. The scope of the draft bill is also narrow: it does not provide an exemption from violation of professional confidentiality (Article 321 CC). At the time of

²¹ See Zopfi/Wyler case and note 22.

²² By way of example, Switzerland communicated a decision of the Federal Administrative Court (TAF Judgment of 19 October 2017 – A-7006/2015) upholding the dismissal of a former official at the Central Compensation Office (CCO) in Geneva. Although the TAF referred to “full legal protection” for whistleblowers, criminal proceedings for breach of official secrecy were nonetheless brought (then closed) against the whistleblower because of the report he made in the case. The onus is on the whistleblower to prove he suffered harm in connection with the report he made.

²³ [ATF 127 III 310](#), grounds 5a; p. 316.

the on-site visit, work on the new version of the draft bill was ongoing, and its adoption by the Government was scheduled for the first quarter of 2018. The parliamentarians interviewed during the on-site visit expected that strong resistance to the safeguards set out in the bill in relation to unfair dismissal would result in its rejection by the Federal Council.

25. The bill is limited in scope, especially the absence of a clearly defined framework to ensure confidentiality of the report and protection of the whistleblower's identity (subject to the application of the general rules in force); the absence of safeguards other than compensation for unfair dismissal; the failure to shift the burden of proof onto the employer to justify dismissal or any other discrimination against an employee; the absence of sanctions for those who take retaliatory measures against whistleblowers and the absence of exemption from liability in the event that a whistleblower is the subject of a claim for civil, administrative or criminal liability in connection with his/her report. Finally, any employee whose contract or working environment is not covered by an employment contract within the meaning of the CO is precluded from the proposed protections (including volunteers, retirees, the self-employed, etc.).

26. The examiners have only very fragmentary, disparate information on private sector whistleblower protection frameworks in the cantons at the time of this evaluation. For example, they were informed that an office to combat corruption has been established within the Ombudsman in Zurich Canton. In November 2017, the Court of Auditors, Geneva, introduced a secure digital platform to receive reports and exchange information with whistleblowers anonymously. The Swiss federal authorities indicated that the cantons did not have the power to legislate for private sector whistleblower protection.

Commentary

The examiners recommend that Switzerland adopt urgently an appropriate regulatory framework to compensate and protect private sector employees who report suspicions of foreign bribery from any discriminatory or disciplinary action. Concerning protection in the public sector, the examiners recommend that Switzerland strengthen existing protection for whistleblowers at the federal level; undertake awareness raising activities (against reprisals or conduct such as intimidation, bullying or harassment); and broaden the legal framework for protection to ensure that it is applied without reserve to all cantonal officials. Finally, the examiners recommend that the Working Group should follow up on prosecutions brought in Switzerland against whistleblowers who report suspected financial offences including, in particular, foreign bribery.

A.2. Self-reporting

27. Although Swiss law does not contain provisions to reward spontaneous reports of irregularities by legal persons generally, self-reporting followed by co-operation during proceedings may be taken into account by the criminal authorities when determining a sentence (Articles 102(3), 47 and 48 CC). Pursuant to Article 48(d) CC, the court may reduce the sentence if the offender has shown genuine remorse, and in particular has made reparation for the damage caused, in so far as this may reasonably be expected of him (see Section B.3.). Additionally, a spontaneous report implies recognition of the facts and therefore allows the legal person to request that the OAG undertake a simplified procedure (see Section B.4.b). In practice, when determining sentence, the OAG considers the different behaviours that result from co-operation. First, it will reduce the sentence of a person who self-reports and thus reveals facts that were unknown to the authorities. This situation must be distinguished, and reflected in the severity of sentence, from that of a person who begins to co-operate only when the facts are discovered by the authorities. Finally, the behaviour of a person who makes reparation for

damage is a positive factor that should also be taken into account. These mitigating circumstances do not give rise to any objection in principle, so long as their application does not compromise the effective, proportionate and dissuasive nature of the sanctions, as happened in the *Banknotes Case*. The company in the *Banknotes Case* is the first company to self-report foreign bribery to the Swiss authorities (see Sections B.3. and C.1).

28. At the on-site visit, the OAG said it encouraged self-reporting at conferences with the private sector, and highlighted the benefits of so doing (including sentence mitigation). No guideline or other form of communication was made available to companies setting out the OAG's policy on the matter. The OAG was of the view that no such initiative was necessary and that it did not fall within its remit. No guidelines have been adopted within the OAG to guide prosecutors dealing with proceedings of this kind. These cases, like all others, tend to be processed by a team of prosecutors (see Section C1 and the role of *Group 102*). The company representatives at the on-site visit were unaware of the *Banknotes Case* and of the fact that it involved a self-report. The representatives of the legal profession interviewed by the evaluation team stressed the absence of legal provisions governing self-reporting and the difficulty in practice faced by a self-reporting company if it is not to self-incriminate. They said that one of the fears that companies have is the risk that criminal proceedings may be instigated in another country following a self-report in Switzerland.

Commentary

Switzerland has concluded its first case of foreign bribery where a company self-reported to the OAG. The examiners recommend that the OAG create a clear and transparent framework for self-reporting by companies which sets out the conditions in which it applies and the applicable procedures, including issues such as the nature and degree of co-operation expected from the company; any benefit for co-operation with the law enforcement authorities; and prosecutions of natural persons connected with the self-reporting company. The Working Group should also follow-up on sanctions applied in foreign bribery cases resulting from a self-report.

A.3. Measures to prevent money laundering

29. As highlighted above, Switzerland's specific features provide significant exposure to foreign bribery, including the laundering of funds generated by this offence. This section of the report analyses the various aspects of the Swiss anti-money laundering (AML) framework that are able to contribute to the detection of foreign bribery. It draws in part on the conclusions of the FATF, which evaluated Swiss measures to combat money laundering and the financing of terrorism in a report published in December 2016.²⁴ In relation to prosecutions involving money laundering where the predicate offence is foreign bribery, it should be noted that the OAG has brought various proceedings and that sentences have been handed down²⁵, demonstrating proactivity by the authorities in this area.

²⁴ [Rapport d'évaluation mutuelle](#) [Mutual evaluation report] of Switzerland by FATF, December 2016.

²⁵ For example, the Federal Criminal Court (FCC) gave an important ruling on six defendants in a case concerning the privatisation of a state coal mining company in the Czech Republic when it handed down custodial sentences for fraud, aggravated criminal mismanagement, aggravated money laundering and forgery (amount exceeding CHF 1 billion approx. EUR 855 million). The judgment was largely upheld by the Federal Court in its judgments of [22 December 2017](#) recognising the power of the Swiss criminal prosecuting authorities to prosecute offences in these circumstances. Additionally, the court upheld both the admissibility of the offences, the compensatory claims and the seizures of assets made by the OAG valued at over CHF 660 million. Finally, the Czech Republic was recognised as an injured party and will be allocated a share

Follow-up on Phase 3 recommendations

30. In Phase 3, the Working Group made two recommendations to Switzerland in relation to the implementation of Article 7 of the Convention. Recommendation 4 was judged to have been implemented at the written follow-up in June 2014.²⁶ The Working Group also issued a recommendation on money-laundering statistics (Recommendation 5) which was deemed not to have been implemented at the time of the written follow-up. As of June 2014, Switzerland had not amended its system for the collection and dissemination of statistics on MLA. In the Phase 4 Questionnaire, the authorities stated that the Federal Office of Justice (FOJ) data-collection system does not allow for the identification of active or passive requests concerning money laundering where the predicate offence was the bribery of foreign public officials. They stated that, in view of the significant number of requests concerning suspicions of money laundering, a manual search would be too time-consuming. Moreover, they referred to the peculiar feature of the Swiss federal system under which the cantons can deal directly with foreign authorities. Recommendation 5 continues to be unimplemented with regard to statistics on money laundering cases.

The role of the MROS in the detection of foreign bribery

31. Corruption is one of the predicate offences that most frequently underpin reports of suspect transactions to the MROS (the authorities state that, in 2015, suspect transactions associated with potential corruption were the subject of 590 communications; in 2016, that figure was 646). More than 90% of suspicions that were reported involved foreign bribery. Once they have been processed by the MROS, the cases are forwarded to the OAG or cantonal attorneys general offices as appropriate.

32. The OAG has become the chief recipient of foreign bribery cases processed by the MROS, pursuant to the Swiss Criminal Procedure Code (CPC) which grants jurisdiction to the OAG in cases that chiefly take place abroad (see Section B.2). In this context, in 2014, the OAG introduced a new procedure to improve the follow-up of the cases analysed and forwarded by the MROS. All new cases forwarded by the MROS are processed by a central body (the ZEB) comprising the Attorney General and his deputies; federal prosecutors specialising in money laundering, corruption and international economic crime; and representatives of the OAG's MLA division. The authorities interviewed during the on-site visit were unanimous on the good quality of the MROS analyses, which assist them in the performance of their duties either by adding important information to ongoing proceedings or by triggering new investigations. According to the OAG and the Attorney General of Geneva Canton, 60% of criminal proceedings brought in 2016 for foreign bribery or associated money laundering were triggered by MROS communications.

33. Additionally the MROS is continuing to work hard on raising awareness. At each of the many conferences held by the MROS, case studies focusing chiefly on corruption are presented. In February 2017, as part of its awareness-raising, the MROS published a compendium of all typologies published

of the assets seized once damages have been determined by the Federal Criminal Court. Penalties up to five years' imprisonment were imposed in this case.

²⁶ An amendment to the statute of limitations entered into force on 1 January 2014 when the limitation on serious misdemeanours (those incurring a maximum penalty of a three-year custodial sentence) was raised from 7 to 10 years. Even though the limitation period for the money laundering offence is still not the same as that for the foreign bribery offence, the Working Group considers that this increase satisfies the terms of this recommendation.

since it was founded.²⁷ The authorities stated that the document is widely used by financial intermediaries for in-house training of employees. In relation to the resources allocated to the MROS, financial intermediaries interviewed during the on-site visit stressed the lack of such resources. This observation was also made by some representatives of law enforcement authorities.²⁸ At the time of writing, the MROS comprised 25 individuals. This would appear to be inadequate given the workload of the Swiss Financial Intelligence Unit (CRF) and the significance of its role in dealing with allegations of foreign bribery.

Despite some shortcomings, the anti-money laundering framework contributes to the detection of foreign bribery

34. All Swiss financial intermediaries are required immediately to inform the MROS if they are aware or have “reasonable grounds” to suspect that assets involved in a business relationship fall under at least one of the criteria set out in the Anti-Money Laundering Act (AMLA), including if they originate in a predicate offence to money laundering (Article 9 paragraph 1 (A) AMLA). In addition to that requirement, Swiss law provides for a right to report “any observations that indicate that assets originate from a felony or an aggravated tax misdemeanour” (Article 305ter paragraph 2 CC). The MROS is responsible for receiving suspicious activity reports (SARs) made by financial intermediaries. Where required following analysis of an SAR, the MROS is authorised to request further information from the financial intermediary making the report and from any other financial intermediary who, according to the analysis, is or was involved in the transaction or business relationship in question (Article 11a paragraph 2 AMLA). By contrast, as also noted by the FATF, the MROS cannot approach Swiss financial intermediaries on the basis of information received from a foreign counterpart.²⁹ As a consequence, the MROS is unable to use important information it has received from other countries in investigations or proceedings in Switzerland. Moreover, the requirement to notify the client of the existence of information issued by a foreign authority as part of an MLA request may lead the financial intermediary to inform a client of the existence of proceedings against him/her abroad and indirectly disclose the report of suspicions filed in Switzerland (and this may force the financial intermediary to breach confidentiality and anti-tipping off obligations under Swiss law). Although it is true that the number of SARs has been growing steadily over recent years following awareness-raising work by the Swiss authorities with the reporting entities,³⁰ the FATF has noted that financial intermediaries should be more proactive in reporting suspicious operations. Moreover, the reports are most often made in response to external sources of information, such as the media, and chiefly involve reasonable grounds to suspect money laundering. At the on-site visit, some of the prosecuting authorities lamented the fact that, in practice, delayed reports limit the effectiveness

²⁷ [Typologies MROS 1998–2015](#), February 2017.

²⁸ It is also reflected in the press; [Blanchiment: les graves lacunes de la Suisse](#) [Money laundering: Switzerland’s serious shortcomings], 12 February 2015.

²⁹ The MROS can request information from any financial intermediary on behalf of a foreign financial intelligence unit only if the financial intermediary has previously made a SAR or if he is associated with a SAR received by the MROS. A [legislative review](#) of the AMLA in order to correct this situation was underway at the time of writing.

³⁰ See MROS [Annual Report 2016](#): over the past three years, MROS has held over 150 conferences and training events.

of investigations and seizure or confiscation measures. The FINMA (Swiss Financial Market Supervisory Authority) had made a similar observation in April 2016.³¹

35. One significant pitfall of the anti-money laundering framework lies in the field of activities covered by financial intermediation within the meaning of the AMLA. In fact, the AMLA applies to activities that give the professional involved a power of disposal over or a shareholding in assets (Article 7 Anti-Money Laundering Ordinance (AMLO) and Article 2 paragraph 3 AMLA). Additionally, the AMLA does not apply to lawyers, notaries and trustees where their roles are restricted to drawing up their clients' transactions without participating in the preparation or execution of the financial component of those transactions. Among other things, this means that, when the role of those persons does not include formal preparation of or participation in financial transactions, any documents relating to the establishment of companies, legal persons and the legal structures with which those persons may be involved do not fall within the scope of the AMLA. This restriction is important, particularly with regard to the activities performed by lawyers and trustees when assembling complex legal structures that may involve domiciliary companies, which are a known instrument in foreign bribery schemes (see below).³² Additionally, auditors' audit and oversight activities do not constitute financial intermediation either, meaning that auditors are removed from any obligation arising under the AMLA (see Section D.1. of the report).³³

36. Since 2011, several dossiers on foreign bribery that have received media coverage have implicated Swiss financial institutions. In the two Petrobras and MDB dossiers, a total of 24 banks based in Switzerland were investigated. Since 2016, FINMA has opened 11 enforcement proceedings³⁴ in these cases against financial intermediaries, of which 8 have now been closed, and

³¹ "A critical eye should be cast over the current system of reporting suspicions as it is now. The moment when the banks are supposed to communicate suspicions to the competent criminal authorities is pivotal [...]. Experience shows that the banks generally communicate suspicions only once their relationships with clients have been exposed as problematic, for example by the media. Reports of suspicions should come more from the banks themselves, rather than as a consequence of information delivered by the media. [...] A more courageous, systematic approach to the system of communication would make work to combat money laundering more effective. "[Conférence de presse annuelle du 7 avril 2016](#)" [Annual press conference of 7 April 2016].

³² For an illustration of the role of lawyers, see: "[Anticorruption: Je commencerais dans le quartier des avocats à Genève](#)" [Combating corruption: I'd start with the lawyers in Geneva], 4 December 2017.

³³ At the time of finalising this report, the Swiss authorities indicated that a legislative reform was underway and intended to make advisory services in relation to the creation of offshore companies subject to provisions in the AMLA. A draft law will be submitted for public consultation in June 2018. It is not possible for the evaluation team to assess whether this draft law will respond to the concerns identified in this report about the application of the AMLA to non-financial professions.

³⁴ The enforcement procedure may result in cumulative measures such as an instruction to re-establish the legal order, the appointment of a lead investigator whose role will be to monitor the enforcement of the injunction, a decision to establish the facts, restrictions on activity, confiscation of proceeds, a ban on practising, withdrawal of authorisation, winding-up, or publication of a decision. There is no provision for pecuniary sanctions. In its evaluation report, FATF sets out the strengths and weaknesses of the system that oversees and monitors compliance with the AML obligations in Switzerland. Although the way the controls are organised generally encourages ongoing supervision of financial institutions and non-financial professions, the FATF highlights an inadequate system of sanctions for serious failures to comply with obligations under the AML that must be improved. Moreover, in response to the FATF criticisms of inadequate numbers of thorough control missions, the FINMA notes that, in 2017, it began to step up the process.

7 sets of proceedings against the persons responsible, one of which had been closed when this report was completed. The procedures led to sanctions (confiscation of proceeds, naming and shaming, restriction or termination of activities, or a ban on practising for several years for individuals).

37. Despite these generally positive observations, the conditions have not yet been met in Switzerland to detect more suspicions of foreign bribery and to do so in a better way. Indeed, financial intermediaries' contribution to detection and their suspicious transaction reporting is not optimal. This was noted by the FATF in its recent assessment (undertaken between October 2015 and October 2016). Others have also spoken out to stress the challenges to implementing money-laundering obligations in Switzerland and the absence of convincing results. By way of illustration, the director of FINMA, officially expressed his reservations in April 2016 about the Swiss banks' and financial intermediaries' slowness and wait-and-see reaction to suspicions of money laundering, and called for a rethink of the system of communicating suspicions.³⁵ A UN report published in September 2017 stated that "In the opinion of many experts, the Swiss bank reporting system simply does not work".³⁶ The civil society representatives interviewed by the evaluation team during the on-site visit also expressed serious reservations about the effectiveness and credibility of the Swiss mechanism to combat money laundering. The authorities report that they are implementing improvement measures.³⁷ The examiners are hopeful that the completion of the legislative reform underway will contribute to reinforcing these mechanisms.

Commentary

The examiners recommend that Switzerland continue with their efforts to amend the Anti-Money Laundering Act (AMLA) and grant powers to the MRO, to approach a financial intermediary on the basis of a request received from, or information spontaneously supplied by, a foreign counterpart, in all circumstances.

In addition to these legislative reforms, the examiners recommend that, in order to increase the detection of foreign bribery, Switzerland take all appropriate measures to encourage financial intermediaries to enhance the reporting of suspicious transactions, as the law allows, even when there are no external triggers prompting them to do so; and provide the MROS with the resources (including staff) it needs to perform its remit fully and be even more effective in combating foreign bribery.

³⁵ [La Finma veut changer "la culture de la lutte contre le blanchiment d'argent"](#), [Finma wants to change the "culture surrounding combating money laundering"], 17 April 2016.

³⁶ [Research-based study on the impact of flow of funds of illicit origin and the non-repatriation thereof to the countries of origin on the enjoyment of human rights, including economic, social and cultural rights](#) – Progress report of the Advisory Committee of the Human Rights Council, Obiora Okafor and Jean Ziegler (Co-Rapporteurs), September 2017. Furthermore, the Federal Council opened a [consultation](#) on a draft bill of the Federal Department of Finance to respond to recommendations formulated by the Global Forum on Transparency and Exchange of Information for Tax Purposes (see section D4). This draft law contains measures on transparency in relation to legal persons. The evaluation team did not have the opportunity to review the relevant provisions.

³⁷ At the time of finalising this report, the authorities indicated that 23 of the FINMA's on-site inspections in 2017 were in relation to upholding the obligation to report to MROS. They clarified that FINMA has also ordered sanctions against several financial intermediaries for violation of the obligation to report and proceeded to make a criminal report to the Federal Department of Finances.

Regarding the collection and maintenance of statistics, the examiners reiterate Phase 3 Recommendation 5 and recommend that the Swiss authorities collect more detailed statistics on MLA requests received, sent and rejected that relate to money laundering where foreign bribery is the predicate offence.

A.4. Detection through the federal and cantonal authorities

38. Since the entry into force of the Convention in Switzerland, no cases of foreign bribery have been detected through reports from federal or cantonal staff. In Phase 3, the Working Group recommended that the federal and cantonal authorities inform their staff of their obligations to report any instances of corruption. At the time of the written follow-up, efforts to provide information and raise awareness had been made at the federal level but were still too weak at cantonal level, and Recommendation 10(c) was judged to have been partially implemented. Since Phase 3, the federal authorities have pressed forward with their awareness-raising.³⁸ To combat corruption, the FDFA has introduced various institutional measures. In particular, it has established a centralised Compliance Office to deal with reports of offences and irregularities made by employees, partners or third parties to an e-mail address or by phone. In terms of prevention, the Compliance Office provides support to employees in situations bordering on illegality who want advice on the rules in force and/or the standards that they must abide by. Additionally information on the reporting of offences and irregularities to the Compliance Office of the FDFA is provided to all new ambassadors when they are assigned to a posting abroad. At the same time, the risks associated with corruption in their host country are also addressed. Furthermore, in conjunction with the FDFA, SECO holds a training session every year on foreign bribery for Swiss diplomatic service trainees. Since May 2012, the FDFA has also had a Memorandum on the role of the Swiss diplomatic and consular network in the handling of corruption matters. The aim of the document is to set out the legal framework (including the OECD Convention); to provide an overview of the responsibilities of the diplomatic and consular network; to clarify the interpretation of certain key concepts; and to indicate the competent authorities to deal with corruption cases. Despite this comprehensive, and seemingly well-established mechanism, no report of foreign bribery has been made through the FDFA since Phase 3.

39. The Working Group welcomes the establishment of two new platforms to facilitate reports of suspicions of foreign bribery. In September 2015, the Federal Police (Fedpol) introduced an anonymous electronic reporting platform. The public was informed of its existence in a press release. During the on-site visit, a representative of Fedpol said that it had been visited 25 100 times and had received 188 reports. No investigation of the reports made over the past two years had resulted in an investigation related to foreign bribery. On 1 June 2017, the Swiss Federal Audit Office (CDF) introduced a new public platform available to all taxpayers (whether natural or legal persons). If an offence is established, it is referred to the criminal authorities.

40. Five cantons report that they have specifically stepped up their awareness-raising activities (by way of brochures, information, training, etc.) of the right and obligation to report instances of corruption. The Working Group nevertheless has a very fragmented view of the initiatives taken by the cantons.

³⁸ Including within the State Secretariat for Economic Affairs (SECO), the Interdepartmental Working Group on Combating Corruption (GTID), the Federal Personnel Office (FPO), the Swiss Federal Audit Office, the Competition Commission (COMCO), the OAG and the tax authorities.

Commentary

The examiners recommend that the federal and cantonal authorities continue their work to raise awareness amongst personnel who are in a position to help with the detection and reporting of bribery of foreign public officials, as stated in Phase 3 Recommendation 10(c), and consider all other means whereby the authorities in question might be encouraged to act.

A.5. Foreign authorities

41. It is relatively common in Switzerland for investigations to be opened on the basis of information supplied by foreign law enforcement authorities as part of MLA or informal communications between prosecutors. Regarding foreign bribery, only one case that had been resolved at the time of writing was originally detected as a result of a request for MLA (*Fertiliser Case*). The authorities note that several proceedings that were ongoing at the time of finalising the report originated from a request for MLA.

Commentary

Having regard to the importance of Switzerland's role in MLA in criminal matters (as a requesting and a requested party), the examiners recommend the Working Group follow-up on the use made by the Swiss law enforcement authorities of MLA requests to open investigations into foreign bribery in Switzerland.

A.6. Media

42. Journalism, especially investigative journalism, is an essential and decisive source of detection in foreign bribery cases. Protecting the media's role in detecting corruption is linked to an appropriate legal framework that protects the freedom, diversity and independence of the press, including its sources.³⁹ One of the tools used by the Working Group to monitor the work done by States Parties to implement the Convention is the "Matrix". It is a collection of allegations of foreign bribery collated by the OECD Secretariat from press articles. It is also used as a source of detection by the States concerned, including Switzerland, according to the authorities. Just one case of foreign bribery that has been resolved to date would appear to have been (directly) detected from a press article (*Oil Company Case*). Additionally, and as is clear from Section A.3. of this report, the publication of (mainly foreign) news in the press is often at the root of reports of suspicious activity made to the MROS by Swiss financial intermediaries,⁴⁰ demonstrating the importance of the information brought to light through this channel.

43. Although Switzerland can take pride in the impressive freedom of its press,⁴¹ it is nonetheless going through a period of turmoil as confirmed by the investigative journalists interviewed by the evaluation team. Swiss journalism is encountering growing difficulties in publishing sensitive news about powerful economic interests. Those difficulties are deemed sufficient to impinge upon

³⁹ For a description of the importance of this source of detection, see the report published by the Working Group in December 2017: "[The Detection of Foreign Bribery](#)".

⁴⁰ In the *Petrobras/Odebrecht case*, press articles by Brazilian journalists led Swiss financial intermediaries to the decision to notify their suspicions to the MROS, which received close to 80 messages in a single day.

⁴¹ See [2017 Report by Reporters without Borders](#).

journalists' freedom to expose instances of foreign bribery or economic crime.⁴² The journalists interviewed reported a "climate of intimidation" leading to self-censorship, difficulties in protecting their sources and in investigating "sensitive" matters. Finally, they were unanimous in criticising the difficulty in accessing judicial decisions (including summary punishment orders of the OAG) and the resulting lack of transparency. The OAG indicated that it has introduced a transparent, efficient procedure to publicise its decisions (available on its webpages) where any person with a justifiable interest can have access to its decisions (including the full decision for a period of 30 days following its adoption). As shown in practice, the OAG's use of press releases is an effective tool for communicating its decisions on foreign bribery. However the OAG could use them more extensively and systematically in such cases, which would help to boost awareness on the part of companies, the authorities and the general public of the offence of corruption of foreign public officials, its detection and exposure, where appropriate (see Section B.5.).

⁴² See "[Rapport 2015/2016: En Suisse, le climat n'est pas propice à une liberté de la presse totale](#)" [Report 2015/2016: the climate in Switzerland is not conducive to full press freedom], "[Pressions sur l'investigation en Suisse](#)" [Investigations under pressure in Switzerland], and "[Le journalisme-d'investigation-en-danger](#)" [Investigative journalism in danger]. The journalists interviewed pointed the finger at the fact that some information relating to the Swiss financial centre is now published by foreign journalists who have deeper pockets and greater freedom to do their jobs.

B. ENFORCEMENT OF THE FOREIGN BRIBERY OFFENCE

44. Since Phase 3, Switzerland has been more active in its implementation of the Convention and should be congratulated. However, after examining the enforcement measures undertaken, this assessment must be qualified. A close analysis of foreign bribery cases concluded to date hints at conflicting judicial interpretations, different criminal policies between law enforcement authorities that create obstacles for readily comprehensible and hopefully predictable enforcement, and a practice with regard to sanctions which questions Switzerland's compliance with certain core requirements of the Convention.

B.1. The foreign bribery offence

Definition of a foreign public official: conflicting case law

45. In Phase 3, the Working Group welcomed the broad interpretation given by the prosecution authorities to the concept of a foreign public official, particularly in the *Alstom cases* in which executives of public companies and the son-in-law of a former President were regarded as foreign public officials. In its summary punishment orders, the OAG has continued to favour this approach, which is welcome. In the first foreign bribery cases to be decided by a court since the entry into force of the Convention, the Federal Criminal Court (FCC) adopted conflicting approaches as regards the scope of the definition of "foreign public official". In the *Construction I Case*, which was settled by means of the simplified procedure, the FCC held that bribes paid to a son of the former Libyan dictator fell within the scope of the foreign bribery offence (Article 322^{septies} CC). This case is significant in that it was the first time that a Swiss court recognised the concept of a "de facto public official" (Commentary 16 to the Convention) in the context of a dictatorial regime. The recipient of the bribes had no particular public function but nevertheless played a decisive role in the award of public contracts. The examiners note the significance of this case law.

46. In the *Gas Pipeline Case*, the OAG brought charges against three Russian nationals and a French national, including charges of active and passive bribery, in connection with the award of a turbine contract in Russia. The FCC acquitted the four accused on the ground that senior executives employed by Gazprom did not have the status of public officials. In its decision, the FCC examined the degree of control over Gazprom exercised by the Russian State at the time of the facts: whether the natural gas supply fell within the remit of the State, and in that context the Russian legal framework governing the supply of natural gas, and the effect on the market of the Gazprom monopoly. The FCC based several of its conclusions on expert testimony provided at the court's request by the Institute of Comparative Law in Lausanne, and on a report by a Russian academic supplied by the defence lawyer, which reached the same conclusions as the expert testimony. On the basis of these elements, the FCC held that Gazprom executives had no functional role as public officials. The OAG decided not to appeal the decision. That case law has set a regrettable precedent in that it is likely to affect enforcement of the foreign bribery offence in Switzerland, given that the vast majority of foreign bribery cases concluded to date in the States Parties to the Convention have involved SOE officials.⁴³ According to representatives of the OAG, their future strategy in this type of case will be to prosecute also for the offence of private bribery (Article 322^{octies} CC) (an offence that was introduced into Swiss criminal law on 1 July 2016). The maximum penalty for private bribery is less than for foreign bribery (3 years instead of 5) and that private bribery is therefore not a predicate offence to money laundering.

⁴³ "[OECD Foreign Bribery Report](#)" (OECD, 2014).

Furthermore, according to the OAG, lawyers are likely in future to try to build their defence on the case law developed in the *Gas Pipeline Case*. The judges interviewed during the on-site visit pointed to the difficulty of applying an autonomous definition of public official that is sufficiently separate from the definition applied by the foreign State. They felt it necessary to refer to the context of the public official's own country and its legal framework, and to rely on expert testimony from academics or other representatives of the legal profession in that country in order to define the status of the corrupted person. They nonetheless considered that such a view was not tantamount to applying the concept of an official under Russian law. As a reminder, Article 1 of the Convention requires the establishment of an autonomous offence which does not have to be substantiated on the basis of the law of the public official's own country.

An offence irrespective of the outcome: two problematic rulings

47. Two recent rulings relating to the application of Article 322^{septies} CC question Switzerland's compliance with the Convention. In 2015, the FCC acquitted in a criminal investigation (the Poland component of the *Alstom case*) individuals accused of qualified money laundering with bribery of public officials as a predicate offence, on the ground that an actual link between the official act, on the one hand, and the corrupt payment, on the other hand, had not been satisfactorily established in law.⁴⁴ The FCC examined the status and role of the Polish official concerned (who was a candidate for and later an elected municipal officer in Warsaw) and was unable to prove the link between the act of the public official, the payment of the bribe and the outcome of the undue advantage (the conclusion of a procurement contract). The FCC held that "*in the absence of a sufficiently demonstrable official act on the part of [the public official], it is not possible to establish the offence of bribery*". The FC dismissed the OAG appeal of this decision.⁴⁵

48. In August 2013, the Zug Office of the Attorney General concluded a foreign bribery case against an individual concerning the giving of undue advantages (in the case in point, clothing and the fee for translating a book) to a President of a central European country and his entourage in exchange for supply contracts in his country. The case was brought to the attention of the Zug Office of the Attorney General following a criminal complaint filed by a Swiss company claiming that various payments had been made by the accused (who at the time was the director of the complainant company) out of the company accounts, that it suspected did not relate to its business activity. The accused was trying to promote his own company, which was in competition with the company filing the complaint. The order discontinuing the investigation distinguishes between the Swiss offences of foreign bribery and offering an advantage to a Swiss public official (found in art. 322^{quinquies} CC), considering that "[t]he mere giving of an advantage without proof of consideration in the form of specific favouritism is punishable only if it relates to Swiss public officials". Since it had not been possible to identify any specific consideration which the chairman or his chief executive officer had given to the accused in that case, the Zug Office of the Attorney General held that this constituted the giving of a non-punishable advantage to foreign public officials.

49. In both these cases, the Swiss law enforcement authorities appear to have favoured a restrictive interpretation of the foreign bribery offence susceptible of contravening the Convention, particularly its Commentaries 4 and 7. These precedents appear to require comprehensive high standard of proof as to the amount of discretion allowed to the foreign public official and the causal link between

⁴⁴ Judgment of 3 June 2015 ([SK.2014.33](#)), in German.

⁴⁵ ATF 6B_1120/2015, in German.

payment of the bribe, the act of the public official and the advantage given to the briber, including its outcome.

Application of the “equivalence link”: examples of restrictive case law

50. In the *Fertiliser Case*, several instances of bribery were investigated. Some resulted in convictions as stated above. However, the chairman of the board of the subsidiary and its executive director were cleared of the bribery of foreign public officials offence in two other arms of the proceedings, one relating to payments to a relative of a Tunisian dignitary (where it was not possible to establish *de facto* public official status) and the other to commission paid to an official, some of which was handed over to an employee of a Tunisian SOE (in this case, it was not possible to establish that the accused knew who the final beneficiary of the payment was). In the latter case, the OAG indicated that it could not prove that the directors knew with sufficient certainty that some of the payments to the official ended up in the hands of a public official. Under Swiss law, the elements constituting the offence require a relationship to exist between the advantage and the official activity. Legal commentators refer to the “equivalence link”. It is a question of distinguishing the offence of bribery from the “gift of an advantage”, which entails less severe sanctions (Article 322^{quinquies} CC) the purpose of which is not a specific official act but merely performance of duties. The link is defined by reference to external elements such as the temporal proximity between the advantage, the promise and the official act, and the frequency of contacts between the briber and the bribed.⁴⁶ There are concerns about the way the “equivalence link” has been applied in certain foreign bribery cases, thereby limiting the scope of Article 322^{septies} CC (foreign bribery), as illustrated to a certain extent in the *Fertiliser Case*. According to the authorities, it is nevertheless necessary to establish a link between payment of the amount of the bribe and the activity of the foreign public official, which under Swiss law can also involve refraining from an act which forms part of that person’s duties.

Commentary

The examiners recommend that Switzerland carry out training and awareness-raising activities for judges and Offices of the Attorneys General in relation to the foreign bribery offence and the Convention, especially with regard to the autonomous definition of a foreign public official and the existence of an offence irrespective of its outcome. The examiners recommend that the Working Group follow-up on these training and awareness-raising activities as well as application of the “equivalence link” in cases of foreign bribery.

B.2. Investigation and prosecution: the institutional framework

Investigation and prosecution: jurisdiction de facto shared between the OAG and the cantons

51. As at the time of Phase 3, the Confederation has jurisdiction to prosecute foreign bribery cases when the crime had been committed for the most part abroad or in several cantons, without any evident predominance in one canton (Article 24(1) CPC). Given that, in the large majority of foreign bribery cases, the deeds take place predominantly abroad or across several cantons, prosecution of the crime fell first within federal jurisdiction. In certain cases, however, a canton will have jurisdiction where the facts are being examined in parallel with other facts in relation to which proceedings have

⁴⁶ [SK.2014.22](#) of the FCC.

already been opened in the canton. The matter of jurisdiction is governed by a joint agreement between the cantonal prosecution services and the OAG. Several mechanisms are in place to facilitate this agreement and the relevant co-ordination,⁴⁷ and they appear to produce satisfactory results. The authorities indicated that no foreign bribery case has yet led to a clash of jurisdiction between authorities.

52. The Phase 4 questionnaire and on-site interviews show that practice has evolved since Phase 3 and to give the OAG priority (almost monopoly) to prosecute foreign bribery cases. The OAG sees itself as being in a position to handle all foreign bribery cases. The opinion of the cantons received by the evaluation team at the time of the on-site visit is somewhat different. The representatives from the Cantons of Geneva and Zurich regard themselves as having jurisdiction under Swiss law and indicated that they intend to continue prosecuting such cases. Their knowledge of local criminal circles was presented as an asset for their investigations. It is not possible to determine whether this opinion is shared more widely by the other cantons. The representative from the Canton of Zug shed another interesting light on the issue by indicating that the OAG's monopoly was "*almost desirable*" in view of the resources needed for these types of proceedings, resources which the smaller cantons certainly do not have.

53. The fact that several authorities can and do have jurisdiction to prosecute foreign bribery cases is not in itself problematic. However, it would like to emphasise that the co-existence of non-harmonised and in practice conflicting, criminal policies risks undermining the readily comprehensible and hopefully predictable nature of prosecutions in this field. Evidence of this can be seen in the differing approaches of the OAG and the Canton of Geneva regarding recourse to the so-called "*reparation*" procedure in foreign bribery cases, where the OAG decided to no longer use it and the Geneva Office of the Attorney General did not rule out its use in ongoing and future proceedings (see Section B.4.b.). Although the lack of a hierarchical link between the OAG and the cantonal Offices of the Attorneys General prevents the latter being instructed as to their criminal policy, there should be better co-ordination with a view to defining consistent strategies in this matter. It is of the view that the Conference of Swiss Prosecutors could, for example, play a role in terms of harmonising practices, as it does in other fields.

Commentary

The examiners recommend that the Swiss authorities take all necessary measures to implement a consistent criminal policy for the investigation and prosecution of foreign bribery, applicable both to the OAG and the cantonal Offices of the Attorneys General.

Investigation and prosecution: guaranteeing expertise and resources within the police force

54. Policing tasks in Switzerland are centralised in the Federal Office of Police (Fedpol). Police investigations are conducted by the Federal Judicial Police (FJP). The FJP plays a supporting role in OAG proceedings. It acts on instructions from the OAG. The FJP is mainly responsible for organising

⁴⁷ By way of example, the Recommendation of 21 November 2013 of the Conference of Swiss Prosecutors (CSP) concerning co-operation in the fight against complex crime provides, *inter alia*, for consensual settlement of conflicting jurisdiction between the OAG and cantonal Offices of the Attorneys General. Federal and cantonal magistrates also consult the Vostra register (register of investigations and convictions) on a regular basis in order to avoid competing procedures.

and conducting searches, collecting local evidence and making the relevant inventories, and for providing and operating IT support. In collaboration with prosecutors, it helps to define strategy and plan operations. It is also authorised to travel abroad to execute MLA requests. At the time of the on-site visit, prosecutors were questioned about the terms of their co-operation with the police authorities. At cantonal level, there appeared to be a lack of police input in terms of financial expertise but co-ordination was generally felt to be good with no particular obstacles. Representatives of the OAG at the on-site visit also emphasised the quality of this co-ordination. The matter of human resources is a recurrent issue, as in many Swiss administrations, due to budgetary restrictions.⁴⁸

Commentary

The examiners recommend that the Working Group follow-up on the future allocation of resources to the Swiss police authorities, whose support for the Offices of the Attorneys General is essential for the performance of their tasks, with a specific emphasis on foreign bribery. They recommend that the Working Group review initiatives targeting the police authorities in terms of training in financial crime.

Investigation and prosecution: maintaining resources and expertise within the prosecution services

55. In Phase 3, given the limited number of prosecutions and convictions, the Working Group had recommended that Switzerland periodically review the resources available to law enforcement authorities in order to effectively combat bribery of foreign public officials (Recommendation 2(b), see Annex 5). The length of proceedings and the fewer than expected prosecutions and judgments on the part of the OAG had already been the subject of criticism by the media, civil society and political circles. This recommendation had been partially implemented at the time of the written follow-up. The Working Group had noted, in particular, that a lack of resources was the reason for discontinuing certain prosecutions in foreign bribery cases. The Phase 3 report also highlighted the need for the authorities to assess the adequacy of human resources engaged in combating foreign bribery (follow-up question 16).

1. Situation of the Federal Office of the Attorney General

56. When preparing its strategy every four years, the OAG reviews its staff deployment and financial resources in the light of its established priorities.⁴⁹ That prioritisation is part of a reworked institutional framework. The OAG's organisation was reformed on 1 February 2016, with a view to simplification and greater efficacy. The number of divisions dealing with investigations was reduced to four: (i) *Protection of the State, terrorism and criminal organisations* (this comprises an operational unit specialised in handling investigations ranging from domestic bribery, the Confederation and its security, to terrorism and criminal organisations); (ii) *Economic crime* (the WIKRI division is an operational unit specialised in handling investigations relating to money laundering, **foreign bribery**, large-scale economic crime, stock market offences and cybercrime); (iii) *Mutual legal assistance, international criminal law* (which specialises in handling passive MLA requests in criminal matters, in cases that fall under federal jurisdiction, and in handling investigations

⁴⁸ [“Fedpol Annual Report 2016”](#) and [“Report for the Federal Department of Justice and Police by the Supervisory Authority of the Office of the Attorney General of Switzerland \(AS-MPC\)”](#), December 2013.

⁴⁹ [OAG Strategy 2016-2019](#).

concerning crimes against humanity and war crimes); and (iv) *Forensic financial analysis* (the FFA is a unit of financial experts providing support for the operational teams which combat money laundering, the financing of terrorism and other underlying offences). In particular, the FFA tracks flows of funds and analyses evidence concerning companies or economic crime (bribery, mismanagement, fraud). Information provided by the FFA helps to pinpoint the evidence required in the context of searches, witness statements and requests for mutual assistance. The authorities have indicated that certain cantonal Offices of the Attorneys General have their own economic and financial analysts or access to external experts.

57. In addition to these divisions, four administrative units are responsible for enhancing the effectiveness of OAG investigations: (i) an operational headquarters of the Attorney General (OAB): a unit charged with examining federal jurisdiction in relation to money laundering, the financing of terrorism and underlying offences, where there is doubt regarding the jurisdiction of the cantonal justice authorities; (ii) a resource management section (SAR): a unit comprising representatives of the OAG and the FJP which aims to ensure that sufficient police resources are assigned to carry out satisfactory investigations in relation to national money laundering and financing of terrorism policies; (iii) centralised handling of potential money laundering allegations and other reports (ZEB); and (iv) the “Enforcement of judgments and asset management” section: a support unit for prosecutors in connection with freezing and confiscation measures (see Section B.5.).

58. Prior to the 2016 reform, a division of eight prosecutors was specifically in charge of foreign bribery. According to the authorities, the new WIKRI division (economic crime) now has 25 prosecutors, 21 assistant prosecutors and 7 jurists out of a total of 88 staff members. In the field of foreign bribery, one prosecutor is responsible for drawing up, implementing and monitoring strategies adopted. In addition, prosecutors supported by financial experts from the FFA, which has a staff of 23. The OAG believes that concentrating the WIKRI division under a single roof has made it possible to tackle highly complex cases more productively by creating genuine task forces (as in the *Petrobras case*). One of these is headed by the prosecutor responsible for bribery who is tasked with guiding prosecutors in their inquiries, developing strategies to ensure effective prosecution, creating a case law unit and directing/co-ordinating the work carried out by the task forces in high-profile, complex cases.

59. Since 2011, the OAG has also created a mechanism for controlling investigations. This falls under the remit of two Deputy Attorneys General who assist the Attorney General in managing the OAG. In this context, the Deputy Attorneys General, in conjunction with chief prosecutors, regularly meet the other prosecutors in order to take stock of their investigations, both in terms of strategy, planning and monitoring timeframes and also in terms of workload. The Attorney General is also involved directly in controlling particularly sensitive cases. A new mechanism known as “Controlling and Coaching” (C+C) has been introduced in relation to economic crime: it involves a quarterly assessment of the risk of pursuing investigations. The fact that several people assess a case makes it possible, for example, to discuss legal matters in a wider context which, in the long term, will lead to a uniformity of legal interpretation (“*unité de doctrine*”). The OAG has also acquired a new tool for managing all current proceedings especially foreign bribery, namely the Portfolio. With the help of this tool, cases involving foreign bribery and money laundering with foreign bribery as predicate offence are categorised and made available to the person in charge of that field, so that he or she can determine case priority in light of their complexity, the risk they present and their strategic significance. According to the OAG, this makes it possible to manage the workload of prosecutors and allocate staff according to the importance of proceedings.

60. The Working Group welcomes these efforts to optimise resources and expertise within the OAG. Its reorganisation has entailed fairly radical changes not only in terms of resource deployment but also in terms of the culture within the OAG. This reform has led, *inter alia*, to a highly pyramidal and hierarchical organisation of cases. For example, the chief prosecutor of the WIKRI division centralises the handling of all OAG investigations which fall within its area of responsibility; this gives him a very good overview and enables him/her to ensure a uniformity of legal interpretation whilst allowing him/her to intervene in various investigations to advise prosecutors. This management system entails a very close supervision of prosecutors, and its implementation has not been without problems. This is a specific observation of the OAG's Supervisory Authority and was widely reported in the Swiss media.⁵⁰ In its 2016 Report,⁵¹ the OAG's Supervisory Authority drew attention to the considerable repercussions of the OAG reorganisation and the major readjustments it provoked in terms of working methods, transparency of proceedings and personnel management.⁵² In the report, the Authority noted that the reorganisation was still being implemented. It also raised the matter of resources and the "*uneasy situation in that respect. That lack of resources will make itself felt especially in the context of voluminous investigations*" whilst noting that not all sections were affected in the same way. In all cases, the staff workload was generally regarded as very high. According to OAG representatives, the reorganisation allowed them to confront large, complex international proceedings that were ongoing at the time (including Petrobras).

61. The staff budget of the OAG was reduced by CHF 300 000 (approximately EUR 260 000) as a result of a parliamentary decision affecting all Confederation services. Conversely, in December 2017, the federal Parliament agreed to allocate the OAG five new assistant federal prosecutor posts, finance an additional post for the Swiss representation to Eurojust and review the 2017 OAG budget reduction of CHF 300 000 in 2018. At the end of 2016, 441 criminal investigations were pending (449 at the end of 2015). The OAG opened 190 new criminal investigations in 2016 (233 in 2015), made 1 094 orders (+50%) and handled an unprecedented number of MLA requests (119 MLA requests granted in 2016 as against 72 in 2015). As indicated previously (see Introduction to cases), the OAG increased its efforts to combat foreign bribery (24 cases of foreign bribery and foreign bribery-based money laundering were pending as at 31 December 2011. At 31 December 2016, 65 foreign bribery cases and 72 cases involving laundering of the proceeds of foreign bribery were under investigation).

62. The OAG "*Strategy for 2016-2019*" targets training and further education as priorities for ensuring that staff has the necessary knowledge and skills. The authorities indicated that OAG prosecutors regularly take part in foreign bribery training initiatives, both in Switzerland and abroad, and continuous in-service training on corporate criminal liability is available in the context of implementing Article 102 CC. Finally, the OAG organises in-house training and further education courses and encourages participation in external courses. The main aim of these courses is to develop the specialist skills of staff and their working methods and techniques in addition to their interpersonal skills, team spirit and managerial competencies. In-house training of prosecutors also takes place at

⁵⁰ Five prosecutors were dismissed in 2015. One of the prosecutors in charge of the important *Petrobras* bribery case resigned and another prosecutor, also heavily involved in the *Petrobras* case, was on sabbatical at the time this report was drafted.

⁵¹ OAG Supervisory Authority, [Activity Report 2016](#).

⁵² The authority emphasised, *inter alia*, that "*the non-renewal of prosecutor contracts decided in 2015 continues to raise concern and a feeling of insecurity among certain OAG staff members. However, these non-renewals are also seen as a signal that the decision-making power now lies with the Attorney General of Switzerland*".

the Conference of Prosecutors, which is attended by all OAG lawyers and also economic experts and specialists.

2. *Situation in the cantons*

63. One of the challenges for Swiss magistrates, including those at cantonal level, is the significant increase in the number of cases at a time of budget cutbacks, with the result that the available resources are not adapted to growing needs.⁵³ According to several commentators, the adoption of a unified Criminal Procedure Code in 2011, described in the Phase 3 report, appears to have had a fairly significant effect on case management and on timelines for the handling of cases.⁵⁴ The Geneva Office of the Attorney General has 44 prosecutors split into four sections. The section known as “*complex cases*” is responsible for combating cross-border economic crime and for investigations opened in relation to bribery of foreign public officials. That section has 9 prosecutors, 8 financial analysts, 6 jurists and 10 administrative assistants. Thus, approximately a quarter of that Office’s resources are devoted to the fight against economic crime. At the time of the on-site visit, the cantons represented identified the issue of resources as one with which they had had to come to terms, especially in relation to economic crime. In the Cantons of Geneva and Zurich, prosecutors who specialise in combating economic crime are offered relevant in-service training, including training in the fight against foreign bribery. They also attend international conferences and symposia on the subject on a regular basis.

Commentary

The examiners reiterate Recommendation 2(b) from Phase 3 by recommending that Switzerland periodically review the resources available to cantonal law enforcement authorities in order to effectively combat bribery of foreign public officials.

The examiners have noted the major re-organisation in the way that investigations are handled within the OAG and its implications for personnel. They recommend that the Working Group follow-up the implementation of this reform and its results in terms of the effectiveness and handling of foreign bribery investigations and prosecutions.

B.3. Foreign bribery: investigation and prosecution

Duty to prosecute: implementation

64. Articles 7 and 309(1)(a) CPC enshrine the principle of the duty to prosecute (legality principle) where there is sufficient suspicion. In practice, a body of evidence leading to an assumption that an offence exists are sufficient to bring a prosecution. Article 8 CPC covers the issue of refraining from bringing a criminal prosecution. In order to guarantee the duty to prosecute under Articles 7 and 309 CPC, the OAG established a system for handling and tracking all new investigations. All communications from the MROS, reports and complaints by individuals and police reports that fall within the remit of the federal justice authority are handled systematically by the ZEB (see above). The decisions of the ZEB are taken following conference calls (generally twice a week) organised by

⁵³ “[Quelles nouvelles de la Justice en Suisse?](#)” (What news of Swiss justice?), 9 September 2016.

⁵⁴ In the Canton of Geneva, the number of criminal investigations concluded in less than 12 months dropped from 70.73% in 2009 to 60% in 2014.

the Attorney General or one of his deputies; these involve representatives from the various operational units of the OAG, including representatives from the MLA division. All case information is recorded in the OAG database. The aims of that unit are to ensure uniform treatment of communications and reports concerning economic crime, optimal detection of offences and allocation of the resources required in light of priorities and the particular strategy adopted for the investigation. In an effort to optimise resources, orders declaring no grounds for prosecution are issued directly by the ZEB. To the extent that the opening of an investigation appears justified (sufficient suspicion), the report is communicated to a prosecutor, bearing in mind his/her experience, special expertise, availability and the language of the proceedings. As far as the OAG is concerned, the ZEB is therefore an important tool for detecting economic crime and for distributing and conducting investigations more effectively and uniformly. The Working Group welcomes this organisational structure, which makes it possible to rationalise and harmonise practices regarding the opening of investigations and their allocation on the basis of staffing and funding constraints.

65. At cantonal level, several prosecutors examine all incoming information jointly. On the basis of that initial assessment, each investigation to be taken forward is allocated to a prosecutor who assumes responsibility for it.

66. The Office of the Attorney General conducts the preliminary inquiry, draws up the indictment and argues the case before the court. Given the extent of the jurisdiction conferred on the Office of the Attorney General, the legislature has defined its limits, principally by giving the Office of the Attorney General full and complete responsibility for the entire preliminary inquiry (Article 15(2) CPC). Furthermore, the legislature decided to establish an adversarial procedure from the outset of the investigation. Following the preliminary inquiry, the Office of the Attorney General decides whether the investigation is to proceed and, if so, how. Thus, on the basis of the inquiry, the Office of the Attorney General either: orders the investigation to be closed; issues a summary punishment order; or decides to prosecute by referring the accused to the competent criminal court (cf. Section B.4).

Offices of the Attorneys General and prosecutors: guaranteeing their independence

67. In Phase 3, the Working Group recommended that Switzerland encourage the cantons where the Office of the Attorney General remains subject to a public authority to ensure its autonomy in relation to such authority (Recommendation 2a). At the time of the written follow-up, the Working Group considered that that recommendation had been implemented by means of an initiative (in the form of a letter) on the part of the Secretary of State for the Economy addressed to the cantons and requiring them to guarantee such autonomy. The cantons assured the Secretary of State that such guarantees were in place and nothing has changed since Phase 3.

68. As indicated in Phase 3, measures aimed at guaranteeing the autonomy of the OAG were introduced in 2011 and sought, *inter alia*, to sever any link with the executive power (the Attorney General and the two Deputy Attorneys General are elected by Parliament). As a result, it is not possible in principle for the political authorities to interfere in the specific activities of the Office of the Attorney General in the field of criminal prosecutions.⁵⁵ These changes were designed to shield the OAG from any undue pressure concerning prosecutions in foreign bribery cases or other political/financial cases. During the on-site visit, the evaluation team raised the issue of a practice

⁵⁵ These points were highlighted in the Council of Europe (GRECO) Report “[Prevention of corruption of members of parliament, judges and prosecutors](#)”, December 2016.

whereby the OAG seeks the assistance of Swiss diplomats in relation to criminal proceedings with an international dimension. That issue arose following the publication of press articles describing the role allegedly played by a Swiss ambassador in ongoing criminal proceedings for the offence of laundering of foreign bribery.⁵⁶ Representatives of the OAG indicated that, in practice, they only resorted to Swiss diplomatic representatives to assist with the provision of MLA⁵⁷ and under no other circumstances. In addition, in the *Oil Company Case*, the prosecutor in charge (who opted for discontinuing the case on the basis of reparation, see Section B.4.), drew attention during the on-site visit to the particular context of that case, which presented clear economic issues (fear of the effect of a conviction on Switzerland) and diplomatic issues (impact on relations with another State). Despite the existence of “pressure from the authorities of a third country and lawyers” the prosecutor was able to carry out the proceedings in complete independence.

69. In the Law on Organisation of the Criminal Justice Authorities (LOAP⁵⁸), the legislature decided on a hierarchical structure of the OAG and gave the Attorney General very extensive powers, including the power to issue instructions to all his staff (power to give general and specific instructions, including instructions on the opening, conduct or closure of an investigation or its continued prosecution or referral to other courts; the rule requires that these instructions be issued in writing). Federal prosecutors and chief prosecutors have the same right to give instructions to staff working for them and to their OAG support units. OAG prosecutors are not therefore completely independent in terms of how they conduct the cases assigned to them. They certainly conduct their investigations autonomously and on their own responsibility, but it can and must be possible for their superiors to intervene directly in the conduct of an investigation by issuing instructions. Orders to discontinue, dismiss or suspend an investigation are subject to the approval of a chief prosecutor if issued by a prosecutor, and to that of the Attorney General if issued by a chief prosecutor. Charges must be approved by the chief prosecutor and by one of the Deputy Attorneys General, who ensure uniformity of legal interpretation. If there is disagreement, a prosecutor can approach the Attorney General. He or she can also approach the OAG’s Supervisory Authority. According to the authorities, the Attorney General has not issued any instruction to prosecutors in foreign bribery cases. The same authorities clarify that changes have been imposed either by the departure of prosecutors or by adjustments to the workload of certain prosecutors. On 1 July 2017, a new directive from the Attorney General was implemented in the form of a Code of Conduct for OAG prosecutors and staff.

70. Very extensive powers are conferred by law on the Attorney General, including in relation to the conduct of prosecutions. The media reported several cases in which the decisions of the Attorney General were contested. Furthermore, the status of the OAG continues to be a subject of debate in Switzerland, (there was a parliamentary initiative in 2016 to reform the organisation of the OAG and establish a collegiate structure based on the model adopted by other federal authorities).⁵⁹ During the on-site visit, OAG representatives confirmed their satisfaction with the existing organisational model and took the view that they already had the benefits of a collegiate and independent structure (owing to the role of the Deputy Attorneys General within the OAG, who are also elected by Parliament). The lead examiners are of the view that these issues are worth following up by the Working Group.

⁵⁶ See FCC Decision of 29 June 2016.

⁵⁷ In the abovementioned case, the FCC ruled that “*the Ambassador in question had intervened without having received a mandate from the Swiss authorities to do so, his intervention is moreover illegal.*”

⁵⁸ “[Federal Law on Organisation of the Criminal Justice Authorities](#)” entered into force on 1 January 2011.

⁵⁹ “[College of 3 Attorneys General to run the OAG](#)”, 19 December 2016.

Commentary

The examiners recommend that the Working Group follows up investigations and prosecutions conducted by the OAG and the cantonal Offices of the Attorneys General to ensure they are not influenced by the considerations listed in Article 5 of the Convention.

The examiners recommend that the Working Group follows up on the evolution of the internal organisation and structural operation of the OAG in the management of foreign bribery cases in order to maintain the independence acquired by the OAG through the 2011 reforms.

Investigation techniques: use of multiple investigative means

71. The Phase 2 and Phase 3 Reports noted the wide variety of investigative means available to law enforcement 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, etc.). The situation remains unchanged with entry into force of the new CPC in 2011, which in fact introduces a new feature: it authorises investigators, with a judicial warrant, to monitor banking relations in order to observe transactions and movements with certain accounts (Article 284 CPC). Bank secrecy is not absolute and criminal and administrative authorities have a legal right to access to bank information (Article 47(5) of the Swiss Law on Banks (LB) and Article 43(5) of the Law on Stock Market and Securities Dealing (LBVM)). During the on-site visit, the OAG representatives indicated that, in the foreign bribery cases investigated to date, documents had been seized during searches, warrants obtained to reproduce banking details, and hearings systematically held. In addition, numerous requests for MLA from abroad had been made. The available case law also shows that companies suspected of criminal activities have conducted internal investigations. The OAG indicates that it systematically obtains company audits, auditors' notes and any internal report drawn up by the company concerning its operations. According to FCC case law, such reports can even be obtained when they have been forwarded to a third party, including a lawyer.⁶⁰

Transparency measures for legal persons and complex legal structures: use in foreign bribery cases

72. As part of the Phase 4 evaluations, the Working Group decided to review transparency measures applicable to legal persons in the States Parties to the Convention.⁶¹ As highlighted in the introduction, Switzerland hosts a large number of domiciliary companies, involved in 38.1% of corruption cases in Switzerland.⁶² The authorities recognise that, including trusts and foundations, domiciliary companies reduce the transparency of the economic background of capital flows in any given business relationship and thereby reduce the likelihood of being able to identify the genuine beneficial owners of the assets concerned. Over recent years, Switzerland has taken measures to increase transparency in relation to legal persons:⁶³ companies must hold a register of their

⁶⁰ [Judgment of the Federal Criminal Court of 30 May 2016](#) (in German).

⁶¹ See Phase 4 Monitoring Guide, footnote 13.

⁶² Above, note 13.

⁶³ See the Federal Act Implementing the Recommendations of the Financial Action Task Force, which entered into force on 1 July 2015. A [draft review of company law](#) also provides for the introduction of an obligation for

shareholders/partners and their beneficial owners, including companies with bearer shares. Trade register records are the basic reference for financial intermediaries and the prosecuting authorities. Information on the trade register is in the public domain, and supporting documents can be made available both to law enforcement authorities and to the supervisory authorities for banking and financial markets. The criminal prosecution authorities (OAG and cantonal Offices of the Attorneys General, police), the MROS and the FINMA claim to have the necessary powers to gain access to basic information and information on beneficial owners, including of domiciliary companies. The Swiss authorities state that this information can be obtained at any time and within a reasonable time frame, however there is no guarantee that the information supplied is accurate or up to date. Additionally, the concept of a “trust” does not appear in the Swiss legal arsenal. A trustee who manages a trust from Switzerland when the assets involved are not within Switzerland is a financial intermediary. The competent authorities say that they have the necessary powers to gain access to information concerning the trust held by the trustee and other parties.

Commentary

The lead examiners recommend that Switzerland ensure that all credible allegations involving legal persons with a connection to the Swiss Confederation, including domiciliary companies, are duly evaluated, with prosecutions and convictions where appropriate. Regarding transparency in relation to legal persons and complex legal structures, the examiners recommend that the Working Group follow up the efforts by Swiss authorities in this area.

Limitation periods: welcome case law

73. The limitation period in foreign bribery cases is 15 years. It runs from the date on which the perpetrator committed the offence, from the day on which the final act was carried out if the offence consists of a series of acts carried out at different times or from the day on which the criminal conduct ceases if the criminal conduct continues over a period of time. (Article 98 CC). At the time of Phase 3, the Working Group decided to monitor the practical application of the limitation period in foreign bribery cases involving legal persons (follow-up question 2(e), see Annex 5). There was a lingering doubt about the limitation periods applicable in this type of prosecution. The Phase 3 written follow-up report mentioned case law to the effect that a higher cantonal court had ruled that Article 102(2) CC constituted a standard of attribution and that the limitation period was therefore to be determined on the basis of the original offence. Several court rulings have upheld that case law since Phase 3 and have established unambiguously that Article 102 CC is to be regarded as a standard of attribution and that the limitation period applicable to companies is the period applicable to the offence committed within the company.⁶⁴ Furthermore, in a judicial about-turn, the Federal Criminal Court now considers that the limitation period no longer applies after the judgment at first instance, whether it is a conviction or acquittal.⁶⁵ The Working Group welcomes this case law development.

large companies operating in the extraction of raw materials to publish a report electronically declaring payments of CHF 100 000 or more to governments by year.

⁶⁴ FCC of 14 December 2016 BB.2016.359 (in Italian).

⁶⁵ Judgment of the Federal Criminal Court of 11 December 2012 6B_771/2011 (in German).

Prosecutions: international consultation and consequences of the ne bis in idem principle

74. Pursuant to Article 4(3) of the Convention, when more than one Party has jurisdiction over an alleged offence described in the Convention, the Parties concerned must, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution. In relation to transnational cases, the OAG stated that it has adopted certain practices such as forming joint investigation teams, requesting to delegate criminal prosecutions, co-ordinating systematically with other countries involved (especially in the context of Eurojust) and systematically forwarding spontaneous information and/or MLA requests. Delegation of criminal prosecutions (whereby the country of origin of the suspect prosecutes and Switzerland refrains from any other measure based on the same facts) was successfully applied in *Petrobras*.

75. The OAG indicated that it had systematically applied Article 4(3) of the Convention by contacting the various countries concerned, trying to give each one jurisdiction for certain facets of the investigation. The OAG has also tried to encourage the country at the centre of gravity of the suspicious activity to take charge of prosecution. For its part, the OAG undertakes to prosecute natural or legal persons who have been active in its territory. OAG prosecutors are therefore used to organising co-ordination meetings with their foreign counterparts, either by inviting them to Switzerland or by going abroad. In this context, the Swiss prosecutor posted to Eurojust is often asked for support. Discussions may lead to the co-ordination of measures (searches for example) or to sharing of cases, with the aim of avoiding any risk of collusion that could compromise a case and of preventing duplication or problems associated with the prohibition of double jeopardy (*ne bis in idem* principle). For example, in the *Odebrecht case*, several co-ordination meetings were held with Brazil, the USA and Switzerland, either in Brazil or by videoconference. It was in the context of those meetings that strategy, such as sharing of cases or offenders, was discussed. This co-ordinated action resulted in sanctions being handed down simultaneously against the accused companies by the law enforcement authorities in Brazil, the USA and Switzerland.

76. During talks with OAG representatives, they regretted that co-ordination initiatives were not numerous enough. They indicated that there were investigations that were already at an advanced stage but that had to be discontinued by the OAG when other countries concluded cases concerning the same facts, without the Swiss authorities having been consulted. Such situations nullified the considerable investigation work undertaken.

77. As in Phase 3, the OAG drew attention to the existence of investigations which had been dismissed because the case had been settled legally or through negotiations in criminal proceedings abroad, under the *ne bis in idem* principle.⁶⁶ The Swiss authorities cited this principle as being one of the main reasons for discontinuing foreign bribery cases (see below, *Braskem case*) or for the Swiss law enforcement authorities not prosecuting certain foreign bribery cases in Switzerland.

⁶⁶ The rules governing application of this principle (Article 3(3) CC) have remained unchanged since Phase 3.

B.4. Concluded cases and recourse to so-called “special” procedures

Cases closed or discontinued and acquittals: developments to monitor

78. The evaluation team had limited access to decisions to discontinue cases or to acquit natural persons in foreign bribery cases (known cases of acquittal being those described in connection with the *Construction 2 Case*, the *Fertiliser Case*, the *Gase Pipeline Case* and the *Alstom Case*). As described in Section B.1., several acquittals are questionable in that they seem to stem from a restrictive interpretation of Article 322^{septies} CC (foreign bribery). The question of the prosecution (or not) of legal persons is considered in Section C.1. of this report.

Commentary

The examiners recommend that the Working Group follow-up decisions to discontinue and acquit in foreign bribery cases for which the authorities should collect statistics, both at federal and cantonal level.

So-called “special” procedures:⁶⁷ frequently used in foreign bribery cases

79. During the Phase 3 evaluation of Switzerland, the Working Group reviewed the use by the federal and cantonal law enforcement authorities of so-called “special” procedures. It was concerned about the consistency and transparency surrounding the use of these procedures. While recognising the innovative use of these three procedures, it recommended that 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 (Recommendation 3) and it undertook to follow-up on the use of these procedures as practice developed (follow-up question 14). At the time of the written follow-up, Recommendation 3 was considered to have been implemented (following publication of press releases by the OAG), and it became a follow-up question so as to allow better evaluation of its practical implementation.

80. Foreign bribery cases concluded in the context of these procedures since Phase 3 are reviewed in this report. In this regard, the examiners note the eagerness of the Swiss authorities to use procedures which lead to a relatively rapid settlement of foreign bribery cases, which tend to be complex and burdensome, to depend on uncertain MLA and susceptible to become time barred, given the duration of traditional criminal prosecutions. Although this need for alternatives to prosecution must be taken into account, such procedures must offer sufficient guarantees in terms of the predictability of the criminal prosecution, its transparency and publicity. These guarantees are essential in order not to give the impression of justice being dispensed outside the courts without suitable controls. The examiners consider that Switzerland needs to make more efforts to increase and institutionalise the publication of foreign bribery cases concluded under these procedures. Available case law in fact points to more systemic recourse to such procedures in these cases, a trend that was not well-established in Phase 3.

⁶⁷ These procedures are described exhaustively in Annex 3 to the report.

1. Summary punishment order: an effective tool despite being a procedure that was not designed for serious offences.

81. In this procedure, prosecutors are responsible for conducting the preliminary inquiry, prosecuting offences during the investigation and drawing up the summary punishment order. Uncontested summary punishment orders have the same status as judgments. They do not call for the intervention of a judge unless one of the persons concerned contests the order. In all, 5 natural persons and 7 legal persons have been convicted of the foreign bribery offence by summary punishment orders in Switzerland since the entry into force of the Convention. The summary punishment order can also be seen as an effective tool in the pursuit and settlement of foreign bribery investigations. However, this type of procedure was originally designed for “minor cases”. Indeed, the sanctions applicable to summary punishment orders are: a fine; a pecuniary sanction of a maximum of 180 fine-days; or a maximum of six months’ imprisonment. These sanctions are alternatives. Moreover, these sanction thresholds are very low for serious crimes such as foreign bribery (see Section B.5.). This procedure is based on a summary assessment of the facts and an order may be issued without opening an investigation and without the accused being heard before the Office of the Attorney General. Thus, it is entirely up to the accused to contest (within a very short period of 10 days) an order which is insufficiently founded in fact or in law, and hence call for a full review of the evidence. During the process of this evaluation, two summary punishment orders had been contested. According to the authorities, the first case against an offshore company involved in the *Petrobras* case was discontinued in December 2017 pursuant to the *ne bis in idem* principle. The *Banknotes Case* was ongoing at the time of the on-site visit. The evaluation team has reviewed the summary punishment orders handed down by the OAG in foreign bribery cases and recognises that they have unquestionable qualities: they set out in detail the facts, the evidence and the methods and principles on which calculation of the fines and confiscation measures are based. However, the failure to publish orders (anonymously where necessary)⁶⁸ is regrettable, and could minimise their impact, undermine the transparency of enforcement actions and deprive the public, including companies and commentators, of their educational value. They consider that the availability of orders for consultation at the OAG for 30 days after their adoption is useful but does not allow sufficient dissemination of these decisions, in particular over time. Much wider publicity of these procedures, which do not call for the intervention of a judge (unless contested), is essential in order to guarantee their predictability and transparency. The fact that they are equivalent to a judgment should encourage the OAG to insure the widest possible publicity.

2. Simplified procedure: emerging case law

82. *Simplified procedure.* On 1 October 2014, the FCC upheld the first conviction of a natural person for foreign bribery under the simplified procedure in connection with the *Construction 1 Case*. The judgment follows the indictment prepared by the OAG pursuant to Article 360 CPC. It is for the judge to examine whether the conditions for a simplified procedure have been satisfied. In the case in point, the FCC held that recourse to a simplified procedure was justified on several grounds, including the admission of the facts by the accused and “the certainty the criminal prosecution for other facts relating to the charge of money laundering would be time-barred before a judgment at first instance could be handed down”. The FCC accepted the sanctions proposed by the OAG. The Attorney General of Switzerland expressed satisfaction with the judgment in that case and noted: “it is

⁶⁸ In order to reconcile the various interests at play, in particular the requirements for transparency and the protection of privacy, pursuant to article 69 CPP.

significant that judges have recognised that recourse to the simplified procedure is not restricted to certain categories of offence”.⁶⁹

83. *Combination of a simplified procedure and a summary punishment order.* The OAG concluded a second foreign bribery case against a legal person (in the *Banknotes Case*) following a simplified procedure and by issuing a summary punishment order in a case in which the company had self-reported. At the time of finalising this report, that decision had not yet become final and enforceable due to the lodging of appeals and counter-appeals by the individuals associated with the case with the Appellate Division of the Swiss FCC. In this case, there was no charge forwarded to the court of first instance and it was possible to settle the case by means of a summary punishment order, which means that it was not reviewed by a judge. It is essential for a foreign bribery case that has been settled by means of a summary punishment order, following a simplified procedure without any intervention at all by a judge, to be suitably published. The lack of such publicity casts doubt on the quality of the justice done and can give the impression of allowing certain accused persons to enjoy preferential treatment without the fairness of that treatment being verifiable. Furthermore, the Working Group is concerned with the strategy adopted by the OAG in simplified procedures to prioritise a resolution through summary punishment order, which deprives these decisions of judicial oversight. The publicity of this case led the convicted company to make a public statement about it.

3. Reparation (Article 53 CC): an attempt at “negotiated settlement” and a closure of proceedings without satisfactory guarantees

84. According to the Phase 4 questionnaire, it was in *Alstom* (whose Swiss subsidiary was convicted in Switzerland) and *Siemens* (convicted in Germany and the United States) that the OAG used the reparation procedure, taking the view that once those companies had been sanctioned, there was no longer any public interest in prosecuting the natural persons involved and that the same procedure should apply to them in order to ensure equal treatment across all files. Since those cases, the OAG has stopped relying on Article 53 CC for the purpose of resolving foreign bribery cases (without having widely communicated this decision) considering that (Phase 4 questionnaire) it is “*clear and undisputed that, as far as foreign bribery is concerned, there is no reason for applying Article 53 CC*” even in the case of self-reporting. In the view of the OAG, the criterion in Article 53 that the public interest in prosecution should be “of little importance” is incompatible with foreign bribery cases. The examiners endorse this view.

85. The OAG decision not to use the reparation procedure any longer in these cases differs from that of the Geneva Office of the Attorney General which relies on Article 53 CC (*Oil Company Case* (2017) and *HSBC* (2015)). The decision to discontinue the foreign bribery investigation in the *Oil Company Case* in exchange for payment of CHF 31 million (approximately EUR 27 million) by way of reparation was taken independently of the background of “diplomatic and economic pressure to avoid a criminal conviction”, uniquely due to a lack of co-operation in terms of mutual legal assistance. The decision remains silent as to how the reparation was calculated (the facts concerned suspicious sums of over USD 70 million). Following the line adopted by the Geneva prosecutors, those from Zurich and Zug interviewed at the time of the on-site visit expressed their intention to continue using Article 53 CC in foreign bribery cases. They unanimously praised its usefulness in complex economic crime cases where the limitation period comes into play and evidence is difficult to obtain. They indicated that they had not been informed about the OAG decision to discontinue reliance on the reparation procedure in foreign bribery cases. The Working Group regrets these

⁶⁹ Le Temps, [Bribery in the Gaddafi clan: a verdict that will set a precedent](#), 27 October 2014.

differences in criminal policy, which are harmful for the predictability of enforcement actions and could encourage undesirable “forum shopping”. The legal profession and companies supported the use of article 53 CC in that it avoids a trial, does not involve a conviction and can remain entirely confidential. These so-called advantages are just as problematic in terms of the transparency and fairness of judicial decisions.

86. Regarding sums paid by way of reparation, the method of calculation and the choice of beneficiary remain obscure. In the *Oil Company Case*, reparation was paid to the Canton of Geneva, which stated that “this agreement provides the Canton of Geneva with a significant financial contribution”. In *Alstom* and *Siemens*, reparation was paid to the International Committee of the Red Cross,⁷⁰ to Transparency International Switzerland (TI), to the Geneva foundation “La maison de Tara” and to SOS Kinderdorf e.V., Munich.⁷¹ According to the authorities, the recipients of the reparation payment were decided in consultation with the accused and taking into account their not-for-profit activities in the countries affected.

87. The conditions governing recourse to and reliance on Article 53 CC are controversial in Switzerland. In this context, a preliminary draft implementation of the [Vischer parliamentary motion of 14 December 2010](#) (amendment of Article 53 CC)⁷² was issued for consultation from 10 October 2016 to February 2017. It does not aim to remove Article 53 CC from the criminal law arsenal but rather to amend it by limiting its applicability to cases in which the sentence is a suspended custodial sentence of up to one year, a suspended pecuniary fine or a fixed fine (option 1), or to cases where the sentence is a suspended pecuniary fine or a fixed fine (option 2), provided that the accused has admitted the charge. In support of his initiative, the author of the motion noted, *inter alia*, that “*some recent cases have given the impression that the provision in question has been applied in such a way as to enable individuals with the means, to easily avoid sanctions. Following up on this, it has been found that Article 53 CC has not, in some cases, been applied according to well-established principles.*”⁷³ According to members of Parliament interviewed during the on-site visit, the matter is due to be discussed by the Federal Council in 2018.

Commentary

The examiners recommend that Switzerland publish, promptly and in conformity with the applicable procedural rules, certain elements of these summary punishment orders including the legal basis for the choice of procedure, the facts of the case, the natural and legal persons sanctioned (anonymised if necessary), and the sanctions imposed. In view of the very low sentencing thresholds available in connection with the summary punishment order procedure, the examiners recommend that Switzerland use summary punishment orders for natural persons only when such use does not undermine the effective, proportionate and dissuasive nature of sentences handed down in foreign bribery cases.

⁷⁰ CHF 1 million (approximately EUR 858 000) (of which one-third in Latvia, one-third in Malaysia and one-third in Tunisia) paid in the context of *Alstom*; CHF 125 000 (approximately EUR 107 000) paid in the *Gas Pipeline Case*.

⁷¹ CHF 630 000 (approximately EUR 540 000) paid in *Siemens*.

⁷² [Federal Assembly, 10.519 Parliamentary motion: amend Article 53 CC, reports and consultation procedures.](#)

⁷³ [Report by the Legal Affairs Committee of the Federal Council of 13 October 2016.](#)

The examiners recommend that Switzerland ensure that the law enforcement authorities do not have recourse to article 53 CC in foreign bribery cases. The examiners are of the view that this measure could be included in the framework of the proposed reform of article 53 CC.

The examiners understand the need of prosecution authorities for a simple and effective procedure for resolving foreign bribery cases. They recommend that Switzerland consider, where necessary taking existing procedures as a basis, the introduction of an alternative procedure to prosecution which has a strict framework, allows for the application of effective, proportionate and dissuasive sanctions and respects the necessary rules of predictability and transparency that are essential in this type of procedure. Such a procedure could be used in relation to economic crime, including cases of foreign bribery.

B.5. Sanctions

Sanctions that are hardly effective, proportionate and dissuasive

1. Sanctions against natural persons

Nature and level of sanctions imposed by the OAG

88. Since Phase 2, the penalty incurred by natural persons for the offence of foreign bribery has not changed: they are liable to a maximum of five years' imprisonment or a fine in the form of fine-days,⁷⁴ determined by the judge "according to the culpability of the offender. It takes account of the previous conduct and the personal circumstances of the offender as well as the effect that the sentence will have on his life" (Article 47(1) CC). In Phase 3, in the absence of any judgments handed down by the courts in the matter, the Working Group decided to monitor penalties imposed on natural persons convicted of bribery of foreign public officials, including those imposed in the context of summary punishment orders and the simplified procedure (follow-up 15, see Annex 5). The law on sanctions was revised on 19 June 2015 (a reform which entered into force on 1 January 2018). This reform upholds the use of suspended fine-days as a pecuniary penalty despite the reservations expressed about it.⁷⁵ It also provides for recourse, in certain conditions, to short prison terms. The sanctions imposed to date against natural persons (and legal persons) are summarised in Annex 2 of this Report.

89. An analysis of the sanctions imposed against natural persons in concluded foreign bribery cases raises serious questions as to whether they are effective, proportionate and dissuasive. Several convergent elements illustrate this finding:

- **The rarity of fixed penalties handed down** despite the seriousness of the facts established and the senior posts held by the persons accused. In one case alone (*Construction 1 Case*) out of the

⁷⁴ This sanction applies on the same terms to bribery of Swiss public officials.

⁷⁵ Several parliamentarians, judges and cantons have criticised the suspension of fines which, in their view, diminishes the deterrent effect of the penalty, meaning that it is no longer a punishment adapted to the crime. See [Message from the Federal Council relating to amendment of the Criminal Code and the Military Criminal Code of 4 April 2012](#). A chorus of critics (police officers, prosecutors, judges, lawyers, politicians and the media) rose up against this new system of penalties, which was seen as "homeopathic", non-dissuasive, inefficient, soft on criminals and humiliating for victims.

six cases involving natural persons since Phase 3, the accused was given a custodial sentence of 3 years, 18 months of which were suspended;

- ▶ **Systematic recourse to custodial sentences converted into suspended fines** (in the form of suspended fine-days) despite the sums at issue. For example, in the *Port Infrastructure Case*, company employees ordered disputed payments totalling USD 21 million over a period several years without ever checking the economic background. They received suspended fines. The possibility of suspending fine-days is one of the most controversial aspects of Swiss law currently in force but practice clearly supports it in foreign bribery cases. In the *Construction 2 Case*, the accused was ordered to pay a suspended pecuniary penalty of 150 fine-days at the rate of CHF 2 500⁷⁶ per day, in other words CHF 375 000 (approximately EUR 322 000). His personal fortune was estimated at USD 50 million (about EUR 43 million) by the OAG. Cumulative fines were imposed in just two cases.

90. The authorities indicated that the suspended pecuniary penalty is not exceptional in Switzerland as a punishment for first offences. Moreover, they pointed out that the new sanctions regime (which entered into force on 1 January 2018) limits the possibility of imposing a pecuniary penalty and relaxes the conditions for imposing short custodial sentences. According to the authorities, penalties should become harsher as a result.

91. In the *Port Infrastructure Case*, the approach adopted by the OAG was, in addition to a suspended financial sanction, to confiscate the financial benefits (bonuses) deriving from commission of the foreign bribery offence in connection with a protracted bribery scheme in which the sums involved were considerable. In the *Fertiliser Case*, the fine (in addition to a suspended financial sanction) was set at CHF 10 000 (approximately EUR 8 600) (the maximum fine allowable under the Swiss Criminal Code) when the amount of the bribe was USD 1.5 million (approximately EUR 1.3 million), made in a single payment in an act held to be complicity in bribery. The fine-days penalties were handed down as a suspended sentence. In these two cases in particular, the sanctions are devoid of proportionality (due to the basic disproportion between the seriousness of the facts and the penalty imposed) and of any dissuasive nature, notably in terms of the general principle of deterrence.⁷⁷

92. As pointed out in previous evaluations of Switzerland,⁷⁸ confiscation measures can prove to be an effective measure and counterbalance the low level of penalties imposed on natural persons. The Swiss authorities reiterated this during the on-site visit. However, it is worth emphasising that confiscation is not a sanction within the meaning of Article 3(1) of the Convention (it is covered by another provision). The aim of confiscation measures is to deprive the offender of additional pecuniary benefits resulting from the offence (the proceeds) and not to strip him/her of assets by way of reparation for the consequences of an act which is punishable under criminal law. In this context, the widespread practice of asset freezing and confiscation cannot offset the failure by Switzerland to implement Article 3(1) of the Convention.

⁷⁶ As a general rule, a fine-day is a minimum of CHF 30 and a maximum of CHF 3 000. Exceptionally, it may be reduced to CHF 10 if required by the offender's personal and economic situation (Article 34.1 CC).

⁷⁷ See The OECD Convention on Bribery: a commentary, by Mark Pieth, Lucinda A. Low and Nicola Bonucci, Section 3.4, p. 290.

⁷⁸ See [Phase 2 Report on Switzerland](#), paragraph 124.

Mitigating factors for sanctions

93. When deciding the level of penalties, a judge is required to take into account the mitigating or aggravating circumstances set out in Article 48 CC. In practice, the OAG has relied on mitigating circumstances of various sorts, including the length of the criminal investigation (*Port Infrastructure Case* against the financial intermediary), good co-operation from the accused (*Construction 1 Case* and *Port Infrastructure Case* against the CFO and the legal adviser) and admission of the facts (*Construction 2 Case*). In *Construction 1 Case*, the Federal Criminal Court took into account the accused's decision to act on the civil claims of the "wronged" company by compensating that company out of its own funds.⁷⁹ According to the FCC, the company was regarded as having been wronged in relation to other facts attributable to a member of its executive. In *Construction 2 Case*, the OAG found that it was appropriate to take into account "current bribery practice" in the country in which the accused operated. Taking solicitations into account goes completely against the Convention and its spirit, to the extent that it is likely drastically to reduce the scope of the foreign bribery offence as laid down in Article 1 and undermine the effective, proportionate and dissuasive nature of sanctions, contrary to Article 3. In two arms of the *Port Infrastructure Case* (against the CFO and the legal adviser), the OAG took into account another mitigating factor that is problematic. It considered the situation of "quasi-duress", in other words a state of necessity of the two accused, within the meaning of Article 18 CC. The state of necessity related in part to the need to protect employees from imminent danger (threats to their lives) and to prevent an attack against the company's assets.⁸⁰ In the opinion of the lead examiners, the second mitigating factor is problematic. It was also disputed by the Working Group in a previous evaluation.⁸¹ Furthermore, commentary 7 of the Convention indicates that a foreign bribery offence exists irrespective of the "alleged necessity of the payment" in order to obtain or retain an improper advantage.

Commentary

The examiners recommend that the Swiss authorities: (i) ensure that the sanctions imposed in practice against natural persons convicted of foreign bribery offences are effective, proportionate and dissuasive in accordance with article 3 of the Convention; (ii) treat mitigating factors such as solicitation, the alleged necessity of the corrupt payment in accordance with the standards of the Convention and with the 2009 Recommendation; and (iii) use the full range of sanctions available under the law, including custodial sentences, where appropriate.

The examiners also recommend that the OAG (i) conduct a systematic analysis of case law on the application of mitigating factors, specifically those relating to solicitation and the alleged necessity of a corrupt payment and (ii) identify from it guidelines for criminal policy on administering sanctions that are consistent with the Convention and the 2009 Recommendation. Prosecutors should be given training in this matter. The application of mitigating circumstances should also be followed-up by the Working Group as Swiss case law evolves.

⁷⁹ The supposedly "wronged" company was also debarred from World Bank tender processes for the longest exclusion period ever imposed by the Bank: "[World Bank debars SNC-Lavalin Inc. and its affiliates for ten years](#)", 17 April 2013.

⁸⁰ The purpose of certain payments at issue was to ensure the continued execution of a project and, in particular, to prevent the immobilisation or seizure of vessels belonging to the accused company.

⁸¹ See [Belgium Phase 3 Report](#).

Finally, the examiners recommend that the Working Group also follow-up on implementation of the new system of penalties which entered into force on 1 January 2018 and the penalties applied to natural persons convicted of the foreign bribery offence with a view to ensuring that they are effective, proportionate and dissuasive.

2. Sanctions against legal persons

94. Pursuant to Article 102(1) CC, the maximum fine for a company convicted of bribing foreign public officials is CHF 5 million (approximately EUR 4.3 million). This amount also applies to convictions under Article 102(2) CC. The exact amount of the fine is determined in practice by the judge “*in accordance with the seriousness of the offence, the seriousness of the organisational inadequacies and of the loss or damage caused, and based on the economic ability of the undertaking to pay the fine*” (Article 102(3) CC). Fines are systematically fixed (i.e. not suspended).

Level of fines imposed by the OAG

95. Since Phase 3, six enterprises have been fined under Article 102(2) CC, one of which was in the context of a simplified procedure. An overview of those sanctions (within the meaning of Article 3(1) of the Convention) appears in Annex 2 of this Report.

96. In the *Odebrecht-CNO Case*, the fine of CHF 0 takes into account, according to the authorities, the level of the fine set in the United States (judged to be very high). In this respect, the OAG considers that “it is manifestly clear that there is no margin left in Switzerland for imposing a further penalty on account of the underlying offence of money laundering” and that, in view of the legal limit for the fine of CHF 5 million, the OAG was obliged to refrain from imposing any fine on Odebrecht. The OAG itself recognised that the “*fine appears modest by comparison with the foreign fine. In setting this amount, the OAG is, however, bound by the statutory maximum fine of CHF 5 million*”. The Working Group questions the appropriateness of the choice made in relation to Odebrecht: i.e. not to reduce but to cancel the fine due to a high fine for the same offence having already been imposed abroad. If the facts are different (and the *ne bis in idem* principle does not apply), it might appear disproportionate to cancel a fine in Switzerland where the offence was detected and must be sanctioned in a proportionate, effective and dissuasive manner. The authorities indicate that this practice complies with Swiss law.

97. The Working Group has strong reservations about the proportionate, effective and dissuasive nature of sanctions imposed on companies convicted of foreign bribery under Article 102(2) CC (even where they are accompanied by confiscation). This is particularly true in view of the facts alleged and the amounts at stake. It notes that the fines imposed never reached the permitted legal maximum (which might itself be regarded as fairly low, see below) and by far (in the *Fertiliser Case*, the fine reached CHF 750 000 (approx. EUR 643 000); in the *Port Infrastructure Case* the parent company was fined CHF 1 (EUR 0.85) and the subsidiary CHF 1 million (approx. EUR 860 000); in the *Odebrecht Case* the parent company was fined CHF 0 (in accordance with art. 49 CC and by way of a fine to complement the fine imposed by the US) and the subsidiary was fined CHF 4.5 million (approx. EUR 3.9 million). Although the Working Group is pleased that there is a more sustained enforcement effort against companies, it is concerned about the implementation of legal provisions and the level of fines actually imposed. In November 2016, the Swiss Attorney General called for more forceful implementation of Article 102 CC against companies in order to “*prevent certain groups from taking refuge in Switzerland in order to escape harsher criminal justice systems in other countries. The reality with large companies is that they look around to see which is the best place to be tried. This is the phenomenon known as forum-shopping – or choosing to establish headquarters in*

the most accommodating jurisdiction in case of criminal proceedings. Indeed, there is a gulf between the massive fines imposed on companies by the United States and the countries which seldom convict them, such as Switzerland".⁸² Switzerland should be able to demonstrate a greater degree of implementation of Article 102 CC, including in foreign bribery cases (see below). It also underlines the importance of sanctions imposed in cases leading to convictions to demonstrating unambiguously their effective, proportionate and dissuasive nature, in line with the criteria laid down in Article 3 of the Convention. The available case law does not indicate that this is currently the case.

98. *Mitigating factors for sanctions.* Based on case law of the OAG in foreign bribery cases the following mitigating circumstances, *inter alia*, have been taken into account: the fact of admitting misconduct, demonstrating cooperative behaviour and self-reporting information. Similarly, measures taken by a company to prevent foreign bribery (after the facts have been committed), including implementation of internal controls, ethics and compliance measures, have also been regarded as mitigating factors. A punitive fine may also be reduced or even cancelled if the company has been or is about to be sanctioned in another jurisdiction for the same offence, or the same complex of facts arising from the same criminal intent (in accordance with the *ne bis in idem* principle and the system of recognition of decisions (*système de l'unité de jugement*)). Finally, the OAG systematically takes into account the economic capacity of the company at the time the offence was committed. In the *Port Infrastructure Case*, the evaluation team asked the OAG representatives interviewed on site to comment on the extremely low level of fines imposed (CHF 1 for the parent company, in particular). In the view of the OAG, that amount was justified by the indirect effect of the subsidiary being imposed a fine of CHF 1 million (furthermore, it appeared that the subsidiary was unable to pay that fine and the parent company had transferred the equivalent amount to its subsidiary to enable it to pay); by the confiscation of all profits made by the subsidiary; by the situation of "*quasi-duress*", within the meaning of Article 18 CC (a mitigating circumstance used in the arm of the case incriminating natural persons, see below); by the good co-operation demonstrated during the criminal proceedings which helped considerably to establish the relevant facts, and by the introduction of a system of compliance after the investigation had commenced.

99. Although the examiners do not object to the application of mitigating circumstances to companies in foreign bribery cases, they do consider that their application (and accumulation) should not have the effect in practice of exonerating them from liability. In addition to confiscation measures (which should not be regarded as penalties, see above), a fine is the only available sanction the Offices of the Attorneys General can impose on companies. Fines must therefore be used in such a way as to be effective and proportionate and they must have a dissuasive effect, which does not appear to have been the case in foreign bribery cases concluded against companies since Phase 3.

100. The fact that the law sets a limit of CHF 5 million (approximately EUR 4.3 million) on these fines is another factor which is likely to undermine satisfactory implementation of corporate liability. In this regard, the authorities indicated during the on-site visit that they were content with this objectively low amount in view of the fact that it does not prevent them from issuing convictions (which companies fear) and from adopting supplementary confiscation measures in respect of very large sums. In response to these arguments, the fact that summary punishment orders are not published systematically (none have been published since Phase 3) and that there is no central criminal record in Switzerland for legal persons. The effect of a criminal conviction on a company's reputation or economic activity (which would prohibit it from tendering for public procurement

⁸² "[Federal prosecutors to come down heavily on banks](#)", 11 November 2016.

contracts in Switzerland or abroad,⁸³ see above) does not have the weight that the authorities appear to give it. Finally, compared to the level of sanctions available in countries with companies of a similar size, the statutory maximum of CHF 5 million (approximately EUR 4.3 million) seems relatively low, in a further context where no additional sanctions are available.

3. Sanctions imposed in the context of so-called “special” procedures

101. In the context of a so-called “*simplified*” procedure in the *Banknotes Case*, the company was sentenced under Article 102(2) CC to a fine of CHF 1 when the total amount of the bribe was more than CHF 24 million.⁸⁴ One of the mitigating factors taken into account by the OAG was the fact that the company self-reported (and was the first company to do so in Switzerland) and that no suspicion, at least in relation to the facts, had been reported to the OAG at the time of the report. Furthermore, the company carried out extensive internal investigations shared the results with the OAG and co demonstrated genuine and continued co-operation with the OAG during the proceedings. It also introduced compliance measures and, with the help of its parent company, set up an integrity fund to reinforce compliance standards in the banknote industry and undertook to pay CHF 5 million into the fund. Finally, the OAG applied Article 48(d) CC, which provides for mitigation of a sanction if the offender has shown “*sincere remorse by his/her actions, and in particular has made reparation for the damage, in so far as this may be expected of him/her*”. During the on-site visit, the representatives of the OAG confirmed the close relationship between self-reporting and “sincere remorse” with the notion of “*effective regret*”, which is prohibited by the Working Group in foreign bribery cases. The Working Group is even more astonished that this principle has been applied to a legal person in that it seems hardly transposable, given its subjective and even psychological, nature. The priority for the OAG in the *Banknotes Case* was to obtain a conviction, the amount of the fine being capable of adjustment at a later stage in the light of the circumstances of the case (i.e. the self-reporting which, in the eyes of the OAG, was an acknowledgement of guilt). It also indicated that it wanted to send a clear signal to other companies encouraging them to self-report, on following the examples of the USA and Great Britain. The examiners note that self-reporting should not result in impunity.

102. In terms of “*reparation*” (see Section B.4.b.), two investigations have been conducted against two companies since Phase 3 for foreign bribery. In the *Gas Pipeline Case* handled by the OAG, the company admitted that it had not taken all the organisational measures that were necessary or could reasonably have been required in order to prevent the payment of hidden commissions to foreign public officials. The subsidiary admitted, in particular, that it had committed gross negligence when auditing consultancy contracts. It paid reparation of CHF 125 000 (approximately EUR 107 000) to the International Committee of the Red Cross. An equivalent claim of CHF 10 606 967 (approximately EUR 9 million) was also ordered, a sum which corresponded to the unlawful proceeds acquired. The proceedings were discontinued namely because several judgments had been handed down abroad in which severe penalties were imposed on the parent company. The sums in question were around USD 3.8 million (approx. EUR 3.2 million).

103. In the *Oil Company Case*, the Geneva Office of the Attorney General ordered the investigation of that company to be discontinued because sufficient suspicion had not been established to justify laying charges and because the elements constituting the offence had not been satisfied. The accused

⁸³ The authorities indicated that, in *Construction 1 Case*, the debarring from World Bank tendering procedures resulted from the conviction handed down in Switzerland.

⁸⁴ As indicated above, that decision had not yet come into force at the time of finalising this report.

were charged with bribing foreign public officials and mismanagement in connection with payments of nearly CHF 70 million (approx. EUR 60 million) on two African markets, which were insufficiently documented by the enterprise. The company was required to pay CHF 31 million (approx. EUR 27 million) to the Canton of Geneva by way of reparation for any harm caused. The Geneva Office of the Attorney General listed the existence of organisational measures to prevent any future shortcomings when approving payments and the good co-operation of the company as mitigating circumstances. The decision to discontinue the investigation was taken very swiftly following an investigation lasting only four months. It raises questions in that it illustrates to some extent the objections made by critics of the reparation procedure.⁸⁵ The order is silent about the conditions and criteria used to set the amount of the reparation. The Working Group regrets this lack of transparency and recommends that this type of resolution should not be used in foreign bribery cases (see Section B.4.b.).

4. Additional sanctions

104. As indicated in Phase 3, Switzerland has an electronic central criminal record known as “Vostra” which is available to law enforcement authorities. This record contains convictions and ongoing criminal proceedings against individuals, including Swiss citizens convicted abroad. On 17 June 2016, the Parliament adopted a federal law on the electronic central criminal record, amending the framework already in place namely in terms of proceedings discontinued on the basis of reparation (Article 53 CC; see Section B.4.)⁸⁶ but rejecting the proposal from the Federal Council to introduce a central criminal record for legal persons. The Working Group’s expectation that a central criminal record for legal persons would be established as swiftly as possible, in order to guarantee feedback regarding convictions of enterprises on the basis of Article 102 CC was not fulfilled by the Swiss authorities and there is no plan to do so.

105. Provisions prohibiting a company convicted of foreign bribery from tendering for Swiss public procurement contracts have not been reviewed since Phase 3 (see Section C.4.). In practice, the conviction of a company under Article 102 CC does not entail exclusion from public procurement.

Commentary

The lead examiners recommend that the Swiss authorities:

- (i) increase the statutory maximum level of fines (CHF 5 million) for legal persons convicted of foreign bribery;*
- (ii) ensure that the sanctions imposed in practice on legal persons convicted of foreign bribery are effective, proportionate and dissuasive, even in situations where the enterprise has self-reported;*
- (iii) use sincere remorse as a mitigating factor for sanctions in conformity with the Convention;*

⁸⁵ “[Parliamentary motion: To amend Article 53 CC](#)”, 31 October 2016: “some recent cases have given the impression that the provision in question has been applied in such a way as to enable individuals with the means, to easily avoid sanctions. Following up on this, it has been found that Article 53 CC has not, in some cases, been applied according to well-established principles.”

⁸⁶ This new law will need to be incorporated in several orders and is likely to enter into force in 2020. In particular, it provides for much more extensive consultation rights, and for longer data retention periods. The registry will make available to prosecution authorities all data concerning judgments and ongoing proceedings. In order to counterbalance the extended consultation rights, the bill increases data protection by extending the rights of the persons concerned.

(iv) apply mitigating factors appropriately so as not to exempt companies in practice from liability under Article 102 CC;

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

The examiners recommend that the Working Group follow-up on the application of mitigating factors in respect of legal persons as Swiss case law evolves. The examiners recommend that the Working Group also follow-up on the sanctions applied to legal persons convicted of bribery of foreign public officials in order to ensure that such sanctions are effective, proportionate and dissuasive.

Tax treatment of fines and confiscated sums: need for clarification

106. Current legislation does not contain any express provision on the tax treatment of fines (other than for tax offences), pecuniary sanctions or administrative sanctions of a pecuniary and criminal nature. In order to remove the resulting legal uncertainty, the Parliament instructed the Federal Council to draft provisions which specifically preclude the tax deductibility of financial sanctions that are criminal in nature. In that bill,⁸⁷ profit-reducing measures that are not criminal in nature may still be deducted from the tax base, as the FC has already ruled. In its decision of 26 September 2016,⁸⁸ the FC upheld the non-deductibility of criminal sanctions from the tax base and from the tax itself whilst allowing the deductibility from the tax base of “sanctions which seek to reduce profit, to the extent that they are not criminal in nature: these are charges which are justified by business practice and are therefore tax deductible”. The tax officers interviewed during the on-site visit confirmed that any payment that is not a criminal fine but seeks to restore a profit (such as confiscation) or to make reparation to victims of a criminal offence can legally be deducted from the tax base. The Federal Council has also followed that approach.⁸⁹ Therefore, the measures applied by the Swiss law enforcement authorities in foreign bribery cases (such as confiscation, equivalent claims, reparation under Article 53 CC or creation of an integrity fund, as in the *Banknotes Case*) are eligible for a reduction of the tax base and hence for a reduction of tax.

Commentary

The examiners recommend that Switzerland adopt the bill currently being drafted with a view to clarifying the tax regime applicable to criminal sanctions and to clarify by any appropriate means the tax treatment applicable to other financial measures imposed in foreign bribery cases, such as confiscation and other forms of claim or compensation. They also recommend that the Swiss law enforcement authorities take into account, when determining sanctions for foreign bribery offences, of the tax treatment applicable to measures such as confiscation and equivalent claims, given that the deductibility of such measures is likely to undermine their impact, especially in terms of their dissuasive effect.

⁸⁷ If the Parliament approves the bill, it will enter into force on 1 January 2019 at the earliest.

⁸⁸ [2C_916/2014](#) (in German only). As the Federal Criminal Court opined in a judgment, “If the fines of legal persons were tax deductible, that would result in part of the fine imposed on an enterprise being indirectly borne by taxpayers in general. The criminal effect of the sanction would therefore be undermined”.

⁸⁹ “[Explanatory report concerning the federal bill on the tax treatment of financial sanctions](#)” of 18 December 2015.

Seizure and confiscation measures: publish measures taken in the context of a robust legislative framework

107. The Phase 2 and Phase 3 reports emphasised that Switzerland had adopted a proactive policy in relation to seizures (usually called *séquestres* in Switzerland) and confiscation (or equivalent claims under Swiss law). During this evaluation, the authorities indicated that use of this type of measure remained one of their priorities, even in foreign bribery cases. The rules applicable to seizure and confiscation remain unchanged since Phase 3.

108. The particularly robust legal framework applicable to seizures and confiscations is able to cope with Switzerland's specific challenges, especially in view of the significant of its financial market. The Working Group welcomes the active approach adopted by Switzerland in relation to seizure and confiscation of assets in foreign bribery cases, especially against individuals. The OAG has requested and obtained confiscation of the proceeds of bribery, in other words the profits made, against the majority of the companies convicted of foreign bribery since Phase 3. Moreover, in order to determine the amounts to be confiscated, the OAG has worked out a strict methodology namely with the support of external financial advisers, for which it is to be congratulated.

109. The amounts of assets seized and confiscated under Swiss law are considerable. For example, between 2011 and 2015, CHF 325 622 808 (approximately EUR 297 million) was confiscated at the federal level, all offences combined. For the Cantons of Geneva, Zurich and Tessin, their respective law enforcement authorities seized and confiscated a total amount of CHF 522 383 594 (approximately EUR 477 million). In the concluded foreign bribery cases, it appears that the OAG made extensive use of equivalent claims, especially against legal persons, based on the principle that punishable conduct should not be profitable. It is apparent from the summary punishment orders made available to the evaluation team that the OAG sought, in all cases judged since Phase 3, to confiscate the proceeds or profit obtained by companies following a bribery payment (*Fertiliser Case*, *Odebrecht-CNO*, *Braskem*,⁹⁰ *Port Infrastructure* and *Banknotes Cases*). In the summary punishment order in the *Odebrecht-CNO Case*, the OAG detailed the methodology used to calculate the amount of profits of the enterprise to be confiscated. In particular, it indicated that, following internal analysis and analysis by external financial experts, it used the estimates made by one of the convicted companies. As provided by law, in the case of equivalent claims, the economic capacity of companies is a determining factor in the calculation, because it is necessary to take into account the absolute limit, which would render the company bankrupt (Article 71(2) CC) (this factor also came into play in the *Banknotes Case*). In the *Odebrecht-CNO Case*, the two companies were ordered jointly to pay CHF 117 million (approximately EUR 100.3 million) by way of an equivalent claim because of their complicity in the commission of the offences. This amount was decided in coordination with the Brazilian and American authorities.

110. In the *Fertiliser Case*, no confiscation order was issued in respect of any of the natural persons concerned as neither of them profited from the offence, according to the OAG. In the *Port Infrastructure Case*, employees had the equivalent of their bonuses in respect of the project subject to bribery confiscated, in other words the assets which had been intended to "reward" them. In the *Construction 1 Case*, the amount of the damages payable to the wronged company was confiscated

⁹⁰ In that same case, Braksem was acquitted (under the *ne bis in idem* principle), but was ordered to make a equivalent claim of CHF 94.5 million (approximately EUR 81 million). That sum corresponds to the proportion of the overall amount confiscated which was allocated to the Swiss judicial authorities in the consultation with the Brazilian and American judges.

from the accused. Finally, CHF 425 000 (approximately EUR 365 000) was confiscated in the *Construction 2 Case*, being a proportion (9.93%) of the assets confiscated from several corrupt sources. By adopting a prorata basis, the authorities claimed that it was possible to avoid harming the victims of the other offences.

111. In order to reinforce implementation of seizures and confiscations the OAG has, since 2011, had a specialised unit with a staff of four: the “*Enforcement of judgments and asset handling*” service. The tasks of this service include enforcement of confiscation orders issued by the court or the OAG, the recovery of equivalent claims payable to the Confederation and the collection of procedural costs. In the context of all its ongoing criminal investigations or MLA procedures, the OAG indicated that it had ordered the freezing of assets worth over CHF 6 billion (approximately EUR 5.1 billion) (valued as at 31 December 2016). Moreover, the OAG confers with the competent foreign law enforcement authorities in relation to the identification, freezing, seizure, confiscation and recovery of the proceeds of bribery of foreign public officials. The OAG indicated that, between 2014 and 2016, it had send at least 200 spontaneous reports to alert foreign law enforcement authorities to the existence of assets credited to Swiss bank accounts.

112. During the on-site visit, the issue was raised of assets seized in Switzerland and the ability of the authorities to manage ever-increasing quantities of assets, often for many years.⁹¹ The Order on the Investment of Seized Assets (O-PI) adopted in 2010 establishes certain general principles which have had to be supplemented by case law. Basically, it is a matter of guaranteeing that assets seized are invested securely, do not depreciate in value and yield a profit. In 2013, the Attorney General of Switzerland issued a directive regarding the conversion of seized assets. The directive makes provision for an inventory of assets seized, to be updated each semester, and the conversion of all assets presenting a risk factor. Various FCC decisions have upheld this practice. OAG representatives interviewed during the on-site visit considered that the framework for and the management of seized assets were satisfactory. In terms of seizures ordered on the basis of foreign criminal investigations, they indicated that they review assets on an annual basis together with the foreign authorities in order to guarantee proper legal protection of the owners of the assets. The authorities dismissed the criticisms of some commentators who consider that the practice of seizing assets (especially in view of the length of investigations) offers inadequate protection for the rights of asset holders and who, in more general terms, regret the lack of transparency of the authorities in this area, especially in relation to the actual number of seizures made and the value of subsequent confiscations.⁹² There is a lack of any systematic data in this respect, especially at cantonal level, which fuels the reservations expressed.⁹³ One of the representatives of the cantonal authorities present during the on-site visit drew attention to the human resource challenges of managing asset seizures (especially those ordered on the basis of foreign criminal proceedings), since those seizures come under the individual responsibility of prosecutors.

⁹¹ In this connection, the 2012 Annual Report of the Management Committees and the Delegation of Management Committees of the Federal Chambers noted that “*the Federal Criminal Court has also had difficulties regarding the confiscation of very large quantities of assets. It is not in fact equipped to manage complicated financial products*”.

⁹² “[Concerns about funds frozen in Switzerland](#)”, 22 November 2016. See also “*Freezing of bank assets in criminal proceedings: the bank’s position*” by Carlo Lombardini, Advocate at the Geneva Bar.

⁹³ The OAG’s practice of publishing information on assets seized or confiscated, basically in connection with high-profile cases.

Commentary

The examiners recommend that the Swiss authorities pursue their efforts to ensure the publication and transparency of confiscation measures, especially in foreign bribery cases, at both federal and cantonal level. Publication in this field by all authorities should contribute to the transparency that the examiners earnestly seek. The examiners also recommend that cantonal authorities are provided with sufficient resources to enable them effectively to handle seizures in practice, including in foreign bribery cases.

International sharing and recovery of illicit assets: a proactive, good practice approach

113. *Sharing of confiscated assets.* In addition to confiscations ordered on the basis of domestic law, Switzerland supports the enforcement of seizures and confiscations ordered on the basis of foreign criminal investigations. During the on-site visit, the authorities confirmed that they had, for several years, been working on a proactive policy of returning confiscated assets. If such assets are confiscated pursuant to a foreign confiscation order, they are forwarded to the requesting State to be consigned to the beneficial owner. In bribery offences, the State concerned may be that beneficial owner. The system of sharing confiscated assets is laid down in the Federal Law of 19 March 2004 on the Sharing of Confiscated Assets (LVPC).

114. The LVPC makes a distinction between active and passive international sharing. In active international sharing, the Swiss authorities confiscate, as part of a domestic procedure, assets which have been obtained illegally under Swiss law. Subsequently they offer a share to the foreign State which helped in the criminal investigation by providing MLA. In passive international sharing, a foreign authority leads the criminal investigation and confiscates assets obtained illegally under its legal system, with the difference that the assets in question are in Switzerland. On the basis of a formal request for MLA, the Swiss authorities forward the necessary evidence or send the assets held in Switzerland. In return, the foreign State sends Switzerland, as part of the sharing operation, a proportion of the confiscated assets. In 2016, the Federal Office of Justice undertook a total of 16 active and passive sharing operations with 8 foreign States. The majority of cases concerned Germany (4) and the United States (3), in addition to Italy, the Netherlands and Spain (2 each). The largest sum of money was shared with the United States (a total of almost CHF 55 million (approx EUR 47 million), of which about 26 million (EUR 22 million) came to Switzerland). In 2016, Switzerland obtained almost CHF 37 million (approx EUR 31.7 million) out of some CHF 70 million (EUR 60 million) of shared assets. In the context of the *Petrobras* complex, the OAG, together with its Brazilian counterparts, was able to repatriate the funds resulting from bribery in a coordinated manner and before the conclusion of proceedings. Pursuant to that good practice, more than CHF 220 million (EUR 190 million) has already been returned to Brazil.

115. *Asset Recovery.* During the on-site visit, the authorities drew attention to Switzerland's proactive policy in terms of recovering illicit assets from politically exposed persons abroad. In order to have a national coordination body and an interface with the foreign governments concerned, the "*Asset Recovery Task Force*" was set up in 2011 as a new organisational structure. This made it possible within the Federal Department of Foreign Affairs (FDFA) to assemble the necessary resources for more effective handling of the assets of high-ranking individuals. The authorities indicated that, over the past 30 years, Switzerland had been able in this way to return nearly CHF 2 billion (EUR 1.7 billion) to the States of origin. However, none of these restitution procedures has been conducted in connection with a foreign bribery case.

Information on concluded cases: encouraging wider dissemination

116. The examiners regret that Switzerland's efforts in terms of transparency and publication of judicial decisions does not measure up to the Working Group's expectations in Phase 3. The amount of information made public in relation to foreign bribery convictions differs from case to case and according to the court or Office of the Attorney General in charge. Summary punishment orders are issued without public debate, are notified in writing and are only accessible to "interested persons" (Article 69(2) CPC) or, according to FCC case law, which also apply to orders to close proceedings, to interested persons, where "the requesting party proves an interest in the information which is worthy of protection and no overriding public or private interest precludes the consultation requested". If this is the case, the orders can be consulted viewed on-site and by request (including the complete order for 30 days after it is adopted). Several foreign bribery cases (*Alstom*, *Odebrecht-CNO*, *Gas Pipeline* and *Oil Company Cases*), were also the subject of a press release however did not contain any information concerning the reasons for the choice of procedure, the collection of evidence, or the principles underlying calculation of the fines imposed). This information is not made public. However, the FCC decision upholding the use of the simplified procedure in the *Construction 1 Case* is available on the FCC's website. In the *Banknotes Case*, the company itself published the outcome of the proceedings on its website, which then drew the attention of journalists who requested a copy of the decision from the OAG. Civil society representatives interviewed during the on-site visit indicated that, despite requests to the OAG, they have never had access to summary punishment orders in foreign bribery cases (other than the *Alstom* order which was published in the press in its entirety). According to them, it is necessary to be a journalist accredited to the Supreme Court in order to be an "interested party" and to have access to judicial decisions. Moreover, if these decisions are not communicated via press release, it is hard for a journalist to know whether a case has been decided and to exercise his/her right of access.

B.6. International co-operation

117. During Phase 3, the Working Group recommended that Switzerland produce more detailed statistics on MLA requests received, sent and rejected, so as to identify precisely the proportion of those requests relating to 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 (Recommendation 5, see Annex 5). The written follow-up considered this recommendation not implemented. No recommendation has been made in terms of extradition and there have been no legislative developments in the matter. This issue has therefore not been covered in this evaluation.

118. Switzerland receives a sizeable and ever-increasing demand for MLA, mainly due to its status as a major financial market. Its contribution to MLA is therefore essential to the success of many investigations and prosecutions at international level. The examiners welcome the proactive stance of the Swiss law enforcement authorities in this area. They are particularly pleased to see recourse to spontaneous forwarding of information, "proactive" mutual assistance, joint investigation teams involving Swiss authorities and their strong input to international and regional law enforcement networks.

Mutual legal assistance

119. The legal framework governing MLA in criminal matters has not fundamentally changed since Phase 3. The Federal Law on International Mutual Assistance in Criminal Matters (IMAC), which governs MLA in the absence of a Convention, has a peculiar feature in terms of the rights of the

parties in an MLA procedure which enables beneficiaries to take part in the proceedings and have access to the files provided this is necessary to safeguard their interests (Article 80(b) IMAC) and offers them a right of appeal against the ruling of the executing authority (Article 80(e) IMAC). These provisions may affect the confidentiality and rapidity of investigations, as pointed out by the OAG⁹⁴ and reiterated by the Working Group in its Phase 2 and 3 reports and highlighted in other reviews of the Swiss mutual legal assistance framework.⁹⁵

120. In line with Phase 4 procedures, Working Group member countries were invited to share their experiences in international co-operation with the Swiss authorities and to indicate the main challenges encountered. According to the responses received from eleven countries, the Swiss authorities respond proactively and efficiently to requests for MLA and provide satisfactory access to financial information. Feedback from delegations tends to support the limitations of the framework, as described above. According to those member countries which shared their experiences, the confidentiality and rapidity of procedures are substantially affected by the participation in those procedures of beneficiaries and by their rights of appeal under the IMAC. These problems still appear to be present, despite the effort on the part of the Swiss authorities in Phase 3 to rationalise appeal procedures, and they appear to be only partly offset by “proactive” mutual assistance (see above).

121. These observations should be seen in the context of a draft amendment of the IMAC, which is being debated and is due to be approved by the Swiss Government and the Parliament in 2018. As currently drafted, the bill enables the federal or cantonal authority with jurisdiction to adopt any MLA measures necessary for the foreign procedure and swiftly to forward information or evidence, spontaneously or on request, before a decision is made to close the proceedings. According to the Swiss authorities, this change should lead to improved co-operation without affecting the rights of the parties to the proceedings. Moreover, the bill provides for access to information for beneficiaries at a later stage in the proceedings.

Mutual legal assistance: a better organised procedural framework at central government and OAG level

122. Depending on their subject matter, mutual assistance requests are actioned by the FOJ (fewer than 5%) and the cantonal authorities and the OAG (over 95%). The International Mutual Assistance in Criminal Matters Division of the FOJ is the central authority in charge of MLA in Switzerland. On receipt of requests, it examines their admissibility, forwards them to the competent canton and contacts the requesting State where information is lacking or incomplete. The introduction on 1 November 2016 of a digital management system operated by the FOJ (TROVA data processing system) is welcomed as a tool for improved handling of the many MLA requests sent and received by the FOJ. This system makes it possible to receive and process electronically sensitive data concerning individuals, files or cases and to produce statistics. It is also designed to allow case files to be monitored more effectively, including the state of progress of the relevant procedures. Finally, it allows requests to be identified by category of offence, thereby allowing those concerning foreign bribery to be identified and quantified. In the field of foreign bribery, the OAG handles nearly all requests. As already mentioned, the OAG has had a specialised operational unit to handle requests for

⁹⁴ [OAG Management Report 2016](#): “*Recourse to legal remedies in this type of case (despite the near-universal rejection of those remedies) entails a wait of many months before evidence can be sent abroad.*”

⁹⁵ They were also raised in connection with other reviews of the Swiss mutual legal assistance mechanism, Financial Action Task Force Report 2016.

passive MLA in criminal matters in cases falling under federal jurisdiction, which should improve its ability to provide MLA promptly and effectively. Interviews with the cantonal authorities present at the time of the on-site visit revealed difficulties in terms of human resources and funding, especially for dealing with economic crime cases. This is likely to affect the ability of cantonal Offices of the Attorneys General to respond to MLA requests, including in foreign bribery cases which some cantons are still prosecuting.

Spontaneous forwarding, proactive mutual legal assistance, co-ordination with foreign authorities and international networks: strengths

123. Under Swiss law, criminal prosecution authorities are authorised to forward spontaneously to a foreign authority the evidence collected during the course of their investigation, where they consider that such information is likely to permit the bringing of a criminal prosecution or could assist the progress of ongoing proceedings (Article 67(a) IMAC). The foreign authority cannot use the information in its investigation, in particular to support the charges, unless it makes a formal *a posteriori* request for MLA. The FOJ recorded seven instances of spontaneous forwarding of information or evidence in 2015 and 2016 in connection with foreign bribery. For its part, the OAG indicated that it had forwarded information spontaneously at least 200 times between 2014 and 2016, mostly in connection with money laundering and foreign bribery offences. The Working Group congratulates Switzerland on this good practice, which is an effective co-operation tool leading to formal requests for MLA from foreign authorities and to the opening of investigations abroad.

124. Furthermore, “proactive” MLA, which allows law enforcement authorities to forward information and evidence before the decision is notified to the person concerned, and the use of joint investigation teams promote co-operation and the confidential forwarding of information. There is currently no provision for these good practices under Swiss law; they are based on various international agreements to which Switzerland is party⁹⁶ and on decisions of the FCC.⁹⁷ Case law developments in this respect are positive from the point of view of facilitating international co-operation. However, an amendment to the IMAC is needed in order to provide a legal basis for these practices and guarantee their continued use.

125. The Working Group welcomes the effective co-operation of the OAG with its foreign counterparts in several foreign bribery cases. This was emphasised by several members of the Working Group who shared their experiences of international co-operation with the Swiss authorities. This co-operation was particularly evident in the *Odebrecht-CNO Case*. The Swiss and Brazilian authorities also worked together closely in several of the *Petrobras cases*.

126. It is also worth stressing the heavy involvement of Switzerland in international and regional law enforcement networks. Switzerland posted a liaison prosecutor to Eurojust at the beginning of 2015 and a deputy liaison prosecutor at the end of 2017. It takes part in the European Judicial Network (EJN) and the Asset Recovery Offices (ARO) Group chaired by the European Commission. It is on

⁹⁶ Including the Second Additional Protocol to the European Convention on mutual assistance in criminal matters of 8 November 2001 (Article 20) and the Arrangement between the Federal Department of Justice and Police of the Swiss Confederation and the Department of Justice of the United States of America, acting for the competent law enforcement authorities of the Swiss Confederation and of the United States of America on the creation of joint investigation teams concerning the fight against terrorism and the financing of terrorism.

⁹⁷ Judgment of the Federal Criminal Court RR.2008.277 – RP.2008.52 of 1 March 2010 and TPF 2010 73.

the European Committee on Crime Problems (CDPC) and the Committee of Experts on the operation of European conventions on co-operation in criminal matters (PC-OC) of the Council of Europe. It participates in the Open-ended Intergovernmental Asset Recovery Working Group of the Conference of States Parties to the UN Convention against Corruption. OAG prosecutors are active in several international networks of prosecutors such as the Global Network of Law Enforcement Practitioners against Transnational Bribery and attend OECD meetings of Law Enforcement Officials, and they have developed many contacts through these channels. During the on-site visit, several panellists mentioned that these networks are often used by Swiss prosecutors to make direct contact with their foreign counterparts and to facilitate MLA mechanisms.⁹⁸

Requests for mutual legal assistance: inventory

127. First, it should be noted that the data forwarded by the Swiss authorities relates to requests processed by the FOJ, the Federal OAG and the Geneva Office of the Attorney General. Data relating to MLA requests processed by the cantons (some of which handle foreign bribery cases) was not communicated. It is worth noting that data relating to requests handled by the FOJ concerns only cases involving facts relating to bribery of foreign public officials. Data for the OAG and the Geneva Office of the Attorney General includes foreign bribery cases and money laundering cases with foreign bribery as the predicate offence in addition to domestic bribery committed abroad, with the result that it is not possible to determine how many of those requests relate solely to foreign bribery.

1. Passive requests

128. In 2016, the FOJ received 2 559 MLA requests for all offences, a number which has been increasing steadily since Phase 3.⁹⁹ A total of 28 requests in 2015 and 2016 concerned bribery of a foreign public official and were forwarded to the OAG for processing. The average response time for these MLA requests was 17 months in 2015 and 3.3 months in 2016. According to the authorities, these times vary depending on the complexity of requests. Response times have been properly recorded since the introduction of the digital management system for MLA requests, in line with Recommendation 5 in Phase 3. The figures for MLA requests processed by the OAG are set out below:¹⁰⁰

	2012	2013	2014	2015	2016
MLA granted	74	85	94	72	119
Referral to FOJ for delegation to cantons	2	20	3	19	27

129. Between January 2011 and December 2016, the Geneva Office of the Attorney General indicates having received 19 MLA requests concerning the offence of foreign bribery and money laundering with predicate offences of foreign and domestic bribery abroad. Those requests mainly sought

⁹⁸ In terms of police co-operation, it is worth noting the role of the *Directorate for International Police Co-operation* of Fedpol. Four Fedpol attachés are in The Hague and provide ongoing relations between Switzerland and Europol, facilitating information exchange. Fedpol is the Single Point of Contact for all police communications in judicial matters issued by Interpol, Europol and Schengen.

⁹⁹ [Activity Report 2016, International mutual legal assistance of the Federal Department of Justice FOJ](#).

¹⁰⁰ See OAG Management Reports [2012](#), [2014](#) and [2016](#).

banking information, asset seizures and interviews with financial intermediaries. The OAG noted that execution of MLA requests takes between six months and two years. The duration depends on several criteria, such as requests for supplementary information, the breadth of the investigation and objections filed by persons affected by the MLA procedure. According to the OAG, the fact that a case relates to foreign bribery does not affect the timeframe for execution.

130. During the on-site visit, the Swiss authorities clarified that only a very small number of MLA requests relating to foreign bribery had been rejected since Phase 3. In Switzerland, rejections of MLA requests are usually linked to a lack of dual incrimination¹⁰¹ or the weakness of the link between the facts prosecuted abroad and the measures requested in Switzerland. Where a request which fails to fulfil the conditions for the grant of assistance reaches the Swiss authorities, the requesting authority is invited to provide supplementary information. However, it can happen that the additional details do not always fulfil the minimum conditions for granting assistance and are not processed, meaning that the Swiss authorities cannot grant assistance. It is regrettable that the FOJ does not record refusals to grant assistance. The OAG, for its part, indicated that it had not refused any foreign bribery-related MLA request.

2. Active requests

131. In 2016, the FOJ sent out 1 022 MLA requests abroad for all fields. A total of nine outgoing requests concerning bribery of a foreign public official were recorded in 2015 and 2016. The OAG reports having made an average of 200 requests per year to foreign authorities since Phase 3, over half of which concerned proceedings for foreign bribery or laundering of the proceeds of bribery. According to the OAG, co-operation in general is effective with the exception of certain countries not party to the Convention who are still uncooperative. Between January 2011 and December 2016, the Geneva Office of the Attorney General sent 40 requests abroad for legal assistance concerning the offence of foreign bribery and money laundering based on predicate offences of foreign or domestic bribery committed abroad. Those requests mainly sought banking information and hearings of accused persons and witnesses domiciled abroad.

132. If there is no response to a request for MLA, practice requires Swiss prosecutors to communicate with the foreign authority to obtain clarification. Where necessary, additional information is supplied to the foreign authority in order to facilitate processing of the request. The Swiss authorities indicated that it is not unusual for investigations to be discontinued for lack of response. However, no information is available concerning the number of such instances.

Commentary

The examiners welcome the practice of proactive MLA and recommend that, in order to consolidate this practice into law, the Swiss authorities adopt the reform of the IMAC that is underway urgently to formalise proactive MLA. Furthermore, they recommend that Switzerland review in that context the conditions governing access to the MLA request and conditions governing appeals by interested persons, in order to create the conditions for more timely and effective MLA.

¹⁰¹ In Switzerland, the matter of double incrimination is examined only if enforcement of the foreign request involves the use of duress. The classification of the offence under the law of the requesting State is not a determining factor.

The examiners recommend (i) that the FOJ collect statistics on rejected mutual legal assistance requests concerning bribery of a public official, and (ii) that the OAG collect statistics on mutual legal assistance requests concerning bribery of a foreign public official that it has received, processed or rejected and (iii) to Switzerland to invite the cantons to provide the Central Authority with the same information.

C. THE LIABILITY OF LEGAL PERSONS

C.1. The liability of legal persons

133. Swiss law governing the criminal liability of legal persons has not changed since the Phase 3 evaluation. The Swiss Criminal Code lays down a system of enterprise liability at two levels: Article 102(2) CC governs the primary liability of legal persons for the bribery of foreign public officials and money laundering. For most other offences including accounting offences, the liability of legal persons is subsidiary to that of natural persons (Article 102(1) CC). To date and since the entry into force of Article 102 CC in 2003, no Swiss court has convicted a legal person of foreign bribery. As pointed out earlier, the only court decision that interprets the provisions of Article 102(2) SSC is what is known as the “*Swiss Post*” case. When required to enforce liability of legal persons, the OAG has issued only summary punishment orders (combined in one case with a simplified procedure). The cases are as follows:

Enforcement of the liability of legal persons for foreign bribery in Switzerland since the entry into force of the Convention¹⁰²

Date of decision	Case	Nationality of company (and sector of activity)	Criminal provisions
22.11.2011 (date of facts: 2004, 2006-)	<i>Alstom Network Schweiz</i>	Swiss subsidiary of a French company (transport and electric turbines) ¹⁰³	Summary punishment order (Article 102(2); Article 322 ^{septies})
31.05.2016 (date of facts: 2007)	<i>Fertiliser Case</i>	Swiss subsidiary of a Swiss company (chemicals)	Summary punishment order (Article 102(2) CC; Article 322 ^{septies})
21.12.2016 (date of facts : May 2005-early 2015)	Construtora Norberto Odebrecht (CNO) SA	Brazilian subsidiary of a Brazilian company (construction and engineering)	Summary punishment order (Article 102(2); Articles 305a and 322 ^{septies}) Summary punishment order (Article 305a)
	Odebrecht	Brazilian company (construction, petrochemicals, defence and technology)	
23.03.2017 (self-reporting 19.11.2015; date of facts: 2005-2014)	<i>Banknotes case</i>	Swiss subsidiary of a German company (manufacture of machines for printing banknotes)	Summary punishment order and simplified procedure (Articles 102(2) and 322 ^{septies})
01.05.2017 (date of facts: 2006-2011)	<i>Port Infrastructure Case</i>	Belgian company (port infrastructure)	Summary punishment order (Articles 102(2) and 322 ^{septies})

134. It should be noted that, in September 2015, the OAG set up a working group tasked with handling issues of corporate criminal liability (Article 102 CC). This group (“AG 102”) is made up of

¹⁰² Pursuant to Article 3 CC, the Swiss Criminal Code applies to any person who commits a felony or a misdemeanour in Switzerland. The place where it is committed is a very broad notion under Swiss law and Article 8 CC defines it as follows: (1) A felony or misdemeanour is considered to be committed at the place where the person concerned commits it or unlawfully omits to act, and at the place where the offence has taken effect; (2) An attempted offence is considered to be committed at the place where the person concerned attempted it, and at the place where s/he intended the offence to take effect.

¹⁰³ In this case, the investigation into the parent company, Alstom SA, was closed in exchange for a reparation payment (Article 53 CC).

the head of the economic crime division, the head of the forensic financial analysis division, prosecutors specialising in the field of foreign bribery, money laundering and general economic crime, together with other prosecutors and financial experts specialising in the fields of MLA or financial expertise. The working group is responsible for analysing all cases involving a legal person, with the aim of reaching uniformity of legal interpretation both at the stage when criminal proceedings are opened, throughout and until the conclusion of the proceedings. It draws up search warrants specific to the company's area of responsibility, with a view, in particular, to collecting documents specific to the organisation of the company and to the measures it has taken to prevent it from being used to commit an offence.

General conditions governing corporate liability

1. An offence committed in the exercise of commercial activities in accordance with the company's objectives

135. A company can be prosecuted for an offence or a misdemeanour only if it was "committed in a company in the exercise of commercial activities in line with its objectives". The purpose of these cumulative objective conditions, applicable both to subsidiary liability and to primary liability, is to ensure that the company cannot simply be charged with an act of criminal wrong-doing of any kind whatsoever. Furthermore, the offence in question must have been "committed in the exercise of commercial activities", i.e. in connection with the sale of goods or the provision of services for the purpose of profit. In addition, it must have been committed in the exercise of "activities in accordance with the company's objectives". The scope of "activities in accordance with the company's objectives" remains unclear. For example, offences committed to further the objectives of a simple minority of members of a legal organ of a company could exclude that company from liability, if such objectives were determined not to be in accordance with those of the company. The Swiss authorities do not share this analysis and consider that "activities in accordance with the company's objectives" means activities in accordance with its usual field of activity under Swiss law. In the *Construction 1 Case*, acts of foreign bribery were attributed to a member of the management (described by the FCC as a "senior executive") of the SNC-Lavalin company, which itself was found to be the "victim" of other acts of which the senior executive was accused, and, on these grounds, the company was awarded damages that were transferred to the Swiss Confederation. It was found that the senior executive had committed disloyal acts which had led to financial harm for the company. In its ruling, the FCC underlined that the commissions the suppliers had paid to the accused "were paid in violation of company rules and had not been authorised by the management". The court acknowledged that, in particular, it was "not clear to what extent [the company] was aware of the fact that the payments it was making in fact benefited, at least in part, the defendant". At no point in this decision were questions raised about the compliance measures in place in the company at the time to prevent this kind of offence, which involved conduct over a very long period of time (between 2001 and 2011). The OAG has indicated that it has dropped its prosecution of the company in question because of a parallel procedure in Canada, where proceedings against that company will begin in September 2018. It will be prosecuted for acts of foreign bribery in Libya, the senior executive convicted in Switzerland is cooperating in these proceedings.¹⁰⁴ Furthermore, the World Bank has taken measures to cancel the company's tenders for the longest exclusion period the Bank has ever set (see below).

¹⁰⁴ [SNC's fraud, corruption hearing set for 2018](#), 26 February 2016; the former manager of SNC-Lavalin Riadh Ben Aïssa was declared guilty of corruption, 1 October 2014.

2. An offence committed “in a company”: the case of intermediaries and subsidiaries

136. In order to establish the criminal liability of a legal person, Article 102 CC also requires the existence of a hierarchical or organisational link between the person who committed the offence and the company. This link must be sufficiently close for the act to be regarded as having been committed “in a company”, which applies if the perpetrator is an organ – *de jure* or *de facto* – a company director or manager, or simply an employee with no particular powers within the company. The 2009 Recommendation provides that “Member countries must ensure that pursuant to Article 1 [of the Convention], and the principle of functional equivalence in Commentary 2 [of the Convention], 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.”

137. A review of foreign bribery cases in which legal persons were convicted clarifies the status of natural persons who invoked liability: a manager for “compliance” (Alstom Network Schweiz AG); the chair of the parent company (for complicity) and the director of the subsidiary (*Fertiliser Case*); a legal adviser and a chief financial officer (CFO) (*Port Infrastructure Case*). The role of intermediaries recognised, in particular, in the *Odebrecht-CNO Case*. In that case, the OAG noted that the company had used intermediaries and a “sophisticated system of companies”, including domiciliary companies, to give bribes. So the liability of legal persons for acts committed by intermediaries does not seem to present any special difficulties.

138. Although acts committed by subsidiaries can be regarded as acts “committed in a company”, the OAG does not seem to have interpreted them as such in its orders. The Swiss Phase 3 report already noted that, in the *Alstom case*, the investigation into the parent company, Alstom SA, was concluded in return for a reparation payment, even though its Swiss subsidiary (Alstom Network Schweiz) had been convicted of foreign bribery and proof existed that this bribery had profited the parent company and involved several companies in the group. Since Phase 3, two Swiss subsidiaries of multinationals (*Fertiliser* and *Banknotes Cases*) have been convicted of foreign bribery without their parent companies being prosecuted. Regarding the CNO sanction, the parent company (Odebrecht SA) was found guilty of violating Article 102(2) CC and sentenced to a fine of CHF 0 and to payment, together with its subsidiary, of an equivalent claim of CHF 117 million (approximately EUR 100.3 million). In the *Gas Pipeline Case*, the investigation of the subsidiary was closed in exchange for a reparation payment (Article 53 CC), but the parent company was not implicated on account, according to the OAG, of the penalties imposed in connection with other convictions by multiple foreign law enforcement authorities. There is no evidence, however, that such penalties were imposed for the same acts of corruption of foreign public officials.

139. The available foreign bribery case law raises concerns about the OAG’s policy of prosecuting parent companies. The *Fertiliser Case* is symptomatic here. The OAG notes the following facts in its summary punishment order: (i) the subsidiary was headquartered in the same location as its parent company; (ii) the subsidiary’s internal structure and functions (e.g. book-keeping and accounts) were outsourced to the parent company; and (iii) the five employees of the subsidiary had an employment contract with the parent company (each time, the subsidiary re-invoiced the parent company for the corresponding personnel expenses). Despite these factors demonstrating very close relations between the two companies, including in legal terms, the OAG decided (after two searches of the parent company’s premises) not to prosecute the Swiss parent company. The OAG also found that the subsidiary company (and its five employees) had not taken necessary and reasonable measures to prevent possible bribery of foreign public officials, for example by creating an internal compliance position and setting up a specific training programme, which would seem more appropriate for a company the size of the parent company. This decision is all the more worrying because in this same

case the OAG convicted the chair of the company's board of directors for complicity in foreign bribery while omitting the liability of the said company. According to the OAG representatives met during the on-site visit, the fact that, in this case, the bribery was committed in the form of a single isolated act and the companies in question were engaged in activities that were "completely independent and autonomous" contributed to the decision not to prosecute the parent company. Furthermore, in the *Banknotes Case*, the subsidiary self-reported, and, once again, the OAG did not look into the possible liability of the parent company. These cases raise questions about Switzerland's compliance with the 2009 Recommendation (Annex I C).

Specific conditions relating to the primary liability of companies

140. Pursuant to Article 102 CC, criminal liability depends on the commission of a prior offence within the company. The main difference between subsidiary and primary of companies resides in the independence of liability: under Article 102(2) CC, the company will be liable for offences committed "irrespective of the criminal liability of any natural persons". This implies that the existence of factors allowing for the exclusion of individual liability (incapacity ("*irresponsabilité*"), death or closure of the case) does not prevent a company from being prosecuted. Moreover, a company can only be held liable for foreign bribery under Article 102(2) CC if it "can be held to have failed to take all reasonable and necessary organisational measures to prevent such an offence". Therefore, to be able to establish liability of the company, it must be established that it could have prevented the offence from being committed by adopting the organisational measures that could reasonably be expected of it.

141. Annex I.B of the 2009 Recommendation requires Parties to the Convention not to restrict liability to cases where the natural person or persons who perpetrated the offence are prosecuted or convicted. In Switzerland, corporate liability can only be invoked when it is proven that a natural person has committed all the constituent (objective and subjective) elements of the offence. The FC set this out clearly in its "Swiss Post" judgment¹⁰⁵ of 11 October 2016 (see above). This decision nullified the only first instance conviction of a company — Swiss Post — for defective organisation within the meaning of Article 102(2) CC, with money laundering as the underlying act. The analysis of cases dealt with by the OAG takes account of this judgment's two-step reasoning in regard to the implementation of Article 102(2) CC: after first proving that an offence of foreign bribery has been committed as an objective condition of criminal liability, it then seeks, in a second step, to prove the defective organisation of the incriminated company.

1. Proving the offence of foreign bribery under Article 102(2) CC

142. A literal reading of Article 102(2) CC suggests a company can be held criminally liable regardless of the criminal liability of natural persons. Yet the Swiss Post decision of 11 October 2016 puts that analysis into perspective. Indeed, the FC (supreme judicial authority of the Swiss Confederation) emphasises that proof of the underlying offence in question is not sufficient: it is still necessary to demonstrate (i) defective organisation on the part of the company and (ii) existence of a causal link between the defective organisation and the underlying offence. In requiring this causal link, the FC is subordinating the implementation of the company's criminal liability to the commission of an offence by a natural person within it.¹⁰⁶ This proves particularly problematic in cases of foreign

¹⁰⁵ [ATF 6B 124/2016](#) (in German).

¹⁰⁶ The "Swiss Post" matter concerned a case of money laundering involving a sum of CHF 4.6 million (approximately EUR 3.9 million), which had been paid out in cash at a post office counter in February 2005.

bribery where it is difficult to identify a natural person who could effectively be shown to have committed the offence intentionally, in particular because of the way the decision-making process is divided up within the company and the difficulty of attributing decisions within hierarchical structures that are often complex and decentralised. Moreover, the authorities point out that if investigations are opened against natural persons and the proceedings against them are dropped or these persons are acquitted and other perpetrators are not in consideration, there is no objective condition for culpability and the liability of the legal person becomes null and void. While the OAG has indicated that it wants to institute criminal proceedings against companies more systematically and is showing that it is implementing Article 102 CC more consistently, its approach could conflict with the FC's case law and its more restrictive approach.¹⁰⁷ The OAG representatives recognised this problematic situation during the on-site visit, pointing out that they had reacted and that this had given rise to case law ensuring that priority could be given to prosecuting a company before convicting a natural person.

143. At the time this report was finalised, the examiners reviewed a decision of the FCC dated 22 January 2018 in the *Banknotes Case*. In this judgement, the court determines (and invalidates) the request to link the procedures against the two individuals implicated in the case with the procedure already concluded against the company (convicted by summary punishment order on 23 March 2017). In this decision, the court comes back to the conditions for applying art. 102 CC. It clarifies that “*the criminal liability of a company and that of the perpetrators of the underlying offence are independent of each other. It has certainly been established that the underlying offence constitutes a condition for the liability of the company pursuant to art. 102 CC. However, the company's liability under art. 102 CC is primary and cumulative with respect to the liability of individuals. It follows that the individuals and the company can each be held guilty or not guilty depending on their primary criminal liability. The summary punishment order in question does not, as such, mention the criminal liability of a specific individual and does not implicitly incriminate a specific individual*” and that “*it is not, for that matter, necessary that the perpetrator be identified or sanctioned.*” This decision appears to allow law enforcement authorities to convict companies under art. 102 CC without convictions for the individual perpetrators of the underlying offence, contrary to the Swiss Post decision. This decision has been appealed to the FC.

The funds, sourced from abroad, were of criminal origin. The criminal investigation initiated in August 2007 by the Solothurn Office of the Attorney General on suspicion of money laundering was directed not only at Swiss Post but also at two employees of the cashier service and the front desk, involved respectively in the preparation and paying out of the CHF 4.6 million (approximately EUR 3.9 million). No proceedings were opened against the compliance department employee who had validated the cash withdrawal. The proceedings against the two employees were dropped in July 2008 for lack of any subjective element of the offence of money laundering on the grounds that the two employees had not acted with intent. Even though no natural person within the company fulfilled the constituent subjective element of money laundering, Swiss Post was convicted of money laundering and sentenced in 2011. On appeal, it was acquitted, and the acquittal was confirmed by the FC. In the view of the FC, given the absence of intentional conduct by a natural person, and therefore of the existence of an underlying offence, Swiss Post could not be held liable on a causal basis, which also made it unnecessary to check the existence of defective organisation within the company.

¹⁰⁷ Legal opinion is of the same view. See, in particular, “[La responsabilité pénale de l'entreprise après l'arrêt La Poste Suisse](#)” [The criminal liability of companies following the Swiss Post ruling], which states that “the Swiss Post ruling certainly constitutes a criticism of the criminal prosecution authorities; that cannot fail to be a considerable obstacle to the recently renewed and declared intention to directly prosecute companies under the terms of Article 102 CC.” It is worth noting that, since that ruling, an FCC case law on the joinder of procedures has intervened to clarify that it is not obligatory for proceedings against legal and natural persons to be consolidated.

144. In the great majority of cases of foreign bribery on which the OAG has ruled to date, natural persons were prosecuted in parallel with legal persons. In the *Port Infrastructure* and the *Fertiliser Cases*, the managers of each Swiss subsidiary were convicted of foreign bribery in parallel with the companies. Proceedings against natural persons implicated in the *Odebrecht-CNO* and *Banknotes Cases* were still ongoing at the time of drafting this report.¹⁰⁸

2. Proving deficiencies in organisational measures with a view to preventing the payment of bribes to foreign public officials

145. According to the OAG prosecutors encountered during the on-site visit, proof of defective organisation remains a major challenge to implementing Article 102 SSC. In the *Fertiliser Case*, the OAG cited the necessary and reasonable internal measures to prevent the possible bribery of foreign public officials that were lacking in the company: “management regulations, internal instructions, directives, codes of conduct, creation of an internal compliance post and establishment of a specific training programme.” In the *Port Infrastructure Case*, the OAG found that at the time of the conduct, neither the parent company nor the subsidiary had a compliance service, internal directives, code of conduct, training programme or awareness-raising of corruption risks and that there were inadequate internal controls. In the *Banknotes Case*, the OAG summarised the strategy for the recruitment and monitoring of officials, including the provisions of the “Agency Agreements” and the system of commission payments. It found that “despite the directives and efforts the [company’s] compliance did not come up to the standard existing at the corresponding period”. The OAG did not, however, indicate the standard existing at the corresponding period (2005-2014). Although these decisions cast some light on the elements the OAG took into account during its evaluation of “necessary and reasonable measures” they do not yet show a clearly defined or consistent approach on the part of the OAG on this subject (see above regarding training within the OAG). The lack of clarity as to what constitutes defective organisation, exacerbated by the fact that the decisions in question were not made public, makes it difficult for the private sector to take preventive measures, such as systems of internal controls, codes of conduct and compliance.

Liability of successor companies and companies in liquidation

146. The FCC pronounced on the question of prosecuting bankrupt companies in its ruling of 16 December 2016 in relation to a case of money laundering by a Swiss bank.¹⁰⁹ The bank called into question the proceedings brought against it by the OAG by arguing that FINMA had declared it bankrupt and that it was in liquidation. That argument did not convince the FCC which rejected the appeal, noting also that the possible precarious situation of the company in liquidation on the grounds of bankruptcy did not constitute a criterion that would lead the criminal prosecution authority to drop the proceedings. The *Fertiliser Case* shows that the acquisition of one company by another does not

¹⁰⁸ Art. 112(4) CC provides that “if a criminal investigation is open for the same facts or for connected facts between an individual and a company, the procedures can be linked.” In the FCC decision of 22 January 2018 (see above), the FCC clarifies that “according to this rule [art. 112(4) CC] the procedures can be linked if a criminal investigation is open for the same facts or for connected facts between an individual and a company. The linkage is, however, not mandatory, de-linking is a possibility if it assists with the efficiency of the procedure. It seems that when the legislator adopted art. 112(4) CC, it went from the principle that the de-linking of procedures against legal persons with those against individuals constituted the rule, including when the facts in question are the same or are linked.”

¹⁰⁹ FCC ruling of 16 December 2016 ([TPF BB-2016.359](#)), in Italian.

nullify the criminal liability of the acquired company, which remains accountable to the acquiring company: following two changes to its business name, the new company was convicted for the bribe payment by the company it had acquired. This did not escape the notice of the OAG, which listed all the successive company names in its decision. It is worth emphasising that this case shows that the proactive approach of the OAG to establishing the liability of successor companies.

Capability and training of prosecutors in regard to the liability of legal persons

147. At the time of Phase 3, the Working Group recommended that Switzerland train prosecutors on the subject of the criminal liability of legal persons and decided to follow up the implementation of this recommendation (Recommendation 1 and follow-up 13, see Annex 5). At the time of the Phase 3 written follow-up report, the OAG had not given its public prosecutors further training on the question of defective organisation and only the canton of Zug had conducted specific training courses on the subject. The Working Group considered that there was still a need to clarify this question and that the recommendation had been partially implemented. The establishment of the AG 102 Working Group shows a resolve to reach uniformity of legal interpretation within the OAG on the conditions for implementing the liability of legal persons and there is no doubt that this constitutes good practice. During the on-site visit, the prosecutors who were members of this Group emphasised its role in supporting and monitoring the prosecutors in charge of cases implicating legal persons. They considered that the very existence of the Group was evidence of conscientiousness and consistency with regard to companies. Yet not one representative of the private sector or the legal profession present during the on-site visit was aware of the Group's existence. The prosecutors have no guidelines on applying corporate liability provisions but the OAG indicates that they may refer to an abundance of legal theory and reports on concrete ongoing cases that deal with defective organisation, as well as presentations for internal use. The documents made available to the evaluation team did not deal with the question of "defective organisation" or the relevant criteria or methods relating to the rules of evidence. The examiners consider that Recommendation 1 of Phase 3 has been partially implemented.

Commentary

On the basis of Recommendation 1 of Phase 3, the examiners recommend that Switzerland clarify the concept of "defective organisation" whereby a legal person may be held liable. They recommend that the Working Group follow up on measures taken by Switzerland to ensure that the level of evidence required to establish the existence of a prior offence as postulated in Article 102(2) CC does not jeopardise the autonomy of criminal proceedings against a legal person from those against a natural person, including cases where no natural person has been prosecuted or convicted. The Working Group should follow up on the liability of parent companies in practice in cases of foreign bribery committed by subsidiaries.

C.2. Mobilising the private sector

148. Since Phase 3, the Swiss authorities have shown a real resolve to make companies more aware of the problem of the offence of the corruption of foreign public officials. Federal actors such as the OAG, the GTID, SECO¹¹⁰ and the FDFA have taken part and put in place a substantial number of

¹¹⁰ "[Prévenir la corruption – Conseils aux entreprises suisses actives à l'étranger](#)" (Preventing corruption – advice to Swiss companies active abroad) reviewed and published by SECO in 2017.

initiatives (training, conferences, presentations, round tables, brochures, articles, information online) in order to raise awareness among companies, including SMEs, of the risks of foreign bribery and encourage them to set up and develop internal measures to prevent and detect it. It should be noted that the majority of these events were conducted on the initiative of or in co-operation with civil society,¹¹¹ whose efforts to raise awareness are welcome. It should also be emphasised that despite the organisation of awareness-raising initiatives targeted specifically at SMEs, at the time of the on-site visit the authorities admitted they had found it difficult to mobilise them.

149. The discussions with large companies during the on-site visit made it clear that they regularly carry out risk analyses relating to foreign bribery and have developed and applied codes of conduct and compliance programmes. The companies the evaluation team met showed that they were aware of the risk of conviction and the fact that the judge would take account of the measures they had introduced in terms of internal controls, codes of conduct and compliance when determining the fine to be imposed in foreign bribery cases (see Section B.3.). This situation encourages companies to take measures to prevent corruption.

150. Several private-sector participants at the on-site visit said they would like the authorities to give them clearer guidelines on the criteria for evaluating the “the seriousness of the organisational inadequacies” referred to in Article 102 CC and for credit for co-operation by the company during an investigation and proceedings in general. One private-sector panel member referred to the guidance that exists abroad, for instance in the United Kingdom and the United States, and hoped for a similar initiative in Switzerland. The OAG said it was aware of this need while expressing some reticence about publishing guidance as it believed this would encourage a standardised approach that would not be suited to the individual needs of each company and risked compromising the quality of the compliance measures. However, the need for predictability expressed by the private sector is understandable. In that regard, publicity and the systematic publication of decisions in foreign bribery cases would remain the best means of providing indications as to how the law in this area is enforced (see Section B.4.). Moreover, general guidelines addressed to the private sector would be a useful means of giving a better understanding of what the Swiss authorities expected in the way of internal controls, codes of conduct and compliance measures.

151. The situation of SMEs as regards prevention remains critical. They make up more than 99% of market-sector companies in Switzerland and generate two-thirds of employment. In that respect, the fact that only two SMEs were present during the on-site visit seems to reveal their lack of involvement in the debate. The SMEs that were present pointed out that they did not feel concerned by the problem of foreign bribery, while admitting that facilitation payments were an inevitable practice for SMEs operating in some parts of the world. They emphasised the availability of the Swiss authorities but also pointed out that they did not know of the awareness-raising events relating to foreign bribery and compliance the authorities had organised for their benefit. In the view of the participants in the on-site visit, compliance constitutes a heavy administrative burden for SMEs and its usefulness remained to be proven. The private-sector representatives consulted about SMEs agreed that SMEs face specific challenges in regard to resources, which had to be taken into account if they were to be offered appropriate, practical and accessible advice.

¹¹¹ Such as Switzerland Global Enterprise, Siemens Suisse SA, Transparency International Suisse, Swiss Shippers Council, PRME Business Integrity Action Center HTW Coire, Global Compact Network Switzerland, the Centre de compétence en droit des transports et de la logistique (KOLT) of the University of Lucerne, the Association Suisse de Normalisation, the University of Basel.

Commentary

The lead examiners welcome the initiatives taken by the Swiss authorities to raise awareness among companies of the issue of bribery of foreign public officials and its prevention. The examiners recommend, however, that the Swiss authorities intensify their efforts to raise awareness among SMEs, namely to encourage them to take internal measures to prevent and detect foreign bribery.

D. MISCELLANEOUS ISSUES

D.1. Accounting standards

152. Two of the recommendations on accounting standards made by the Working Group in Phase 3 had been partially implemented at the time of the written follow-up (Recommendations 7(a) and 7(b)). They are reviewed in this report. In Switzerland, the legal framework for accounting and audit is set out in the Code of Obligations (CO). At the time of the Phase 3 evaluation, the federal authorities were working on a reform of accounting law that would introduce uniform accounting rules for all companies constituted under private law. The Working Group recommended that Switzerland incorporate the requirements of the 2009 Recommendation into these reforms. The amendments to the CO entered into force on 1 January 2013. The Federal Audit Oversight Authority (FAOA) has responsibility for the licensing and scrutiny of individuals and firms that provide audit services.

Rules on disclosure by internal auditors are still inadequate

153. In Phase 3, the Working Group asked that Switzerland continue its efforts, namely in the context of the accounting law reform under way at the time, to encourage disclosure by accountants and auditors, in order to improve the prevention and detection of bribery of foreign public officials (Recommendation 7(a)). Listed companies, large companies and companies required to produce consolidated statements must submit their annual accounts for ordinary audit by an independent auditor (Article 727 CO). If the auditor identifies serious breaches of the law or other regulations during his audit, he must not only inform the senior management or administrative organ of the company but also its highest decision-making body (in the case of a limited company, this is the general meeting of shareholders, Article 728c CO). The annual accounts of small businesses are subject to limited audit. Although not expressly required by the letter of the law (Article 729c CO), the auditor must also, in accordance with prevailing theory and practice, disclose substantial infringements of the law affecting the annual accounts, in the report to the supreme organ of the company (Article 729b CO). As already pointed out by the Working Group, it is not yet proven that suspected foreign bribery constitutes a “substantial infringement of the law”. According to the authorities, this point has not as yet been challenged in Switzerland. Nevertheless, and contrary to the 2009 Recommendation (X.B.iii), it is not established that external auditors who discover indications of possible acts of bribery are obliged to report these to management and, where appropriate, to the company’s oversight bodies. The proposed reform of the law governing limited companies, under discussion when this report was being drafted, does not envisage further changes aimed at clarifying this point or widening the scope of the reporting requirement for auditors. Auditors interviewed during the on-site visit were not aware of any suspicions of bribery being reported by auditors of companies audited in Switzerland, although this is known to have happened in the *Oil Company Case*.

Still no plans for auditors to report suspicions of bribery to law enforcement authorities

154. In Switzerland, reporting by external auditors is limited by the “duty of discretion” (Article 730b CO) and criminal liability (up to 3 years’ imprisonment) for violation of professional confidentiality (Article 321 CC). Article 321(2) CC provides for an exception to the offence of violation of professional confidentiality if there is written authorisation from the higher authority or oversight body. In addition, the duty of discretion does not apply to the FAOA. The Working Group recommended that Switzerland consider requiring external auditors to report suspected acts of foreign bribery to the competent authorities (Recommendation 7(b)). The follow-up report described the

position of Switzerland: there were no plans to revise Article 730b CO, since the text of the law and criminal penalties associated with it left no room for exemptions over and above those provided for in Article 730b(2) CO and Article 321(2) CC and art. 15a(2) of the Law on Audit Oversight. The Working Group considered that Recommendation 7(b) had been partially implemented. In the Questionnaire, the authorities confirmed that they had no plans to review the existing rules on reporting. The evaluators note that the position of the authorities has not shifted despite advances in international standards,¹¹² which endorse the principle that auditors and accountants should report irregularities to the competent authorities. More generally, the FAOA does not endorse the principle that the profession has a part to play in detecting foreign bribery. The auditors interviewed during the on-site visit expressed the same reservations as the FAOA with respect to their role, citing their duty of discretion as a major obstacle to reporting outside the company and in the context of a group audit.

155. No foreign bribery case has been reported to the law enforcement authorities by an external auditor. But the *Oil Company Case* offers an unprecedented illustration of the importance of auditors in uncovering foreign bribery, contrary to the view of the Swiss authorities and the auditors interviewed by the evaluation team. After warning the company's board of directors in March 2016 and contacting the FAOA, the external auditor (Deloitte) publicly withdrew from its role as auditor for the company in December 2016, citing unjustified payments and whistleblowers' reports of suspected foreign bribery. Following press articles about Deloitte's withdrawal, the Geneva Office of the Attorney General opened an investigation and received co-operation from Deloitte (cf. Introduction).

Commentary

The examiners recommend that Switzerland:

- (i) clarify that external auditors who find indications of suspected acts of foreign bribery are required to report these to management and, where appropriate, to the company's oversight bodies, in accordance with the 2009 Recommendation X.B.(iii) and as recommended during Phase 3 (Recommendation 7(a));*
- (ii) consider requiring external auditors to report suspected acts of bribery of foreign public officials to competent authorities such as the law enforcement authorities, as envisaged in the 2009 Recommendation X.B.(v) and recommended during Phase 3 (Recommendation 7(b));*
- (iii) organise training and awareness-raising activities for external auditors, to promote their role in the identification and reporting of foreign bribery.*

¹¹² In July 2016, the International Ethics Standards Board for Accountants (IESBA) published a new standard which constitutes the very first guide for accounting professionals on the measures they should take in the public interest when confronted with suspected or manifest instances of non-compliance with laws and regulations. This standard, entitled "[Responding to Non-Compliance with Laws and Regulations](#)", applies to all categories of accounting professionals, including auditors.

D.2. Tax measures¹¹³

Tax treatment of bribes to foreign public officials: less than proactive

156. The Federal Law of 22 December 1999 provides that “illegal commissions as defined by Swiss criminal law that are paid to Swiss or foreign public officials are not deductible, neither are they conventionally justified business expenses.” The Questionnaire shows that the cantons vary in their approach to the non-deductibility of bribes: some base themselves on federal law, whilst others have changed their cantonal tax laws to introduce an explicit exclusion. All, according to the authorities, uphold the principle that bribes are not tax-deductible. These same authorities have said that they organise training and awareness-raising activities for cantonal tax officials on the non-deductibility of bribes. However, discussions held during the on-site visit gave no indication that the tax authorities are proactive in enforcing the non-deductibility of bribes. As far as the evaluation team is aware, there have been no reviews of the tax position of Swiss companies convicted of foreign bribery. As stated earlier, the difficulty of gaining access to information on these convictions significantly hampers the federal and cantonal tax authorities, because Switzerland has no *casier judiciaire* (central criminal registry) for legal persons.

Commentary

The examiners recommend that Switzerland continue its efforts to train cantonal tax officials in the non-deductibility of bribes. They also recommend that the Swiss tax authorities – federal and cantonal – be more proactive and more energetic in enforcing the non-deductibility of bribes in cases of foreign bribery, in particular by systematically re-examining the tax position of Swiss companies that are convicted of foreign bribery. Lastly, the examiners recommend that the authorities introduce systems of information exchange so that tax authorities can be informed of convictions by the Swiss courts and Offices of the Attorneys General in cases of foreign bribery.

Federal detection efforts contrast with slower progress at cantonal level on both the legal framework and enforcement

157. During Phase 3, apart from one case, which the Geneva tax authorities reported to the Geneva Office of the Attorney General, no irregularity regarding foreign bribery was detected by the Swiss tax authorities. Discussions with the federal and cantonal tax administration revealed no clear policy of enhanced due diligence in sectors where there might be a risk of illegal commissions being paid to foreign officials. At the time of the written follow-up report, the Working Group had noted that awareness-raising activities were being organised for officials of the Federal Tax Administration (FTA) (training, distribution of the OECD Bribery Awareness Handbook for Tax Examiners). The FTA had reported a case of foreign bribery to the OAG after finding the taxpayers guilty of tax evasion. According to the authorities, the statutory limitation period for this case expired shortly after the FTA’s notification. However, the Working Group found that the cantons were not doing enough and considered that Recommendations 8(a) and (b) had been partially implemented.

¹¹³ The issue of the tax treatment of sanctions is dealt with in Section B.4 of the report. The Global Tax Forum adopted its Phase 2 evaluation for Switzerland in July 2016. Its report analyses Swiss practice on tax data exchange during the period July 2012 to June 2015 (the evaluation period), and it contains a number of recommendations to Switzerland on the sharing of tax data. For an in-depth review of this subject, including automated tax data exchange, see: [Peer Review Report Phase 2: Implementation of the Standard in Practice – Switzerland](#) (July 2016), pp. 143-147.

158. At federal level, the FTA uses risk analysis in its tax audits of companies with major links to foreign countries. The figures provided by the FTA show that the number of company audits varies from year to year. About 8 000 such audits were conducted in 2015, and the number is reported to have risen since. The Questionnaire shows that the system of audits by the cantonal tax authorities has also grown, with more exchanges with the cantonal Offices of the Attorneys General and the establishment of regular audits. The examiners consider that Recommendation 8(b) of Phase 3 has been implemented. But not enough has been done yet in terms of training and awareness-raising activities for cantonal tax officials in the detection and reporting of foreign bribery, and the examiners consider that Phase 3 Recommendation 8(a) has been partially implemented. Still on the matter of awareness-raising, the FTA's guidelines (Circular No. 16 of 13 July 2007) remain in force even though they are out of date. They do not take account of the latest case law on what constitutes a foreign public official (see Section B.1.). Moreover, they exempt tax officials from the duty to report bribery, despite the general duty to report crimes and offences which was introduced by the Federal Personnel Act (BGB/LPers) as of 1 January 2011 and which also applies to officials of the FTA. At cantonal level, at the time of the written follow-up report, only 11 of the 26 cantons imposed an obligation for tax officials to report bribery to the cantonal tax authority. At the time of this evaluation, 18 cantons had an obligation to report, 3 were preparing legislation to that end and 5 still had no such obligation in their cantonal law. It should be noted that no foreign bribery case has been reported by the FTA since the Phase 3 written follow-up report.¹¹⁴

Commentary

The examiners recommend that the FTA update its Circular of July 2007 to take account of all legislative changes since its adoption and all relevant foreign bribery case law. At cantonal level, they recommend that Switzerland encourage all cantons to introduce a statutory obligation on tax officials to report bribery. Lastly, they recommend that Switzerland take measures to ensure that all cantons conduct training and awareness-raising activities for their tax officials on the issues of detecting and reporting foreign bribery, as previously recommended by the Working Group during Phase 3 (Recommendation 8(a)).

D.3. Public advantages

Export credits

159. No recommendation on export credits was made during Phase 3. But there has been one noteworthy development of relevance to this report. The new Article 27a of the Swiss Export Risk Insurance Act (SERVG),¹¹⁵ which came into force on 1 January 2016, introduces an obligation on members of the personnel and organs of SERV/ASRE¹¹⁶ to report to the criminal law enforcement authorities, their superiors, the board of directors or the Swiss Federal Audit Office (CDF) all crimes and offences prosecuted *ex officio* of which they become aware during the performance of their duties. They are also entitled to report to their supervisors, the board of directors or the Swiss Federal Audit

¹¹⁴ At the time this report was finalised, the FTA reported that it was conducting proceedings for bribery, but it was not yet certain that the case concerned involved foreign bribery.

¹¹⁵ Article 27a (Duty to report, right to report and protection), see www.admin.ch/opc/fr/classified-compilation/20041349/index.html#a27a.

¹¹⁶ SERV/ASRE (Swiss Export Risk Insurance) covers the political and commercial risks of exporting goods and services.

Office other irregularities, which are detected during the performance of their duties or reported to them. The Act protects them if they report in good faith. The Working Group welcomes this addition to the Act.

160. In relation to the practical implementation of its controls, SERV/ASRE said in the Phase 4 Questionnaire that it had taken additional civil and administrative measures in four cases of foreign bribery since 2011. By way of illustration and further to the summary punishment order issued on 22 November 2011 against Alstom Network Schweiz AG, a number of measures were taken by SERV/ASRE against Alstom and its subsidiaries. During the on-site visit, representatives of SERV/ASRE reported that they did not have access to summary punishment orders against legal persons in Switzerland (the one against Alstom had been posted on the Internet) and that they had to rely on information published in the press. This lack of transparency, together with the failure to publish decisions, hampers verification operations by SERV/ASRE and weakens the impact of its controls.

Public procurement

161. During Phase 3 the Working Group asked Switzerland to take the necessary measures to implement systematic mechanisms whereby competition for public procurement contracts could be suspended for companies convicted of bribery of foreign public officials in violation of national law (Recommendation 12(a) and follow-up 18, see Annex 5). At the written follow-up this recommendation was judged not to have been implemented. It should be noted that Swiss law on public procurement,¹¹⁷ which comprises a Federal Act on Public Procurement, an inter-cantonal agreement and 26 cantonal laws, still contains no general rule on the conditions under which an awarding authority may exclude a bidder, or any explicit reference to a conviction for bribery as grounds for exclusion. At the time this report was completed, the law on public procurement¹¹⁸ and the inter-cantonal agreement on public procurement¹¹⁹ were still being revised.

Commentary

The examiners repeat the Phase 3 recommendation that Switzerland complete its revision of the Federal Act on Public Procurement and the inter-cantonal agreement on public procurement, so that the authorities can suspend companies convicted of foreign bribery from competing for public procurement contracts or other public advantages.

D.4. Official development assistance

162. During Phase 3 there was no provision in Swiss law for authorities to suspend access to contracts funded by official development assistance (ODA) by companies convicted of foreign bribery. No measures to that end had been taken at the time of the written follow-up, and Recommendation 12(a)

¹¹⁷ Swiss public procurement law is based on the WTO's Government Procurement Agreement (GPA) and the agreement between the Swiss Confederation and the European Union. The revised WTO Agreement (GPA 2012) was adopted on 30 March 2012 and came into force on 6 April 2014. But Switzerland will not ratify GPA 2012 until it has aligned its domestic law with the provisions of the revised GPA, which means it must first complete the revision of its public procurement law.

¹¹⁸ [Draft public procurement act.](#)

¹¹⁹ [Draft inter-cantonal agreement on public procurement.](#)

(see Annex 5) has not been implemented. The measures available in Switzerland for managing the risks of foreign bribery in development co-operation are reviewed in this report, applying the new OECD Recommendation of the Council for Development Co-operation Actors on Managing Risks of Corruption dated 16 November 2016 (hereinafter “the 2016 Recommendation”). As in Phase 3, two institutions have responsibility for providing official development assistance in Switzerland: (i) the Swiss Agency for Development and Co-operation (SDC), part of the Federal Department of Foreign Affairs; and (ii) Economic Co-operation and Development (SECO WE), a division of the State Secretariat for Economic Affairs (SECO) which is itself part of the Federal Department of Economic Affairs, Education and Research.

Efforts to prevent and detect bribery are undermined by the absence of any obligation to declare convictions for foreign bribery and insufficient use of blacklists¹²⁰

163. The award of contracts is governed by a range of framework conditions designed to ensure that funds available are used carefully and effectively. Under the contractual rules governing calls for tender, the SDC and SECO WE expressly forbid their operational partners and any of their subcontractors from giving bribes. The internal verification systems of the SECO WE allow for checks on whether an intended partner has been blacklisted by a multilateral development bank and whether, after internal evaluations of the contracts performed, the intended partner is categorised as “not recommended”. The SDC has compiled an internal list of all information to which it has access (including, for example, partners who committed irregularities in the performance of a contract funded by the SDC) but which is of limited use and scope. It seems that companies convicted of foreign bribery in Switzerland since Phase 3 do not feature on that list, because information on them is not held in any records (Switzerland does not have a *casier judiciaire* for legal persons) and is not made public in an appropriate manner (see Section B.5.). Moreover, Swiss federal law on public procurement does not provide for blacklists. The principle of debarment of a bidder from a federal procurement process on the basis of a list, including blacklists compiled by multilateral financial institutions, is not explicitly provided for, in disregard of 2016 Recommendation 6(iv). As in Phase 3, bidders are not required to declare that they have no convictions for bribery. Lastly, Switzerland has taken no measures to implement the 2009 Recommendation which suggests that countries enact legislation allowing the suspension of companies convicted of foreign bribery from competing for public procurement contracts or other public advantages, including contracts funded by official development assistance (see Section C.4.). Consequently, Recommendation 12(a) has still not been implemented.

Mechanisms for reporting foreign bribery are in place and in use¹²¹

164. Both the SDC and SECO WE have introduced internal mechanisms for reporting suspected bribery in connection with the programmes or projects they oversee, as required by the 2016 Recommendation. If an internal investigation confirms the suspicions, employees of the SDC and SECO must, as of 1 January 2011, report these to the criminal law enforcement authorities, their

¹²⁰ See 2016 Recommendation, Recommendation 6.

¹²¹ See 2016 Recommendation, Recommendation 7.

superiors or the Federal Audit Office under Article 22a of the Federal Personnel Act.¹²² No case reported so far has involved foreign bribery.

*A sanctioning regime is in place*¹²³

165. The measures in place are unchanged from Phase 3 in that any government or private-sector organisation receiving development funding or commercial contracts from the Confederation must sign an anti-bribery clause allowing funding to be suspended or withdrawn if corrupt practices are discovered at any stage of the contract's conclusion and performance.

*Measures are in place to provide a joint response and take account of the risks posed by the operational context*¹²⁴

166. The SDC and SECO WE indicate that, when granting assistance and in managing ongoing contracts, they take into consideration and systematically assess the risks posed by the operational context, including the corruption risk. They liaise closely with Swiss embassies and representation offices which have a good local knowledge of beneficiary countries and development actors in the field. During the on-site visit, representatives of the SDC and SECO WE said that they interacted with partner countries and local officials to promote anti-corruption measures at their level.

Commentary

The examiners recommend that Switzerland amend its legislation to (i) ensure that blacklists of national institutions and multilateral financial institutions can serve as a possible basis for excluding bidders from contracts funded by official development assistance; (ii) to ensure that persons bidding for contracts funded by ODA are required to declare that they have no convictions for bribery. They also recommend that Switzerland implement Phase 3 Recommendation 12(a) (cf. Section D.4.).

¹²² Switzerland: Phase 3 – Final Report, paragraph 111. In 2015 and 2016, both the SDA and SECO WE completed handbooks for their staff setting out the obligations to report bribery.

¹²³ See 2016 Recommendation, Recommendation 8.

¹²⁴ 2016 Recommendation, Recommendations 9 and 10.

CONCLUSION

The Working Group congratulates Switzerland on progress it has made in recent years towards implementing the Convention, notably with regard to companies. It encourages Switzerland to further intensify these efforts and commit to imposing sanctions that are effective, proportionate and dissuasive, as required by the Convention. Finally, the authorities should make it a priority to make enforcement actions more widely by ensuring a wider and better publicity of concluded cases.

Regarding implementation of the Phase 3 recommendations, and although Switzerland has fully implemented Recommendation 8(b), Recommendations 1, 2(b), 7(a), 7(b), 8(a) and 10(c) are still partially implemented; Recommendations 11 and 12(a) remain not implemented and Recommendation 5 is judged partially implemented. The Phase 3 recommendations that are not or only partially implemented are reflected below in the Phase 4 recommendations to Switzerland.

Good practices and positive achievements

Throughout this report a number of good practices and positive achievements by Switzerland have been identified, which may be effective in controlling bribery of foreign public officials, including prosecutions and convictions. In particular, the Swiss Financial Intelligence Unit (MROS) has equipped itself to detect numerous foreign bribery cases and its role has been recognised.¹²⁵ This achievement is the result of a clearly proactive approach by the MROS and of major and decisive action to raise awareness financial intermediaries' awareness of the offence of foreign bribery and their part in detecting it. A number of good practices and positive achievements have emerged from prosecutions for foreign bribery brought by the OAG. At an institutional level, the OAG has set up an internal working group tasked with handling issues of corporate criminal liability. This group ("AG 102") is responsible for analysing all cases involving a legal person, with the aim of reaching uniformity of legal interpretation both at the stage when criminal proceedings are opened, throughout and until the conclusion of the proceedings. This centralising of cases and expertise in such a complex field is an innovative and interesting approach. In addition, centralised processing of money laundering reports received from the MROS, together with other reports coming into the same OAG unit, streamlines the way in which these reports are handled and makes it all the more efficient.

Regarding the way in which both the OAG and the FCC interpret the offence of foreign bribery, one welcome case-law development is recognition of the concept of a "*de facto* public official" in the context of dictatorial regimes. On the matter of applying Article 102(2) CC to the criminal liability of legal persons, credit must be given to the OAG for its proactive approach in enforcing the corporate liability of successor companies.

In the conduct of foreign bribery cases the OAG prioritises and encourages joint action with foreign law enforcement authorities, as in the *Odebrecht* case with the US and Brazilian authorities. With respect to MLA, under Swiss criminal law enforcement authorities may spontaneously provide a foreign authority with evidence they have collected in the course of their investigation if they think this may enable criminal proceedings to be opened or may help in the progress of an ongoing investigation. In addition, "dynamic mutual legal assistance", which allows the law enforcement authority to pass on information and evidence before the person concerned has been notified of the decision, together with the use of joint investigation teams, facilitates co-operation and transmission of confidential information. These good practices should be emphasised and encouraged.

¹²⁵ ["The Detection of Foreign Bribery"](#) (in English only), OECD, December 2017.

The OAG routinely seizes and confiscates assets in foreign bribery cases, which is commendable. This policy is based on art. 75 of the Federal Law on Organisation of the Criminal Justice Authorities of the Confederation, which requires the creation of a specialist unit within the OAG responsible for executing confiscation measures, and collecting equivalent claims and procedural costs.

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 I to reinforce the implementation of the Convention; and (2) will follow up on the issues identified in Part II. Switzerland will submit an oral report to the Working Group within one year (March 2019) detailing the adoption of appropriate legislation to protect private-sector employees from any discriminatory or disciplinary action when they report suspicions of bribery of foreign public officials (Recommendation 1(a)). Within two years (March 2020), Switzerland will submit a written report to the Working Group on the implementation of all recommendations and its efforts to implement the Convention.

Recommendations of the Working Group

Recommendations for ensuring effective prevention and detection of foreign bribery

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

(a) adopt promptly an appropriate regulatory framework to compensate and protect private sector employees who report suspicions of foreign bribery from any discriminatory or disciplinary action [2009 Recommendation IX(iii)]; Phase 3 Recommendation 11]; and

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

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

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

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

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

3. Regarding **awareness of the offence of foreign bribery** amongst personnel of federal and cantonal administrations, the Working Group recommends that Switzerland (i) continue the work of raising awareness amongst those personnel who are in a position to help with the detection and reporting of bribery of foreign public officials, and (ii) consider all other means whereby the

authorities in question might be encouraged to act [2009 Recommendation III(i), VII and IX(ii); Phase 3 Recommendation 10(c)].

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

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

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

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

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

Recommendations for enforcement of the foreign bribery offence

6. Regarding the **offence of foreign bribery**, the Working Group recommends that Switzerland carry out training and awareness-raising activities for judges and Offices of the Attorneys General in relation to the foreign bribery offence and the Convention, especially with regard to the autonomous definition of a foreign public official and the existence of an offence irrespective of its outcome [Convention Article 1, Commentaries 4, 7, 14 and 15; 2009 Recommendation V].

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

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

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

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

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

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

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

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

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

8. Regarding **methods, resources and training**, the Working Group recommends that Switzerland (a) periodically review the resources available to cantonal law enforcement authorities in order to effectively combat bribery of foreign public officials; (b) provide the cantonal authorities with sufficient resources to enable them effectively to handle seizures in practice, including those in foreign bribery cases; (c) conduct training for the judiciary in the offence of foreign bribery and the use of mitigating factors, in particular those relating to solicitation and alleged necessity of a corrupt payment; and (d) provide police forces with appropriate training in the combating of financial crime, including foreign bribery [Convention Article 5; 2009 Recommendation Annex I.D and Phase 3 Recommendation 2(b)].

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

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

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

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

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

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

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

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

10. Regarding **sanctions imposed by the OAG**, the Working Group recommends that the OAG: (a) conduct a systematic analysis of Swiss case law on the application of mitigating factors, specifically those relating to solicitation and the alleged necessity of the corrupt payment; and (b) identify from it guidelines for criminal policy on administering sanctions that are consistent with the Convention and the 2009 Recommendation [Convention Article 3(1); 2009 Recommendation III(ii) and V].

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

(a) pursue its efforts to ensure that such measures in foreign bribery cases are publicised and transparent, at federal and cantonal level;

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

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

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

(b) the FOJ collect statistics on rejected MLA requests concerning bribery of foreign public officials; and

(c) the Swiss authorities collect separate statistics on MLA requests concerning bribery of a foreign public official and money laundering predicated on foreign bribery that it has received, processed or rejected and invite the cantons to provide the same information to the central authority [Convention, Article 9(1) and Phase 3 Recommendation 5].

Recommendations for corporate liability

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

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

Other recommendations to improve implementation of the Convention

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

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

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

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

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

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

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

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

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

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

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

Follow-up by the Working Group

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

- (a) prosecutions brought in Switzerland against whistleblowers who report suspected financial offences including, in particular, foreign bribery;
- (b) Swiss law enforcement authorities' use of MLA requests to open investigations into foreign bribery in Switzerland;
- (c) efforts by Swiss authorities to encourage greater transparency in relation to legal persons and complex legal structures, including domiciliary companies in Switzerland;
- (d) training and awareness-raising activities for judges and Offices of the Attorneys General as well as application of the "equivalence link" in foreign bribery cases;
- (e) future allocation of resources to police forces supporting foreign bribery investigations;
- (f) number of foreign bribery cases discontinued and number of acquittals at federal and cantonal level;
- (g) that investigations and prosecutions conducted by the OAG and the cantonal Offices of the Attorneys General are not influenced by the considerations listed in Article 5 of the Convention;
- (h) implementation of the reorganisation of investigations within the OAG and any repercussions this has on foreign bribery cases;
- (i) evolution of the internal organisation and structural operation of the OAG in the management of foreign bribery cases;
- (j) application of mitigating factors in foreign bribery cases;
- (k) implementation of the new system of sanctions that came into force on 1 January 2018, including level and types of penalties imposed on natural and legal persons convicted of the offence of bribery of a foreign public official, including in self-reported cases;
- (l) measures taken by Switzerland to ensure that the level of evidence required to establish the existence of a prior offence as set out in Article 102(2) CC does not jeopardise the autonomy of criminal proceedings against a legal person from those against a natural person, including cases where no natural person has been prosecuted or convicted; and
- (m) liability of parent companies in practice in cases of foreign bribery committed by subsidiaries.

ANNEX 1: SWITZERLAND: IMPLEMENTATION SINCE PHASE 3

1. Cases decided by summary punishment order

The four [4] (for the most part anonymised) cases decided by summary punishment order since the Phase 3 evaluation are as follows:

Fertiliser Case

By a summary punishment order of 31 May 2016, the OAG convicted the CEO of company A (subsidiary of a Swiss group) of complicity in the bribery of foreign public officials and document forgery, imposing a suspended day-fine of 120 days at CHF 3 000 per day, i.e. a total of CHF 360 000 (approx. EUR 309 000) and a fine of CHF 10 000 (approx. EUR 8 600). He was accused of having paid a bribe at the request of a third-party company (a Norwegian company, convicted in Norway) without questioning the real reasons for the request. A second individual, the director of company A, was convicted of document forgery in a summary punishment order of 31 May 2016, but the charge against him of bribery of a foreign public official was not proved. Criminal proceedings were instituted by the OAG on 30 March 2012 on matters already under investigation abroad, namely by the authorities in Norway.¹²⁶ The case concerned payment in March 2007 of a USD 1.5-million bribe to a senior Libyan official (Minister for oil) in exchange for the right to build a fertiliser plant in Libya. The Norwegian company was found guilty of having solicited this payment from the CEO of company A into a bank account in Geneva belonging to an offshore company, the beneficiary of which was the Libyan oil minister's son. Company A supposedly recovered this sum in 2007 and 2008 from deliveries of fertiliser over-invoiced by a subsidiary of the Norwegian group. Company A twice changed its business name following the events in question. In a third summary punishment order of 31 May 2016, the OAG imposed a fine of CHF 750 000 (approx. EUR 643 000) on company A, quoting all the company names it used, for failing to take reasonable and necessary organisational measures to prevent corrupt payments being made to foreign public officials (Article 102 paragraph 2 CC). The OAG found in that order that the suspected bribery of foreign public officials in connection with other contracts was not confirmed. The OAG stated that it had considered bringing charges against the parent company and had expressly ruled that out because there was not enough evidence.

*Odebrecht-CNO Case*¹²⁷

As part of the international corruption case involving the (semi-) State-owned Brazilian company Petrobras and on the basis of reports from the MROS concerning suspect banking transactions, corrupt payments by a number of construction companies were investigated and prosecuted by the OAG from 2014 onwards. Sums of money had been moved through the company books and subsequently transferred via a number of offshore companies so that the corrupt payments could be made. These payments were traced *inter alia* to Odebrecht SA and its subsidiary Construtora Norberto Odebrecht SA (CNO), companies headquartered in Brazil. In a summary punishment order of 21 December 2016, and having co-ordinated its proceedings with Brazil and the USA, the OAG found

¹²⁶ The convicted Norwegian company pleaded guilty to various corrupt payments connected with investments in Libya, and the final sentence imposed on it was a fine of NOK 295 million.

¹²⁷ The OAG issued a press release on this matter on 21 December 2016, [online here](#).

Odebrecht SA and CNO guilty of an offence under Article 102 paragraph 2 CC in that they had not taken all reasonable and necessary organisational measures to prevent bribery of foreign public officials (Article 322^{septies} CC – in the case of CNO) and money laundering (Article 305^{bis} CC – in the case of Odebrecht SA and CNO). These two companies were held jointly and severally liable to pay Switzerland the sum of CHF 117 million (approx. EUR 100 million) in an equivalent claim; the subsidiary CNO, a fine of CHF 4.5 million (approx. EUR 3.9 million) and the parent company Odebrecht, a fine of CHF 0. The company Braskem SA also paid bribes via the same channels as Odebrecht SA and CNO. Brazil and the USA, together ordered asset seizures and fines totalling over USD 3.5 billion against Odebrecht and Braskem. It was agreed that Brazil would keep 80% of this amount and that Switzerland and the USA could keep 10% each. The OAG reasoned that the centre of gravity in this affair was Brazil, and so the lion's share of the sum seized should go to Brazil. Firstly, Odebrecht SA has a majority shareholding in Braskem and, secondly, it is associated with the Brazilian State through Petrobras. The proceedings against individuals were ongoing as this report was completed. Proceedings against Braskem were abandoned following its conviction by the USA (cf. above). This case was the subject of an OAG press release.

Port Infrastructure Case

In four summary punishment orders of 1 May 2017 the OAG convicted a Belgian company (company B) and its subsidiary (company BB), specialists in port infrastructure development, for failure to take reasonable and necessary organisational measures to prevent bribes to foreign public officials (Article 102(2) CC). Two individuals employed by these two companies were convicted of foreign bribery and a third (a financial intermediary) of complicity in foreign bribery. The employees received a suspended day-fine of 120 days at CHF 210, i.e. a total of CHF 25 200 (approx. EUR 21 700). They also had to pay an equivalent claim of CHF 56 686 (approx. EUR 49 000) and pay a suspended day-fine of 120 days at CHF 210 and an equivalent claim of CHF 195 179 (approx. EUR 168 000). The financial intermediary was convicted of making corrupt payments via offshore letterbox companies, and his punishment was a suspended day-fine of 60 days at CHF 150, i.e. a total of CHF 8 550 (less 3 days' preventive detention already served) (approx. EUR 7 400). The investigation revealed a financial set-up whereby the Belgian subsidiary and the two individuals in question paid funds to public officials in Nigeria, in part through companies whose beneficiaries were politically exposed persons (PEPs). These payments were moved through three letterbox companies domiciled in the British Virgin Islands. They served as shell companies between the Belgian company and the deposits in Nigeria. These three companies held accounts with Swiss banks. The payments were used to obtain information from Nigerian leaders, ensure continuity in the execution of an ongoing project and security for the companies' employees. Between 2005 and 2013 company B earned 604 million from these operations. More than 20 million was allegedly paid in bribes over the same period. The subsidiary (company BB) was fined CHF 1 million (approximately EUR 860 000) and had to make a compensation payment of CHF 36 741 473 (approx. EUR 31 500 000). The parent company (company B) was fined CHF 1 (EUR 0.85).

Construction 2 Case

A businessman belonging to an eminent North African family was convicted of complicity in the bribery of foreign public officials in a summary punishment order of the OAG dated 22 March 2016. The man had acted as intermediary in a corruption case in Libya involving a Canadian engineering group (see *Construction case 1, Libya*). He was convicted of complicity in foreign bribery and given a suspended pecuniary day-fine of 150 days at CHF 2 500, i.e. a total of CHF 375 000 (approx. EUR 322 000). Assets to the value of CHF 425 264 (approx. EUR 368 000) were confiscated, his total worth being estimated at over USD 50 million (approx. EUR 42 million). It is worth noting that these

two criminal prosecutions were only possible because of analyses conducted by the prosecutor and his team in connection with the “Alstom case”.

2. Decisions following a simplified procedure that have entered into force

The one [1] (anonymised) case decided following a simplified procedure since the Phase 3 evaluation is as follows:

Construction 1 Case

This case concerns charges of foreign bribery against a former senior executive of a Canadian construction company. Inducements were given to a Libyan public official, the son of the late dictator, in order to secure contracts. These were valued at more than USD 21 million (approximately EUR 18 million), and generated assets worth more than EUR 70 million. The companies of which the former executive was the beneficial owner allegedly made illicit gains of over EUR 30 million. The OAG launched a criminal investigation on 11 May 2011 against the former executive who was arrested and placed in preventive detention in Switzerland on 10 April 2012 where he remained until his extradition after conviction. On 18 July 2014 the OAG filed a simplified-procedure indictment against the Canadian group and its former executive. The Federal Criminal Court gave its ruling on 1 October 2014. The accused pleaded guilty to the main charges and the court upheld the judgment recommended by the OAG in the simplified procedure. The Canadian company was acknowledged as the plaintiff in this case (the injured party), in respect of another aspect of the procedure (retrocessions to the senior executive, which is mismanagement). The court held that the former executive’s breach of his duty of due diligence had damaged the company and its financial interests. The former executive was given a 3-year custodial sentence (less the period of preventive detention already served and with the remaining time suspended). Some of his assets were confiscated and he was required to pay damages to the Canadian company which passed this sum on to the Swiss Confederation (CHF 12 million plus interest, i.e. approx. EUR 10 million).

3. Decisions by summary punishment order following a simplified procedure that have not entered into force

The one [1] (anonymised) case decided by summary punishment order following a simplified procedure but which had not entered into force when this report was drafted is as follows:¹²⁸

Banknotes Case

Company DD, a subsidiary of company D (a world leader in the manufacture of machinery for the printing of banknotes) self-reported to the OAG on 19 November 2015 a possible breach of Article 102 paragraph 2 in conjunction with Article 322^{septies} CC over a deal in Nigeria. This spontaneous initiative was followed in April 2016 by the reporting of further suspicions concerning other deals in Morocco, Brazil and Kazakhstan. Two internal investigation reports were sent to the OAG along with a large number of other documents. The OAG began a criminal investigation on 15 December 2015. Company DD applied for a simplified procedure in December 2016 which was granted in January 2017. The OAG subsequently extended its probe to individuals. The investigation

¹²⁸ The OAG reports that legal avenues have been used by third parties in this case which may prevent the summary punishment order from entering into force.

revealed (and Company DD acknowledged) that a number of employees of the incriminated company had worked together with the common purpose of securing contracts for the company by the payment of bribes to officials, domiciliary companies and “*slush funds*”. Existing compliance policies (in respect of agents) were found to be inadequate. The value of the contracts secured by the company in these four countries was CHF 626 million (approx. EUR 537 million), and the total paid in bribes was CHF 24.6 million (approx. EUR 21 million). In a summary punishment order of 23 March 2017 Company DD was convicted and fined CHF 1 (approx. EUR 0.85). It was also required to pay an equivalent claim of CHF 35 million (approx. EUR 30 million), of which CHF 5 million (approx. EUR 4.2 million) were paid into a fund for the improvement of compliance standards in the banknotes industry. The investigation into a number of individuals was still ongoing when this report was completed.¹²⁹

4. Cases closed following reparation (Article 53 CC)

The two [2] cases closed following reparation are as follows:

Gas Pipeline Case

The OAG closed a criminal investigation against a Swedish company (company S) on 5 September 2013. The investigation was closed after company S acknowledged that it had not taken all reasonable and necessary organisational measures to prevent the payment of illegal commissions to foreign public officials. The company paid CHF 125 000 (approx. EUR 107 000) by way of reparation to the International Committee of the Red Cross (ICRC). Company S also had illegal assets confiscated to the value of the illicit gain (USD 10.6 million). The OAG also investigated the award to the Swedish company, which was taken over by a large German group in 2003, of a contract for gas turbines for the pipeline linking Russia’s Yamal peninsula to Western Europe. As part of this project illegal commissions were paid to senior executives in Gazprom. The bribes were paid by company S between 2004 and 2006 into the recipients’ Swiss bank accounts, which is what triggered the OAG’s probe. Use of the reparation procedure was justified by the authorities as follows: the company had declared its willingness to make good the damage caused; “*the public interest in prosecuting*” was described as minor; Sweden had closed the case against the incriminated company, which had been “*fully punished by the international media coverage and by the judgments handed down in Germany and the USA*”. Two years later, the FCC gave a ruling in this same case, acquitting four of the accused on the grounds that senior executives of Russia’s Gazprom were not public officials (see Section B.1.). This case was the subject of an OAG press release.

Oil Company Case

On 22 February 2017, the Geneva Office of the Attorney General opened criminal proceedings for suspected bribery of foreign public officials against two members of the board of an oil company and against the company itself, which was based in Switzerland and a subsidiary of a Chinese company. The accused were charged with making improper payments totalling tens of millions of dollars to a law firm in Nigeria. After an investigation lasting four months it was found that these payments were not adequately documented, so doubts still persisted as to whether they were lawful. The accused argued that the law enforcement authorities had failed to prove any criminal intent, but acknowledged that there might have been organisational defects and shortcomings on the part of company Z. By way

¹²⁹ These individuals challenged the order against the legal person. The Office of the Attorney General declared their objections inadmissible on the ground that they did not have standing to appeal. This was confirmed by the Appeals Chamber of the Federal Criminal Court.

of reparation, company Z paid the Canton of Geneva the sum of CHF 31 million (approx. EUR 27 million). In the light of this reparation and the measures taken by company Z, the proceedings were abandoned on 5 July 2017 under Article 53 CC. This case was the subject of a press release by the Geneva Office of the Attorney General.

ANNEX 2: SUMMARY OF SANCTIONS IMPOSED IN FOREIGN BRIBERY CASES: JUDGMENTS SINCE PHASE 3¹³⁰

1. Sanctions imposed on individuals

<i>Chief Financial Office (CFO) – foreign bribery – Port Infrastructure Case</i>	<u>Sanction</u> : suspended day-fine of 120 days at CHF 210, i.e. a total of CHF 25 200 (approx. EUR 21 700); equivalent claim of CHF 195 179 (approx. EUR 168 000). <u>Amount of bribe</u> : USD 21 million (approx. EUR 18 million).
<i>Legal adviser – foreign bribery – Port Infrastructure Case</i>	<u>Sanction</u> : suspended day-fine of 120 days at CHF 210, i.e. a total of CHF 25 200 (approx. EUR 21 700); equivalent claim of CHF 56 686 (approx. EUR 49 000). <u>Amount of bribe</u> : USD 21 million (approx. EUR 18 million).
<i>Financial intermediary – <u>complicity</u> in foreign bribery – Port Infrastructure Case</i>	<u>Sanction</u> : suspended day-fine of 60 days at CHF 150 – less 3 days’ preventive detention already served, i.e. a total of 57 days or CHF 8 550 (approx. EUR 7 400). <u>Amount of bribe</u> : USD 21 million (approx. EUR 18 million).
<i>CEO of the incriminated subsidiary – <u>complicity</u> in foreign bribery – Fertiliser Case</i>	<u>Sanction</u> : suspended day-fine of 120 days at CHF 3 000, i.e. a total of CHF 360 000 (approx. EUR 309 000) plus a fine of CHF 10 000 (approx. EUR 8 600). <u>Amount of bribe</u> : approx. EUR 1.3 million.
<i>Former senior executive – foreign bribery – Construction 1 Case</i>	<u>Sanction</u> : 3-year custodial sentence (safety measure), partially suspended. <u>Illicit gain</u> : EUR 70 million. <u>Amount of bribe</u> : EUR 30 million.
<i>Intermediary – <u>complicity</u> in foreign bribery – Construction 2 Case</i>	<u>Sanction</u> : suspended day-fine of 150 days at CHF 2 500, i.e. CHF 375 000 (approx. EUR 322 000). <u>Illicit gain</u> : CHF 33 million (approx. EUR 28 million).

¹³⁰ Confiscation measures are detailed in Section B.5. of this report.

2. Sanctions imposed on legal persons¹³¹

Fertiliser Case: the company was convicted of failure to take reasonable and necessary organisational measures to prevent corrupt payments to foreign public officials and was fined CHF 750 000 (approx. EUR 643 000) for a corrupt payment of USD 1.5 million (approx. EUR 1.3 million).

Port Infrastructure Case: the parent company was convicted of an offence under Article 102 a. 2 CC and fined CHF 1 (EUR 0.85). The amount of the corrupt payments was estimated at over CHF 20 million (approx. EUR 17 million). The subsidiary was fined CHF 1 million (approx. EUR 860 000).

Odebrecht-CNO Case: the OAG described the value of corrupt payments and money laundering in Switzerland as “*extraordinarily high*” (hundreds of millions of CHF). It fined CNO, the subsidiary company, CHF 4.5 million (approx. EUR 3.9 million) and the parent company Odebrecht CHF 0.

¹³¹ At the time this report was completed, one case was still pending (the banknotes case dealt with by simplified procedure). In this, the total value of the incriminated contracts was estimated to be CHF 626 million (approx. EUR 537 million) and the total bribes paid were CHF 24.6 million (approx. EUR 21 million). The company has since been convicted and ordered to pay CHF 1 (EUR 0.85).

ANNEX 3: “SPECIAL” PROCEDURES

For an analysis of these procedures see Section B.4. of this report.

Summary punishment order	<p>The summary punishment order procedure is provided for in Articles 352 to 356 CPC. The Office of the Attorney General may use this if the accused has admitted the facts or if these have been established. The penalties that may be imposed are a fine, a pecuniary day-fine of not more than 180 days or a custodial sentence not exceeding six months. A fine may be imposed in addition to another penalty (Article 352 paragraph 3 CPC). The Office of the Attorney General is not obliged to interview the accused.¹³² Immediate written notice of the summary punishment order is given to persons and authorities, who are entitled to oppose it (Article 353 paragraph 3 CPC).¹³³ If rejected, the order in principle constitutes an indictment and the file is passed to the court of first instance. Thereafter the procedure is governed by the general provisions on ordinary proceedings (Article 328ss CPC). Summary punishment orders that are unopposed count as final judgments (Article 354 paragraph 3 CPC); interested persons may inspect judgments and summary punishment orders (Article 69 paragraph 2 CPC). The summary punishment order procedure is widely used in Switzerland. Statistics available at the time of drafting this report indicate that 85 to 90% of proceedings are settled in this way.</p>
Simplified procedure	<p>The simplified procedure is provided for in Articles 358 to 362 CPC. The accused may ask for this to be applied if he has admitted the material facts required to establish the offence. It may not be used if the Office of the Attorney General is seeking a custodial sentence of more than five years. The Office of the Attorney General notifies the parties (including the plaintiff) of the indictment. If any party opposes the indictment, the Office of the Attorney General must conduct ordinary preliminary proceedings (Article 360 paragraph 5 CPC); if they consent to it, the Office of the Attorney General transfers the file to the court of first instance. The judge then determines whether the conditions for a simplified procedure are met. In this connection the judge will interview the accused and the other parties, if they are present (Article 362 CPC). If the judge determines that the conditions for a simplified procedure are not met, the judge may require the public prosecutor to conduct ordinary preliminary proceedings (Article 362 paragraph 3 CPC).</p>
Reparation	<p>Reparation is not a special procedure as such. It features in the Swiss Criminal Code (but not in the Swiss Criminal Procedure Code) and, if the offender has made reparation for the loss, damage or injury or made every reasonable effort to right the wrong caused, it enables the competent authority to refrain from prosecution, trial or punishment. Article 53 CC may only be applied if two further conditions are met: (1) the requirements for a suspended sentence must be fulfilled, and (2) the public interest or the injured party’s interest in bringing a criminal prosecution must be negligible.</p>

¹³² A preliminary draft revision of the CPC, opened for consultation in December 2017, will require the Office of the Attorney General to interview the accused if a day-fine of more than 120 days or a custodial sentence longer than four months is being sought (<https://www.ejpd.admin.ch/ejpd/fr/home/aktuell/news/2017/2017-12-01.html>).

¹³³ At present, the plaintiff cannot oppose an order. However, the preliminary draft revision of the CPC provides for the right of opposition to be granted to the plaintiff too.

ANNEX 4: RELEVANT LEGISLATIVE PROVISIONS

1. Criminal Code

Place of commission

Art. 8

¹ A felony or misdemeanour is considered to be committed at the place where the person concerned commits it or unlawfully omits to act, and at the place where the offence has taken effect

² An attempted offence is considered to be committed at the place where the person concerned attempted it and at the place where he intended the offence to take effect.

Monetary penalty

Assessment

Art. 34

¹ Unless the law provides otherwise, a monetary penalty amounts to a minimum of three and a maximum of 180 daily penalty units. The court decides on the number according to the culpability of the offender.

² A daily penalty unit normally amounts to a minimum of 30 and a maximum of 3000 francs. By way of exception, if the offender's personal or financial circumstances so require, the value of the daily penalty unit may be reduced to 10 francs. The court decides on the value of the daily penalty unit according to the personal and financial circumstances of the offender at the time of conviction, and in particular according to his income and capital, living expenses, any maintenance or support obligations and the minimum subsistence level.

³ The authorities of the Confederation, the cantons and the communes shall provide the information required to determine the daily penalty unit.

⁴ The number and value of the daily penalty units must be stated in the judgment.

Art. 47

¹ The court determines the sentence according to the culpability of the offender. It takes account of the previous conduct and the personal circumstances of the offender as well as the effect that the sentence will have on his life.

² Culpability is assessed according to the seriousness of the damage or danger to the legal interest concerned, the reprehensibility of the conduct, the offender's motives and aims, and the extent to which the offender, in view of the personal and external circumstances, could have avoided causing the danger or damage.

Mitigation of the sentence / Grounds

Art. 48

The court shall reduce the sentence if:

a. the offender acted:

1. for honourable motives,
2. while in serious distress,
3. while of the view that he was under serious threat,
4. at the behest of a person whom he was duty bound to obey or on whom he was dependent;

b. the offender was seriously provoked by the conduct of the person suffering injury;

c. the offender acted in a state of extreme emotion that was excusable in the circumstances or while under serious psychological stress;

- d. the offender has shown genuine remorse, and in particular has made reparation for the injury, damage or loss caused, insofar as this may reasonably be expected of him;
- e. the need for punishment has been substantially reduced due to the time that has elapsed since the offence and the offender has been of good conduct in this period.

Reparation

Art. 53

If the offender has made reparation for the loss, damage or injury or made every reasonable effort to right the wrong that he has caused, the competent authority shall refrain from prosecuting him, bringing him to court or punishing him if:

- a. the requirements for a suspended sentence (Art. 42) are fulfilled; and
- b. the interests of the general public and of the persons harmed in prosecution are negligible.

Equivalent claim

Art. 71

¹ If the assets subject to forfeiture are no longer available, the court may uphold a claim for compensation by the State in respect of a sum of equivalent value, which claim may be enforced against a third party only if he is not excluded by Article 70 paragraph 2.

² The court may dismiss an equivalent claim in its entirety or in part if the claim is likely to be unrecoverable or if the claim would seriously hinder the rehabilitation of the person concerned.

Limitation of prosecution rights

Commencement

Art. 98

The limitation period begins:

- a. on the day on which the offender committed the offence;
- b. on the day on which the final act was carried out if the offence consists of a series of acts carried out at different times;
- c. on the day on which the criminal conduct ceases if the criminal conduct continues over a period of time.

Liability under the criminal law

Art. 102

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 inadequate organisation of the undertaking, then the felony or misdemeanour is attributed to the undertaking. In such cases, the undertaking is liable to a fine not exceeding 5 million francs.

² If the offence committed falls under Articles 260^{ter}, 260^{quinquies}, 305^{bis}, 322^{ter}, 322^{quinquies}, 322^{septies} paragraph 1 or 322^{octies}, the undertaking is penalised irrespective of the criminal liability of any natural persons, provided the undertaking has failed to take all the reasonable organisational measures that are required in order to prevent such an offence.

³ The court assesses the fine in particular in accordance with the seriousness of the offence, the seriousness of the organisational inadequacies and of the loss or damage caused, and based on the economic ability of the undertaking to pay the fine.

⁴ Undertakings within the meaning of this title are:

- a. any legal entity under private law;
- b. any legal entity under public law with exception of local authorities;
- c. companies;
- d. sole proprietorships.

Breach of manufacturing or trade secrecy**Art. 162**

Any person who betrays a manufacturing or trade secret that he is under a statutory or contractual duty contract not to reveal, any person who exploits for himself or another such a betrayal, is liable on complaint to a custodial sentence not exceeding three years or to a monetary penalty.

Money laundering**Art. 305^{bis}**

1. Any person who carries out an act that is aimed at frustrating the identification of the origin, the tracing or the forfeiture of assets which he knows or must assume originate from a felony or aggravated tax misdemeanour is liable to a custodial sentence not exceeding three years or to a monetary penalty.

1^{bis}. An aggravated tax misdemeanour is any of the offences set out in Article 186 of the Federal Act of 14 December 1990 on Direct Federal Taxation and Article 59 paragraph 1 clause one of the Federal Act of 14 December 1990 on the Harmonisation of Direct Federal Taxation at Cantonal and Communal Levels, if the tax evaded in any tax period exceeds 300 000 francs.

2. In serious cases, the penalty is a custodial sentence not exceeding five years or a monetary penalty. A custodial sentence is combined with a monetary penalty not exceeding 500 daily penalty units.

A serious case is constituted, in particular, where the offender:

- a. acts as a member of a criminal organisation;
- b. acts as a member of a group that has been formed for the purpose of the continued conduct of money laundering activities; or
- c. achieves a large turnover or substantial profit through commercial money laundering.

3. The offender is also liable to the foregoing penalties where the main offence was committed abroad, provided such an offence is also liable to prosecution at the place of commission.

Insufficient diligence in financial transactions and right to report**Art. 305^{ter}**

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

Breach of official secrecy**Art. 320**

1. Any person who discloses secret information that has been confided to him in his capacity as a member of an authority or as a public official or which has come to his knowledge in the execution of his official duties is liable to a custodial sentence not exceeding three years or to a monetary penalty.

A breach of official secrecy remains an offence following termination of employment as a member of an authority or as a public official.

2. The offender is not liable to any penalty if he has disclosed the secret information with the written consent of his superior authority.

Breach of professional confidentiality**Art. 321**

1. Any person who in his capacity as a member of the clergy, lawyer, defence lawyer, notary, patent attorney, auditor subject to a duty of confidentiality under the Code of Obligations, doctor, dentist, chiropractor, pharmacist, midwife, psychologist or as an auxiliary to any of the foregoing persons discloses confidential information that has been confided to him in his professional capacity or which

has come to his knowledge in the practice of his profession is liable on complaint to a custodial sentence not exceeding three years or to a monetary penalty.

A student who discloses confidential information that has come to his knowledge in the course of his studies is also liable to the foregoing penalties.

A breach of professional confidentiality remains an offence following the termination of professional employment or of the studies.

2. No offence is committed if the person disclosing the information does so with the consent of the person to whom the information pertains or on the basis of written authorisation issued in response to his application by a superior authority or supervisory authority.

3. The federal and cantonal provisions on the duty to testify and on the obligation to provide information to an authority are reserved.

Bribery of foreign public officials

Art. 322^{septies}

Any person who offers, promises or gives a member of a judicial or other authority, a public official, an officially-appointed expert, translator or interpreter, an arbitrator, or a member of the armed forces who is acting for a foreign state or international organisation an undue advantage, or gives such an advantage to a third party, in order that the person carries out or fails to carry out an act in connection with his official activities which is contrary to his duties or dependent on his discretion, any person who as a member of a judicial or other authority, a public official, an officially-appointed expert, translator or interpreter, an arbitrator, or a member of the armed forces of a foreign state or of an international organisation demands, secures the promise of, or accepts an undue advantage for himself or for a third party in order that he carries out or fails to carry out an act in connection with his official activity which is contrary to his duty or dependent on his discretion is liable to a custodial sentence not exceeding five years or to a monetary penalty.

Bribery of private individuals

Art. 322^{octies}

¹ Any person who offers, promises or gives an employee, partner, agent or any other auxiliary of a third party in the private sector an undue advantage for that person or a third party in order that the person carries out or fails to carry out an act in connection with his official activities which is contrary to his duties or dependent on his discretion is liable to a custodial sentence not exceeding three years or to a monetary penalty.

² In minor cases, the offence is only prosecuted on complaint.

2. Criminal Procedure Code

Obligation to prosecute

Art. 7

¹ The criminal justice authorities are obliged to commence and conduct proceedings that fall within their jurisdiction where they are aware of or have grounds for suspecting that an offence has been committed.

² The cantons may provide:

a. for the exclusion or limitation of criminal liability for statements made in the cantonal parliament by the members of their legislative and judicial authorities and of their governments;

b. that the prosecution of members of their authorities responsible for the execution of sentences and measures and judicial authorities for felonies or misdemeanours committed while in office be made subject to the authorisation of a non-judicial authority.

Waiving prosecution

Art. 8

¹ The public prosecutor and courts shall waive prosecution if the federal law so permits, in particular subject to the requirements of Articles 52, 53 and 54 of the Swiss Criminal Code (SCC).

² Unless it is contrary to the private claimant's overriding interests, they shall also waive prosecution if:

- a. the offence is of negligible importance in comparison with the other offences with which the accused is charged as regards the expected sentence or measure;
- b. any additional penalty imposed in combination with the sentence in the final judgment would be negligible;
- c. an equivalent sentence imposed abroad would have to be taken into account when imposing a sentence for the offence prosecuted.

³ Unless it is contrary to the private claimant's overriding interests, the public prosecutor and courts may waive the prosecution if the offence is already being prosecuted by a foreign authority or the prosecution has been assigned to such an authority.

⁴ In such cases, they shall issue an order stating that no proceedings are being taking or that the ongoing proceedings have been abandoned.

Federal jurisdiction in the case of organised crime, terrorist financing and white-collar crime

Art. 24

¹ Federal jurisdiction further applies to the offences in Articles 260^{ter}, 260^{quinquies}, 305^{bis}, 305^{ter} and 322^{ter}-322^{septies} SCC as well as the felonies associated with a criminal organisation as defined in Article 260^{ter} SCC, if the offences:

- a. have to substantial extent been committed abroad;
- b. have been committed in two or more cantons with no single canton being the clear focus of the criminal activity.

Public Proceedings

Principles

Art. 69

¹ Proceedings before the court of first instance and the court of appeal, together with the oral passing of judgments and decrees of these courts shall, with the exception of the judges' deliberations, be conducted in public.

² If the parties to such cases have waived their right to the public passing of judgment, or if a summary penalty order is issued, interested persons may inspect the judgments and summary penalty orders.

Surveillance of Banking Transactions Principle

Art. 284

In order to investigate felonies or misdemeanours, the compulsory measures court may, at the request of the public prosecutor, order the surveillance of transactions between a suspect and a bank or bank-type institution.

Opening the investigation

Art. 309 (1a)

¹ The public prosecutor shall open an investigation if:

- a. there is a reasonable suspicion that an offence has been committed based on the information and reports from the police, the complaint or its own findings

Penalty Order Procedure

Art. 352

¹ If the accused has accepted responsibility for the offence in the preliminary proceedings or if his or her responsibility has otherwise been satisfactorily established, the public prosecutor shall issue a summary penalty order if, having taken account of any suspended sentence or parole order that must be revoked, it regards any of the following sentences as appropriate:

- a. a fine;
- b. a monetary penalty of no more than 180 daily penalty units;
- c. ...
- d. a custodial sentence of no more than 6 months.

² Any of these sentences may be combined with a measure in accordance with Articles 66 and 67e-73 SCC.

³ Sentences in accordance with paragraph 1 letters b-d may be combined with each other provided the total sentence imposed corresponds to a custodial sentence of no more than 6 months. A fine may always be combined with any another sentence.

Art. 353

¹ The summary penalty order contains:

- a. the name of the authority issuing the order;
- b. the name of the accused;
- c. a description of the act committed by the accused;
- d. the offence constituted by the act;
- e. the sanction;
- f. notice of the revocation of a suspended sentence or of parole with a brief statement of the reasons;
- g. the costs and damages due;
- h. details of any seized property or assets that are to be released or forfeited;
- i. reference to the possibility of rejecting the order and the consequences of failing to reject the order;
- j. place and date of issue;
- k. the signature of the person issuing the order.

² If the accused has accepted the civil claims of the private claimant, this shall also be recorded in the summary penalty order. Claims that are not accepted shall be referred for civil proceedings.

³ Immediate written notice of the summary penalty order shall be given to persons and authorities who are entitled to reject the order.

Art. 354

¹ A written rejection of the summary penalty order may be filed with the public prosecutor within 10 days by:

- a. the accused;
- b. other affected persons;
- c. if so provided, the Office of the Attorney General of Switzerland or of the canton in federal or cantonal proceedings respectively.

² A rejection other than that made by the accused must be accompanied by a statement of grounds.

³ Unless a valid rejection is filed, the summary penalty order becomes a final judgment.

Art. 355

¹ If a rejection is filed, the public prosecutor shall gather the additional evidence required to assess the rejection.

² If the person filing the rejection fails to attend an examination hearing without an excuse despite being served with a summons, the rejection is deemed to have been withdrawn.

³ After taking the evidence, the public prosecutor shall decide to either:

- a. stand by the summary penalty order;
- b. abandon the proceedings;
- c. issue a new summary penalty order;
- d. bring charges in the court of first instance.

Art. 356

¹ If the public prosecutor decides to stand by the summary penalty order, it shall send the files immediately to the court of first instance for the conduct of the main hearing. The summary penalty order constitutes the indictment.

² The court of first instance shall decide on the validity of the summary penalty order and its rejection.

³ The rejection may be withdrawn at any time prior to the conclusion of the party submissions.

⁴ If the person filing the rejection fails to attend the main hearing without excuse or being represented, the rejection is deemed to have been withdrawn.

⁵ If the summary penalty order is invalid, the court shall revoke it and refer the case back to the public prosecutor for new preliminary proceedings to be conducted.

⁶ If the rejection relates only to costs and damages or other incidental legal orders, so the court shall decide in written proceedings, unless the person filing the rejection expressly requests a hearing.

⁷ If summary penalty orders have been issued to two or more persons in relation to the same act, Article 392 applies mutatis mutandis.

Accelerated Proceedings**Art. 358**

¹ At any time prior to bringing charges, the accused may request the public prosecutor to conduct accelerated proceedings provided the accused admits the matters essential to the legal appraisal of the case and recognises, if only in principle, the civil claims.

² Accelerated proceedings are not an option in cases where the public prosecutor requests a custodial sentence of more than five years.

Art. 359

¹ The decision of the public prosecutor on whether to conduct accelerated proceedings is final. The ruling need not contain a statement of reasons.

² The public prosecutor shall notify the parties that accelerated proceedings are to be conducted and shall set the private claimant a time limit of 10 days to file civil claims and request the reimbursement of costs incurred in the proceedings.

Art. 360

¹ The indictment shall contain:

- a. the details required in accordance with Articles 325 and 326;
- b. the sentence;
- c. any measures;
- d. instructions related to the imposition of a suspended sentence;
- e. the revocation of suspended sentences or parole;
- f. the ruling on the civil claims made by the private claimant;
- g. the ruling on costs and damages;
- h. notice to the parties that by consenting to the indictment, they waive their rights to ordinary proceedings and their rights of appeal.

² The public prosecutor shall serve the indictment on the parties. The parties must declare within ten days whether they consent to the indictment or not. Consent is irrevocable.

³ If the private claimant fails to give written notice rejecting the indictment within the time limit, he or she is deemed to have consented to it.

⁴ If the parties consent, the public prosecutor shall pass the indictment with the files to the court of first instance.

⁵ If any party rejects the indictment, the public prosecutor shall conduct ordinary preliminary proceedings.

Art. 361

¹ The court of first instance shall conduct a main hearing.

² At the main hearing, the court shall question the accused and establish whether:

- a. he or she admits the matters on which the charges are based; and
- b. this admission corresponds to the circumstances set out in the files.

³ If necessary, the court shall also question other parties present.

⁴ No procedure for taking evidence shall be conducted.

Art. 362

¹ The court shall be free to decide whether:

- a. the conduct of accelerated proceedings is lawful and reasonable;
- b. the charge corresponds to the result the main hearing and the files; and
- c. the requested sanctions are equitable.

² If the requirements for a judgment in the accelerated proceedings are fulfilled, the court shall issue a judgment that sets out the offences, sanctions and civil claims contained in the indictment, together with a brief statement of reasons for the fulfilment of the requirements for the accelerated proceedings.

³ If the requirements for a judgment in the accelerated proceedings are not fulfilled, the court shall return the files to the public prosecutor so that ordinary preliminary proceedings may be conducted. The court shall give notice of its decision not to issue a judgment both orally and by issuing written conclusions. This decision is non-contestable.

⁴ Following a decision not to issue a judgment in accelerated proceedings, statements made by the parties for the purpose of the accelerated proceedings may not be used in any subsequent ordinary proceedings.

⁵ The sole grounds for appeal against a judgment in accelerated proceedings are that a party did not consent to the indictment or that the judgment does not correspond to the indictment.

3. Federal Act on the Amendment of the Swiss Civil Code (The Code of Obligations)

Obligations of the employee

Duty of care and loyalty

Art. 321a

⁴ For the duration of the employment relationship the employee must not exploit or reveal confidential information obtained while in the employer's service, such as manufacturing or trade secrets; he remains bound by such duty of confidentiality even after the end of the employment relationship to the extent required to safeguard the employer's legitimate interests.

Audit requirement

Ordinary audit

Art. 727

¹ The following companies must have their annual accounts and if applicable their consolidated accounts reviewed by an auditor in an ordinary audit:

1. publicly traded companies; these are companies that:

- a. have shares listed on a stock exchange,
- b. have bonds outstanding,
- c. contribute at least 20 per cent of the assets or of the turnover to the consolidated accounts of a company in terms of letter a or b;

2. companies that exceed two of the following thresholds in two successive financial years:

- a. a balance sheet total of 20 million francs,
- b. sales revenue of 40 million francs,
- c. 250 full-time positions on annual average;

3. companies that are required to prepare consolidated accounts.

² An ordinary audit must be carried out if shareholders who represent at least 10 per cent of the share capital so request.

³ If the law does not require an ordinary audit of the annual accounts, the articles of association may provide or the general meeting may decide that the annual accounts be subjected to an ordinary audit.

Ordinary audit

Duties of the auditor

Duty to notify

Art. 728c

¹ If the auditor finds that there have been infringements of the law, the articles of association or the organisational regulations, it gives notice of this to the board of directors in writing.

² In addition, it informs the general meeting of any infringements of the law or the articles of association, if:

1. these are material; or
2. the board of directors fails to take any appropriate measures on the basis of written notice given by the auditor.

³ If the company is clearly overindebted and the board of directors fails to notify the court of this, then the auditor will notify the court.

Limited audit (Review)

Duties of the auditor

Audit report

Art. 729b

b. Audit report

¹ The auditor provides the general meeting with a summary report in writing on the result of the audit. This report contains:

1. a reference to the limited nature of the audit;
2. an assessment on the result of the audit;
3. information on independence and, if applicable, on participation in accounting and other services provided to the company being audited;
4. information on the person who managed the audit, and on his specialist qualifications.

² The report must be signed by the person who managed the audit.

Limited audit (Review)

Duties of the auditor

Duty to notify

Art. 729c

If the company is obviously overindebted and the board of directors fails to notify the court, then the auditor will notify the court.

Information and confidentiality

Art. 730b

¹ The board of directors provides the auditor with all the documents and information that it requires, in writing if so requested.

² The auditor safeguards the business secrets of the company in its assessments, unless it is required by law to disclose such information. In its reports, in submitting notices and in providing information to the general meeting, it safeguards the business secrets of the company.

4. Ordinance on Combating Money Laundering and Terrorist Financing

Professional Basis

General Criteria

Art. 7

¹ A financial intermediary is deemed to practice its activity on a professional basis if it:

- a. achieves a gross revenue of more than CHF 50,000 per calendar year with this activity;
- b. takes up business relationships with more than 20 contractual parties which do business with the company more than once a calendar year or which maintains more than 20 such relationships per calendar year;
- c. has unlimited control of third-party funds which can exceed CHF 5 million at any one point in time, or
- d. performs transactions at a volume of more than CHF 2 million per year.

² For the calculation of the transaction volume pursuant to (1)(d), inflows of assets and restructuring within the same account shall not be taken into account. For mutually binding contracts, only the benefit provided by the counterparty must be taken into consideration.

³ Activities on behalf of institutions and persons pursuant to Article 2(4) AMLA shall not be taken into account for the determination of the professional basis.

⁴ When determining the professional basis, activities for related parties shall only be taken into account if a gross revenue of more than CHF 50,000 is achieved during the calendar year.

⁵ The following are deemed to be related parties:

- a. near relatives and in-laws in lineal descent;
- b. near relatives collaterally related to the third degree;
- c. spouses and registered partners;
- d. co-heirs until the conclusion of the inheritance proceedings;
- e. reversionary heirs or heirs in remainder pursuant to Article 488 of the Swiss Civil Code;
- f. persons living in a stable relationship with the financial intermediary.

5. *Federal Act on Combating Money Laundering and Terrorist Financing*

Scope of application

Art. 2

³ Financial intermediaries are also persons who on a professional basis accept or hold on deposit assets belonging to others or who assist in the investment or transfer of such assets; they include in particular persons who:

- a. carry out credit transactions (in particular in relation to consumer loans or mortgages, factoring, commercial financing or financial leasing);
- b. provide services related to payment transactions, in particular by carrying out electronic transfers on behalf of other persons, or who issue or manage means of payment such as credit cards and travellers' cheques;
- c. trade for their own account or for the account of others in banknotes and coins, money market instruments, foreign exchange, precious metals, commodities and securities (stocks and shares and value rights) as well as their derivatives;
- d. ...
- e. manage assets;
- f. make investments as investment advisers;
- g. hold securities on deposit or manage securities.

Duties in the Event of a Suspicion of Money Laundering

Duty to report

Art. 9

¹ A financial intermediary must immediately file a report with the Money Laundering Reporting Office Switzerland ("the Reporting Office") as defined in Article 23 if it:

- a. knows or has reasonable grounds to suspect that assets involved in the business relationship:
 1. are connected to an offence in terms of Article 260ter Number 1 or 305bis SCC,
 2. are the proceeds of a felony or an aggravated tax misdemeanour under Article 305bis number 1bis SCC,
 3. are subject to the power of disposal of a criminal organisation, or
 4. serve the financing of terrorism (Art. 260quinquies para. 1 SCC)

Provision of Information

Art. 11a

² If, based on this analysis, it becomes apparent that in addition to the financial intermediary making the report, other financial intermediaries are or were involved in a transaction or business relationship, the financial intermediaries involved must on request provide the Reporting Office with all related information that is in their possession.

6. *Federal Act on International Mutual Assistance in Criminal Matters (IMAC)*

Spontaneous transmission of information and evidence

Art. 67a

¹ An authority prosecuting offences may, without being requested to do so, transmit to a foreign authority prosecuting offences information or evidence that it has gathered in the course of its own investigation, when it determines that this transmission may:

- a. permit the opening of criminal proceedings; or
- b. facilitate an ongoing criminal investigation.

² The transmission as defined in paragraph 1 does not have any effect on the criminal proceedings pending in Switzerland.

³ The transmission of evidence to a State with which Switzerland does not have an international agreement shall be subject to authorisation by the Federal Office.

⁴ Paragraphs 1 and 2 do not apply to evidence that is subject to the rules on secrecy.

⁵ Information that is subject to the rules on secrecy may be transmitted if it may enable the foreign State to present a request for mutual assistance.

⁶ A record shall be made of each spontaneous transmission.

Participation in the proceedings and access to the files

Art. 80b

¹ The persons entitled may participate in the proceedings and have access to the files provided this is necessary to safeguard their interests.

² The rights provided for in paragraph 1 may be limited only:

- a. in the interest of the foreign proceedings;
- b. for the protection of an important legal interest if the requesting State so requests;
- c. because of the nature or urgency of the measures to be taken;
- d. for the protection of important private interests;
- e. in the interest of Swiss proceedings.

³ Access to the files or participation in the proceedings may only be denied in the case of files or procedural measures for reasons of confidentiality.

Appeal

Appeal against the ruling of the executing authority

Art. 80e

¹ The ruling of the executing cantonal or federal authority on the conclusion of the mutual assistance proceedings together with the preceding interim rulings shall be subject to appeal to the Appeals Chamber of the Federal Criminal Court.

² Interim rulings preceding the final ruling may be appealed against separately provided that they cause immediate and irreparable prejudice through:

- a. the seizure of assets or valuables; or
- b. the presence of persons involved in the foreign proceedings.

³ Article 80f paragraphs 2 and 3 applies by analogy.

7. Federal Act on the Swiss Export Risk Insurance

Duty to report, right to report and protection

Art. 27a

¹ Members of the organs and the personnel of SERV shall report to the criminal prosecution authorities, to their supervisors, to the Board of Directors or to the Federal Financial Audit Office all crimes or offences that are to be prosecuted ex officio, which they become aware of during their official activity or that are reported to them.

² Duties to report under other Federal laws are reserved.

³ The duty to report is not applicable to people who have the right to refuse to give evidence or to testify as per Articles 113 paragraph 1, 168 and 169 of the Swiss Criminal Procedure Code.

⁴ The members of the organs and the personnel of SERV are entitled to report to their supervisors, to the Board of Directors or to the Federal Financial Audit Office other irregularities, which are detected during their official activity or reported to them. The recipient of this notification will establish the facts of the case and take necessary measures.

⁵ Anyone filing a report or testifying in good faith, must not be put at a disadvantage in his professional position.

8. *Swiss Federal Personnel Law (FPL)*

Duty to report, right to report and protection

Art. 22a

¹ Employees are required to report to the criminal prosecuting authorities, their superiors or the Swiss Federal Audit Office (SFAO) any crimes or offences prosecuted ex officio that they discover during their official activities or are notified to them.

² This shall be without prejudice to any duty to report by virtue of other Swiss Federal legislation.

³ This duty to report shall not apply to persons, who under Article 113 Paragraph 1 or Articles 168 and 169 of the Swiss Code of Criminal Procedure of 5 October 2007 are entitled to refuse to file a report or give evidence as a witness.

⁴ Employees are entitled to notify the SFAO of other irregularities that they discover during their official activities or are notified to them. The SFAO shall investigate the circumstances and take the necessary action.

⁵ If a person files a criminal report or notification or gives evidence as a witness in good faith, this shall not result in a detriment to their professional position.

9. *Federal Act on Banks and Savings Banks*

Article 47

¹ Whoever intentionally does the following shall be imprisoned up to three years or fined accordingly:

- a. discloses confidential information entrusted to them in their capacity as a member of an executive or supervisory body, employee, representative or liquidator of a bank, as a member of a body or employee of an audit firm or that they have observed in this capacity;
- b. attempts to induce such infraction of the professional secrecy;
- c. discloses confidential information to third parties or uses this information for own benefits or the benefit of others.

¹ bis. Whoever enriches themselves or others with an action in accordance with (1)(a) or (c) shall be punished with imprisonment for up to five years or fined accordingly.

² Whoever acts in negligence shall be penalized with a fine of up to CHF 250,000.

³ ...

⁴ The violation of the professional confidentiality shall remain punishable even after a bank license has been revoked or a person has ceased his/her official responsibilities.

⁵ The federal and cantonal provisions on the duty to provide evidence or on the duty to provide information to an authority shall be exempted from this provision.

⁶ Prosecution and judgement of offences pursuant to these provisions shall be incumbent upon the cantons. The general provisions of the Swiss Penal Code shall be applicable.

10. *Federal Act on Stock Exchanges and Securities Trading*

Breach of professional secrecy

Article 43

¹ Whoever intentionally does the following shall be imprisoned up to three years or fined accordingly:

- a. discloses confidential information entrusted to them in their capacity as a member of a governing body, employee, mandatary or liquidator of a stock exchange or a securities dealer or of which he has become aware in any such capacity;

- b. attempts to induce such infraction of the professional secrecy;
- c. discloses confidential information to third parties or uses this information for own benefits or the benefit of others.

¹ bis. Whoever enriches themselves or others with an action in accordance with (1)(a) or (c) shall be punished with imprisonment for up to five years or fined accordingly.

² Whoever acts in negligence shall be penalized with a fine of up to CHF 250,000.

³ ...

⁴ The violation of the professional confidentiality shall remain punishable even after a bank license has been revoked or a person has ceased his/her official responsibilities.

⁵ The federal and cantonal provisions on the duty to provide evidence or on the duty to provide information to an authority shall be exempted from this provision.

⁶ Prosecution and judgement of offences pursuant to these provisions shall be incumbent upon the cantons. The general provisions of the Swiss Penal Code shall be applicable.

ANNEX 5: PHASE 3 RECOMMENDATIONS OF THE WORKING GROUP AND WRITTEN FOLLOW-UP

Phase 3 Recommendations (December 2011)		Written Follow Up Report (June 2014)
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].	<i>Partially implemented</i>
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].	<i>Fully Implemented</i>
	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].	<i>Partially Implemented</i>
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].	<i>Fully Implemented</i>
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) of the Swiss Criminal Code (SCC), that allows sufficient time for investigation and prosecution of such cases [2009 Recommendation, III (ii)].	<i>Fully Implemented</i>
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)]	<i>Not Implemented</i>
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 programmes or other internal policies. [Convention, Article 1, 2009 Recommendation VI].	<i>Fully Implemented</i>

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)].	<i>Partially Implemented</i>
	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)]	<i>Partially Implemented</i>
	c) continue its efforts, in co-operation with business associations, to encourage companies, in particular SMEs, to develop internal control and compliance mechanisms [2009 Recommendation X. C. (i) and (ii)].	<i>Fully Implemented</i>
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].	<i>Partially Implemented</i>
	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) and II].	<i>Partially Implemented</i>
	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]	<i>Fully Implemented</i>
9.	Regarding awareness of the offence of bribery of foreign public officials , the Working Group recommends that Switzerland continue its efforts, in particular by an even more targeted awareness-raising for SMEs, and an intensified focus on the issue of foreign 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)].	<i>Fully Implemented</i>
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 Swiss Export Risk Insurance and FINMA.	<i>Fully Implemented</i>
	b) encourage the cantons that have not yet adopted such measures to consider instituting them.	<i>Fully Implemented</i>
	c) inform federal employees explicitly of their obligation to report all instances of corruption, including bribery of foreign public officials, and encourage the	<i>Partially Implemented</i>

	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)].	<i>Not Implemented</i>
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)].	<i>Not Implemented</i>
	b) 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].	<i>Fully Implemented</i>

Follow-up by the Working Group

13. Application by law enforcement authorities of corporate criminal liability [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. of the Criminal Procedure Code (CrimPC)); (ii) to negotiate with the accused through the accelerated procedure (Article 358 ff. CrimPC); and (iii) to use the provisions of the Swiss Criminal Code on “Reparation” (Article 53 SCC) 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 accelerated 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 foreign bribery in the context of the implementation of the new Criminal Procedure Code [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 6: LIST OF PARTICIPANTS AT THE ON-SITE VISIT

Federal administration	
Federal Department of Justice and Police (FDJP)	<ul style="list-style-type: none"> • Federal Office of Justice: Units – Criminal law International Criminal Law; Civil Law and Law of Civil Procedure; Mutual Assistance I Seizure and Handing over of Assets; Extraditions • Federal Office of Police: Federal Criminal Police (Fedpol) • Money Laundering Reporting Office (MROS) • Federal Audit Oversight Authority (FAOA)/Law and international affairs
Office of the Attorney General (OAG)	
Federal Criminal Court (FCC)	
Swiss Conference of Prosecutors (CPS/SKK)	
Federal Department of Economic Affairs (FEA)	<ul style="list-style-type: none"> • State Secretariat for Economic Affairs: International Investment and Multinational Enterprises • State Secretariat for Economic Affairs: Economic Co-operation and Development • State Secretariat for Economic Affairs: world trade (WTO)
Federal Department of Finance (FDF)	<ul style="list-style-type: none"> • State Secretariat for International Financial Matters (SIF) • Swiss Federal Audit Office (SFAO) (subdivision of the FDF) • Swiss Federal Office for Construction and Logistics (BBL/OFCL) • Federal Tax Administration (FTA) • Federal Personnel Office • FINMA (Swiss Financial Market Supervisory Authority)
Federal Department of Foreign Affairs (FDFA)	<ul style="list-style-type: none"> • Swiss Agency for Development and Co-operation • Compliance Office and Competence Centre for Contracts and Procurement • Interdepartmental Platform on Commodities • Interdepartmental Working Group on Combating Corruption • Interdepartmental Working Group on the Assets of Politically Exposed Persons (PEPs)
Government agencies and Swiss public-law bodies	<ul style="list-style-type: none"> • Swiss Export Risk Insurance (SERV/ASRE)
Parliament	<ul style="list-style-type: none"> • Legal Affairs Committee of the Federal Council • Legal Affairs Committee of the Council of States
Cantonal administrations	
Swiss Conference of Prosecutors (CPS/SSK)	

Canton of Vaud	<ul style="list-style-type: none"> • Tax Administration
Canton of Berne	<ul style="list-style-type: none"> • Cantonal Tax Office
Canton of Neuchâtel	<ul style="list-style-type: none"> • Regional Court of the Mountains and the Val-de-Ruz
Canton of Zurich	<ul style="list-style-type: none"> • Office of the Attorney General
Canton of Geneva	<ul style="list-style-type: none"> • Office of the Attorney General
Canton of Zug	<ul style="list-style-type: none"> • Office of the Attorney General
Federal Criminal Court, Bellinzona	
Private sector	
Private-sector companies	<ul style="list-style-type: none"> • Hoffmann-La Roche Ltd • Alpiq Holding AG • Metalor • ABB • Thales Suisse SA • Swisscom AG • Bühler Management AG • CFF SA • Givaudan SA • MERCURIA • SOLO Swiss SA • DIXI Services SA
Associations representing the private sector	<ul style="list-style-type: none"> • Ethics and Compliance Switzerland (ECS) • Swiss Bankers Association (SBA) • Economiesuisse • SwissHoldings • Switzerland Global Enterprise (S-GE) • Swiss Federation of Small and Medium Enterprises (SGV/USAM) • Swiss Trading & Shipping Association (STSA)
Legal profession	
Practitioners/Lawyers	<ul style="list-style-type: none"> • Étude Lachat Harari • Bär & Karrer AG • Monfrini Bitton Klein Avocats au Barreau de Genève • Etude Freymond, Tschumy & Associés • LALIVE SA • Cabinet Homburger • Etude Poncet Turrettini • Schellenberg Wittmer Business Law Firm (Geneva) • Etude Lenz Staehelin Business Law Firm (Geneva) • Self-regulatory organisation (SOR) of the Swiss Insurance Association (OAR ASA)) • Self-regulatory organisation (SOR) of the Swiss Bar Association and Swiss Notaries Association (OAR FSA/FSN) • MKS (Switzerland), Swiss Association of Manufacturers and

Traders in Precious Metals (ASFCMP)	
Accountants and auditors	
Private firms and professional associations	<ul style="list-style-type: none"> • Pricewaterhouse Ltd • BDO SA • Deloitte SA • EXPERTsuisse • KPMG SA
Civil society and universities	
Civil society	<ul style="list-style-type: none"> • Basel Institute on Governance • Transparency International • Public Eye • Global Compact Network Switzerland
Universities	<ul style="list-style-type: none"> • University of Fribourg • University of Geneva • Institute for Economic Crime Investigation (ILCE), Neuchâtel • University of Applied Sciences HTW Chur
Media	
<ul style="list-style-type: none"> • Le Matin and SonntagsZeitung • Freelance journalist and university researcher • Radio-Télévision Suisse (RTS) 	