



SWITZERLAND: FOLLOW-UP TO THE PHASE 3 REPORT & RECOMMENDATIONS

June 2014

This report, submitted by Switzerland, provides information on the progress made by Switzerland in implementing the recommendations of its Phase 3 report. The OECD Working Group on Bribery's summary of and conclusions to the report were adopted on 24 June 2014.

The Phase 3 report evaluated Switzerland's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions.

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

TABLE OF CONTENTS

SUMMARY AND CONCLUSIONS BY THE WORKING GROUP ON BRIBERY	4
WRITTEN FOLLOW-UP TO PHASE 3 REPORT: SWITZERLAND	7
PART I: RECOMMENDATIONS FOR ACTION	7
PART II: ISSUES FOR FOLLOW-UP BY THE WORKING GROUP	27

SUMMARY AND CONCLUSIONS BY THE WORKING GROUP ON BRIBERY

Summary of findings

1. In March 2014, Switzerland presented its written follow-up report to the Working Group on Bribery in response to the recommendations made by the Working Group in its Phase 3 evaluation of Switzerland in December 2011. Since the Phase 3 evaluation, Switzerland has closed four foreign bribery investigations of one legal person and three natural persons (of whom two were Swiss nationals) by ordering the payment of damages and compensation equivalent to the illegally acquired proceeds, in application of the ‘*réparation*’ procedure provided for in Article 53 of the Swiss Criminal Code (SCC). The case concerning the legal person is the only one of the four to have been reported in a press release on the web site of the Office of the Attorney General (OAG).¹ Since the Phase 3 evaluation, the OAG has closed seven investigations of foreign bribery concerning 14 natural persons.

2. The Working Group welcomed the replies provided by Switzerland as part of this written follow-up exercise, as well as the efforts undertaken by the OAG to bring foreign bribery cases to a successful close by confiscating the proceeds of this offence. It noted that several major draft bills were in progress, relating in particular to whistleblower protection and the creation of a criminal record for legal persons. In accordance with the established practice of the Working Group, the implementation of the Phase 3 recommendations relating to these draft bills will only be evaluated once they have been enacted. Out of 20 recommendations, the Working Group considers that 10 have been fully implemented, 7 have been partially implemented, and 3 remain not implemented.

3. Several of the Working Group’s recommendations asked the federal authorities to “encourage” the cantons to pursue certain reforms. In view of the federal organisation of the country and the constitutional constraints noted by Switzerland, a letter dated 15 May 2013 from the State Secretariat for Economic Affairs (SECO) to the Conference of Cantonal Governments (CdC) asking the cantons to report on progress in the implementation of Working Group recommendations affecting the cantons, and the centralisation of the replies received, were held by the Working Group to be sufficient to meet the requirements of these recommendations (*Recommendations 2(a), 8(c) and 10(b)*).

4. The Swiss government, as well as civil society and Swiss business organisations, have undertaken, both at federal and at cantonal level, numerous initiatives to raise awareness of foreign bribery and the need to adopt internal control and compliance mechanisms aimed at the private sector, including small and medium-sized enterprises (SMEs). Regular training courses have been organised for federal and cantonal public officials, including diplomatic and consular staff (*Recommendations 7(c) and 9*). Although no reforms have been initiated, actions have been taken to raise awareness of the issue of small facilitation payments among federal public officials and companies by the Interdepartmental Working Group on Corruption (IDAG) and through training courses organised by the Federal Department of Foreign Affairs (*Recommendation 6*).

5. With regard to the criminal liability of legal persons, Switzerland has not provided any training for OAG prosecutors on the issue of defective organisation, other than a training course organised at the time of the Phase 3 evaluation. Nonetheless, according to Switzerland’s replies, the OAG discusses this issue in its weekly meetings and prosecutors are encouraged to attend external courses on this topic. At the cantonal level, only Zug has provided specialised training courses on this subject. In view of the lack of

¹ See: [Bribery relating to the construction of the Yamal Pipeline: Siemens subsidiary pays reparation](#), 12 November 2013.

case law regarding the issue of defective organisation in relation to foreign bribery since the Phase 3 evaluation (the sole case in this area having been closed in application of the reparation procedure), the Working Group considers that this issue still needs to be clarified and therefore considers that the recommendation has been partially implemented (*Recommendation 1*).

6. Investigations and prosecutions are now pursued at the federal level by a division specialised in foreign bribery, money laundering and defective organisation cases (WIKRI II), created in September 2012 through the break-up of the central unit in charge of economic crime (Phase 3, para. 56). At the time of this follow-up report, there were four prosecutors, a deputy prosecutor, an assistant prosecutor, and a legal assistant in WIKRI II. Prosecutors from other OAG branch offices are assigned to new cases according to the workload and on the basis of regular reviews of the resources allocated, such that other OAG divisions may also take on foreign bribery cases. At the end of 2013, WIKRI II had 44 ongoing cases of foreign bribery. The lead examiners nonetheless noted the mention made of lack of resources in criminal court rulings (*ordonnances pénales*) as the reason for closing some recent foreign bribery prosecutions (*Recommendation 2(b)*). In relation to the publication of detailed information on the use of criminal and reparation procedures, the OAG's guidelines set out the procedure for implementing article 69 of the Swiss Criminal Code (SCC). Although decisions to close cases (anonymised) and the *ordonnances pénales* can be consulted by persons involved in the case and by the press, by going in person to OAG headquarters in Berne, they are not published on-line. The OAG decides in certain cases presenting a particular public interest (other than decisions to close the case) to publish a press release summarising the case and its conclusion. Following the Phase 3 evaluation, the OAG published one press release relating to a case of foreign bribery (see note 1, *supra*) (*Recommendation 3*).

7. In relation to mutual legal assistance (MLA), Switzerland has not modified its system for collecting and disseminating statistical data since Phase 3. There are no detailed statistics available at federal level on the number of MLA requests received and granted in relation to foreign bribery, money laundering, seizures, confiscations and restitutions, although Switzerland was able to provide statistics on MLA with regard to bribery without making any formal distinctions. At the cantonal level, Switzerland reports the existence of data collection mechanisms in only a few cantons (Aargau, Zug, Zurich), due to a lack of resources or lack of interest in all the other cantons. The Working Group therefore considers that the recommendation has not been implemented and invites Switzerland to put in place a system for collecting detailed statistics on foreign bribery (*Recommendation 5*).

8. Following Phase 3, a new accounting law (the Code of Obligations (CO)) entered into force on 1 January 2013. Pursuant to this law, the auditor of a company subjected to a limited audit (art. 727a CO) must disclose any infringements of the law which have an impact on the annual accounts, in a report drafted for the attention of the highest decision-making body of the company (art. 729b CO). Switzerland has stressed that legal doctrine and practice require the disclosure of only “substantial infringements of the law”, which poses the question as to whether foreign bribery falls into this category. The Working Group considers that this point poses a problem for the full implementation of the recommendation to encourage the disclosure of suspected cases of foreign bribery discovered by the accounting profession (*Recommendation 7(a)*). With regard to reporting by external auditors of suspected acts of bribery of foreign officials to law enforcement authorities, Switzerland decided not to proceed with a reform of the CO. The Working Group therefore considers that this recommendation has been partially implemented (*Recommendation 7(b)*).

9. In the area of money laundering, a law modifying the SCC entered into force on 1 January 2014 which raises the limitation period from seven to ten years for serious misdemeanours (including money laundering).² Even though the limitation period for the money laundering offence is still not the same as

² Federal Law of 21 June 2013.

that for the foreign bribery offence, the Working Group considers that this increase satisfies the terms of this recommendation (*Recommendation 4*).

10. With regard to tax measures, actions have been undertaken to raise the awareness of the federal tax administration (training courses, dissemination of the OECD Bribery Awareness Handbook for Tax Examiners). However, the efforts directed at cantons were held to be insufficient, as it would appear that some cantons reported a lack of resources or interest in the role of cantonal tax administrations in detecting and reporting suspicious transactions. In practice, Switzerland only mentions a small number of cases detected by the tax administration, and only 11 Swiss cantons make it mandatory for their tax officials to report offences (*Recommendation 8(a), 8(b)*).

11. The Working Group considered the actions undertaken by Switzerland in respect of the reporting of foreign bribery. On 5 September 2013 the Federal Personnel Office (OFPER) sent a letter regarding the obligation to report an offence to all employees in the federal administration; however, a similar initiative at cantonal level did not take place (*Recommendation 10(c)*). With regard to whistleblower protection, a draft bill amending the CO and the message relating to it were submitted to Parliament at the end of November 2013, and Switzerland indicates that its entry into force would be feasible in the first half of 2016. In accordance with the established practice of the Working Group, the implementation of this recommendation will only be evaluated once the bill has been enacted (*Recommendation 11*).

12. With regard to the Swiss agencies responsible for the granting of public advantages, following Phase 3 the Swiss Export Risk Insurance (SERV) revised its due diligence procedure (in 2012), which now includes verification of the black lists of multilateral development banks (*Recommendation 12(b)*). The OFPER has conveyed the will of the Swiss government to extend the requirement to report acts of bribery, to officials who are not subject to federal personnel law in a letter to all the Secretaries-General of departments (including SERV and FINMA) in which they were asked to introduce the necessary amendments (*Recommendation 10(a)*).

13. Switzerland has still not yet taken the necessary steps to implement systematic mechanisms for the debarment of companies convicted of bribery of foreign officials from public procurement contracts (*Recommendation 12(a)*). There are two draft bills which could satisfy this recommendation. The first is a draft adaptation of Swiss law pursuant to the World Trade Organisation's (WTO) revised plurilateral Agreement on Government Procurement allowing conviction for bribery as grounds for exclusion from competition for public contracts. The second is a preliminary draft bill on the creation of a criminal record for companies, which could be consulted by the public procurement authorities in order to check for convictions for foreign bribery. The Working Group encourages Switzerland to bring these two projects to a successful conclusion, in accordance with the aim of the recommendation.

Conclusions

14. On the basis of the findings of the Working Group on Bribery with respect to Switzerland's implementation of the Phase 3 recommendations, the Working Group concluded that Switzerland had fully implemented recommendations 2(a), 3, 4, 6, 7(c), 8(c), 9, 10(a), 10(b) and 12(b); that Switzerland has partially implemented recommendations 1, 2(b), 7(a), 7(b), 8(a), 8(b) and 10(c); and that recommendations 5, 11 and 12(a) have not been implemented. Recommendations 2(b) and 3 are converted to follow-up issues in order to better evaluate their implementation in practice. Follow-up issues remain relevant and will be examined, together with the implementation of recommendations that have been partially or not implemented, in the context of future evaluations by the Working Group.

WRITTEN FOLLOW-UP TO PHASE 3 REPORT: SWITZERLAND

Instructions

This document seeks to obtain information on the progress each participating country has made in implementing the recommendations of its Phase 3 evaluation report. Countries are asked to answer all recommendations as completely as possible. Further details concerning the written follow-up process is in the Phase 3 Evaluation Procedure [[DAF/INV/BR\(2008\)25/FINAL](#), paragraphs 55–67].

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

*Please complete and return your replies to the Secretariat by **3 February 2014**.*

Name of country:	Switzerland
Date of approval of Phase 3 Report:	16 December 2011
Date of information:	27 January 2014

PART I: RECOMMENDATIONS FOR ACTION

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

Text of recommendation 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].

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

Firstly, it must be remembered that foreign bribery cases are a matter for the federal authorities, that is to say they are investigated by the Office of the Attorney General (OAG); it is thus this body which essentially – indeed exclusively – deals with issues concerning the legal liability of legal persons under the terms of the Convention.

Following the Phase 3 evaluation for Switzerland, the OAG has, amongst other things, concentrated its in-service anti-corruption training on the question of the liability of legal persons and defective organisation. A number of training events were held with the assistance of outside speakers.³

³ See Swiss OAG’s annual report for 2011, p. 7: <http://www.bundesanwalt.ch/dokumentation/00024/index.html?lang=fr>.

For example, in 2011, the OAG organised a training event on the subject of “societas delinquere potest”, in response to the examiners’ oral conclusions. This event was for all OAG prosecutors, and its theme was the criminal liability of legal persons. A specialist in defective organisation was invited who gave a presentation of the legal theory and examples of case law and explored some of the practical issues arising in this area.

Ongoing training is attached to the autonomous jurisdiction of the cantons and is therefore carried out in accordance with the needs of the law enforcement authorities of the relevant canton. We are not able to provide more detailed information on each training module but, in general, the cantons undertake to take all necessary measures to ensure that the requisite knowledge for the prosecution of corruption cases is available in large quantities.

During its weekly sessions, the Economic Crime Division II discusses all topics relating to Art. 102 SCC, also in particular, all developments and, wherever possible, important developments in international cases. Furthermore, the staff of this division is encouraged to participate in external training in this field.

The success of these measures is evidenced by the fact that the OAG has opened six cases for defective organisation since 2012.

As stated, because the jurisdiction of the cantons is more restricted in this area, they have less exposure to foreign bribery cases. However, specific training has been organised at cantonal level too, notably in the canton of Zug. But the issues are clear enough from the legislation, legal theory and case law, so additional training in the subject is not needed, certainly not by authorities which encounter these issues less frequently.

When necessary, the cantonal and federal authorities coordinate procedures. With regards to jurisdiction, the OAG has a specialised unit (EMO), the focal contact of the cantonal authorities.

If no action has been taken to implement recommendation 1, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Text of recommendation 2(a):

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].

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

The State Secretariat for Economic Affairs (SECO), in its letter of 15 May 2013, encouraged those cantons where the Public Prosecutor’s Office is still answerable to a political authority to make it independent of that authority. Out of 23 cantons, 19 replied that the public prosecutor’s independence of the political authority was guaranteed by the fact that they shared the duty of oversight equally and interference in investigations and proceedings was prohibited. The other four cantons replied that the Public Prosecutor’s Office was not accountable to any political authority in the canton.

If no action has been taken to implement recommendation 2(a), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Text of recommendation 2(b):

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

- (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].

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

Following a recent reorganisation in 2012, the Office of the Attorney General formed a special division with responsibility for foreign bribery (“Economic Crime II”), comprising four prosecutors, a deputy prosecutor, an assistant prosecutor and a legal official. As part of the same reshuffle, a former WFTU delegate was appointed to head the OAG’s Lausanne branch office (comprising six prosecutors, one deputy prosecutor and four legal officials). This appointment enabled specialised knowledge on the subject of foreign bribery to be developed in French-speaking Switzerland too. Lastly, the reorganisation made for a smoother flow of information between divisions, with the result that other entities also work on foreign bribery cases, liaising with Economic Crime II from the angle of organised crime.

Prosecutors in the Economic Crime Division II also have jurisdiction for cases concerning offences other than foreign bribery. However, as already mentioned in our written responses (page 3), since the reorganisation in 2012, this division deals with foreign bribery, including money laundering and defective organisation (Art. 102 SCC) as a priority in this context.

As stated earlier, the cantons do not, in principle, have jurisdiction in matters of foreign bribery. However, there are officials specially trained to deal with national corruption offences in those cantons that are particularly exposed due to their economic circumstances (Zurich and Zug).

If no action has been taken to implement recommendation 2(b), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Text of recommendation 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].

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

(1) Position of the OAG:

Firstly, as a rule, the OAG publishes its (anonymised) decisions to close cases and its summary punishment orders. Thus these decisions can be consulted by representatives of the press or any other person demonstrating an interest worthy of protection.

Secondly, the OAG also publishes details of cases of public interest on an *ad hoc* basis. Thus, in the recent international corruption case involving the Siemens group, the OAG published press releases on both the summary punishment order and the closing of the case.⁴ The relevant decisions are also made available to the press in such cases.

In this way, the OAG assists and ensures, in foreign bribery cases, that compliance with the applicable procedural rules can be verified.

(2) Position of the cantons

Often, the decision to use a simplified procedure will depend on how much information is available about the offence, how much of the accused's past is public knowledge, and on whether or not the investigation has been conducted in depth. This matter is covered by the provisions of the Criminal Procedure Code, which govern the principle that the details of the investigation or decision must be made public (Article 69 ff. and Article 74 CrimPC). Except as stipulated by these provisions of law, the criminal prosecution authorities are not allowed to disclose information about the decision or details of the offence.

The principle of reparation established in Article 53 of the Swiss Criminal Code (SCC) can only be applied exceptionally in corruption cases, given that the public interest is involved.

This is an overall position expressed by the cantons.

If no action has been taken to implement recommendation 3, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Text of recommendation 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)].

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

In November 2012, the Federal Council adopted and laid before Parliament the Bill and its Message increasing the statutory period of limitation from seven to ten years for serious misdemeanours, that is to say offences carrying a custodial sentence of not more than three years. The aim was to give the criminal prosecution authorities enough time to act effectively against economic crime. Money laundering is one of

⁴ See Annexes 1.1 and 1.2: two press releases of 12 November 2013 concerning the Siemens case.

the serious misdemeanours mentioned above. Parliament adopted the new law amending the Swiss Criminal Code, and it came into force on 1 January 2014 (see Annex 2).

If no action has been taken to implement recommendation 4, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Text of recommendation 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)].

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

The Federal Office of Justice (FOJ) maintains numerous up-to-date statistics including figures on requests for mutual legal assistance made by and to Switzerland in the area of corruption (see Annex 3, appended table 2006-2013).

This table shows that the FOJ received 118 foreign MLA requests in corruption cases in 2012 and 91 in 2013. The FOJ itself made 45 MLA requests in corruption cases in 2012 and 22 in 2013. It also made nine spontaneous transmissions of information and evidence abroad in 2012 and 14 in 2013; one can add to this figure those cases in which the Swiss criminal authorities communicate directly with foreign authorities. According to an internal survey, the OAG made 19 spontaneous transmissions of information abroad in 2012 and 2013.

Regarding the number of MLA requests refused, Switzerland operates on the principle of not refusing MLA requests. If a request is incomplete or appears inadmissible, the requesting State is asked to provide further information and/or to modify its request. Therefore, the statistics do not include any figures on refusals.

The cantons of Aargau, Zug and Zurich compile detailed statistics on MLA requests received, accepted or refused in cases of international corruption, notably bribery of a foreign public official. It is not thought necessary for the small cantons to have specific instruments for the collection of detailed data. They handle so few foreign bribery cases that the workload would not be justified.

Not all cantons keep statistics on MLA requests. If this is the case, they are free to choose the structure and content of these statistics, the FOJ has not issued guidelines on this topic. The FOJ therefore are not aware of what differences there may be. Furthermore, given the direct contact between law enforcement authorities, some MLA requests that have been executed or sent by the cantons are unknown to the FOJ and consequently are not included in their statistics.

In principle, it is the same authority that is responsible for the execution of the MLA request and federal investigations. With regards to foreign bribery, it is the responsibility of the OAG. Needless to say that in case of doubt, a consultation takes place between the cantonal and federal authorities (see answer no. 6).

If no action has been taken to implement recommendation 5, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Recommendations for ensuring effective prevention and detection of foreign bribery

Text of recommendation 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].

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

In line with the 2009 Recommendation, Switzerland routinely reviews its policies and approach on small facilitation payments in order to combat this phenomenon effectively.

The federal authorities raise awareness among companies of the risks of corruption in international business transactions, citing the 2009 OECD Recommendation which encourages companies to prohibit or discourage the use of such payments in their internal company controls, ethics and compliance programmes or measures.

Companies were made aware of the 2009 Recommendation on this subject in the course of two events “Corruption in Central and Eastern Europe: a risk for Swiss SMEs?” held on 23 April 2013, and “Preventing corruption in the export trade”, held on 14 June 2013. These events were organised as a collaboration between the private sector and Chur’s University of Applied Sciences (HTW) (see also recommendation 9).

Many Swiss companies operating internationally have a policy of zero tolerance.⁵

The Interdepartmental Working Group on Combating Corruption (IDWG Combating Corruption) is continuing its awareness-raising efforts on the question of small facilitation payments. The Federal Department of Foreign Affairs (FDFA) routinely includes this in the annual training given to new recruits to the diplomatic and consular service. It is also an integral part of the economic seminars organised jointly by the FDFA and Switzerland Global Enterprise⁶ for staff of the Swiss Business Hubs⁷ and (local and transferable) staff responsible for business and trade affairs in Switzerland’s embassies and consulates-general.

⁵ See the study “*Lutter efficacement contre les risques de corruption – Stratégies pour les entreprises internationales*” (*Effective action against the risks of corruption – Strategies for international businesses*). Table 5 shows that 62.4% of the 318 companies questioned and operating abroad (including a large proportion of SMEs) have “Active and open communication in-house and outside and there is zero tolerance by management of corruption”, p. 20, Chur, 2012.
http://www.htwchur.ch/fileadmin/user_upload/institute/SIFE/4_Publikationen/Wissenschaftliche_Publikationen/Business_Integrity/IFBI_FR_Leitfaden_Korruptionsrisiken_HTW_fr.pdf.

⁶ Switzerland Global Enterprise is the Swiss platform for promoting imports, exports and investment. It is represented in more than 19 markets by Swiss Business Hubs.

⁷ Swiss Business Hubs are responsible for promoting exports and Switzerland as an economic centre.

On 12 September 2012, the IDWG Combating Corruption also held a special workshop on active bribery entitled “Management of borderline-legal behaviour in foreign operations” (38 participants), for the benefit of federal government employees. The aim of this workshop was to hold a frank discussion of facilitation payment issues in difficult foreign contexts (for example humanitarian aid) and to find pragmatic solutions to minimise the risks and make things better for the persons concerned.

The UN Global Compact Network Switzerland held a round-table discussion on 17 June 2013 on “Facilitation payments – identifying frequent issues for companies and NGOs”, at which the 2009 Recommendation was also discussed.

If no action has been taken to implement recommendation 6, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Text of recommendation 7(a):

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)].

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

(A) Accounting standards

The Federal Council set the date for the entry into force of the new accounting law, approved by Parliament on 23 December 2011 (Article 957 ff. CO), as 1 January 2013.⁸ Companies have a transitional period of two years, or three years in the case of consolidated accounts, in which to adapt to the new legislation. These rules apply to entities of all legal forms, from not-for-profit associations to commercial limited companies. The accounting requirements vary depending on the size of the company. Thus listed companies, notably large co-operatives or foundations must, in addition to their annual accounts, prepare financial statements compliant with a recognised accounting standard (Article 962 CO), for example the International Financial Reporting Standards (IFRS). Where a legal person has significant economic interests, in particular a limited company, controls another company that is required to prepare accounts, that legal person must draw up consolidated accounts (Article 963 CO). The new accounting law on several occasions provides more rights for minority shareholders and partners, who can enforce these even against the will of the board of directors, for example by insisting on additional company or group financial statements prepared in accordance with a recognised accounting standard.

(B) External audit

Large companies must submit their annual accounts for ordinary (full) audit by an independent auditor (Article 727 CO). If the auditor identifies major infringements of the law in the course of his work (criminal provisions also apply), he must notify not only the company’s board of directors but also its supreme decision-making body (in the case of a limited company, this is the general meeting, Article 728c CO). For small companies, the annual accounts must undergo merely a “limited audit”

⁸ Federal Council communiqué of 22 November 2012: <http://www.ejpd.admin.ch/content/ejpd/fr/home/dokumentation/mi/2012/2012-11-22.html>.

(Article 727a CO). Although the text of the law does not expressly say so (Article 729c CO), the auditor must also, in line with accepted accounting theory and practice, disclose in his report to the general meeting any essential infringements of the law which impact on the annual accounts (Article 729b CO).

According to the predominant view and practice,⁹ the auditors of a company subject to a limited audit must also, much like large companies that are subject to a regular audit (Article 728c CO), disclose the essential violations of the law which have had an impact on the annual financial statements, in a report produced for the highest governing body of the company (Article 729b CO). Thus, the more a violation is liable to affect the decision of the shareholder made at the general assembly (e.g. when discharge is to be given, but also in the event of re-election or dismissal), the more it is considered to be serious. In order to assess the gravity of the violation, it should also be considered to what extent the violation is likely to influence the shaping of the will of the shareholders, with regards to maintaining (including exercising voting rights), buying or selling shares.

If no action has been taken to implement recommendation 7(a), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Text of recommendation 7(b):

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

- (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)].

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

If the audit firm is subject to scrutiny by the State, it must immediately and in writing provide the Federal Audit Oversight Authority (FAOA) with all the facts needed for this to be done (Article 14, paragraph 2, of the Federal Act on the Licensing and Oversight of Auditors (Auditor Oversight Act, AOA)¹⁰). Anonymous notifications (whistleblowing) may also be sent to the FAOA.¹¹ If the suspicion of infringement is confirmed, the FAOA notifies any oversight authority under special laws (Article 22 AOA), the stock exchange (Article 23 AOA) or the criminal prosecution authorities (Article 24 AOA).

Auditors' duty of discretion under Article 728c CO does not allow them to report possible offences directly to the criminal prosecution authorities. They must nevertheless notify the general meeting of any major infringements of the law or the company's articles which they discover. Persons attending the general meeting or the shareholders may notify law enforcement authorities at any time. It seems unlikely that the

⁹ BSK OR-II Watter/Maizar, art. 729c CO, no 4, with reference to: Böckli, Revisionsstelle und Abschlussprüfung nach neuem Recht, 2007, no 502 ; Camponovo/von Graffenried-Albrecht, Neues Revisionsrecht – offene juristische Fragen, L'EC 2008, p. 204 ss, p. 211 ss ; Tax Chamber, ch. 3.7 ; Kleibold, Erfahrungen mit der eingeschränkten Revision, L'EC 2010, p. 91 ss, p. 94 ainsi que Böckli, Schweizer Aktienrecht, 4e éd, 2009, § 15, p. 407 ss ; Böckli, Revisionsstelle und Abschlussprüfung nach neuem Recht, 2007, no 416.

¹⁰ <http://www.admin.ch/opc/fr/classified-compilation/20032757/201301010000/221.302.pdf>.

¹¹

http://www.revisionsaufsichtsbehoerde.ch/docs/whistleblowing_f.asp?id=31454&sp=F&m1=30481&m2=30493&m3=31454&m4=&domid=1063.

auditor's duty of discretion under Article 728c CO will change, because an audit can achieve what is expected of it only if auditors offer the companies they audit the assurance that they will treat the information they handle in total confidence.

According to information from the Swiss Institute of Certified Accountants and Tax Consultants (*Chambre fiduciaire/Treuhand Kammer*), the following seminars/events, aimed at external auditors amongst others, have been held on the topics of compliance programmes, control mechanisms and awareness-raising on action against corruption.

- 4 June 2012: “Corporate governance: for an effective economy”, Zurich.
- 20 September 2012: “Capital markets law forum”, Zurich.
- 11 December 2012: “Latest developments in economic criminal law”, Neuchâtel. Topics included the identification of criminal funds in criminal proceedings and mutual legal assistance in cases of economic crime.
- 29 August 2013: “Criminal acts in the SME environment: occurrence, detection, management”, Zurich. Topics included the criminal prosecution of economic crimes in SMEs.

A revision of Article 728c CO is not currently being considered. The plain language of the law and criminal sanctions also do not really leave any room for an exception.

We draw your attention, however, to the proposed partial modification of the Code of Obligations which regulates conditions concerning whistleblower protection, in which the reporting of irregularities by an employee (whistleblower) will be considered as lawful (whistleblower protection for employees, see <http://www.ejpd.admin.ch/content/ejpd/fr/home/dokumentation/mi/2013/2013-11-200.html>).

If no action has been taken to implement recommendation 7(b), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Text of recommendation 7(c):

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

- (c) continue its efforts, in cooperation with business associations, to encourage companies, in particular SMEs, to develop internal control and compliance mechanisms [2009 Recommendation X. C. (i) and (ii)].

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

The federal authorities, in particular the State Secretariat for Economic Affairs (SECO), have continued their co-operation with business associations and the large multinationals in an effort to encourage SMEs to set up adequate internal control and compliance mechanisms. For the federal authorities, this is an ongoing exercise.

Since the launch of Phase 3 of the evaluation of Switzerland, various events have been held to raise the awareness of companies, and business associations especially, to the risks of bribery of public officials during their activities abroad. Events of this kind will be repeated in future to protect companies against

these risks. At these meetings, the federal authorities inform SMEs and business associations of the existence and content of the internal control and compliance mechanisms discussed in Annex II to the revised 2009 Recommendation of the OECD for further combating bribery of foreign public officials in international business transactions. This Annex II is freely available on the SECO website¹² and is frequently consulted by companies. According to SECO's IT department, data taken from the SECO website, where Annex II is accessible, establishes that it has been viewed 16,799 times between 1st January 2012 and 31st December 2013.

At the events held on 23 April 2013, “Corruption in Central and Eastern Europe: a risk for Swiss SMEs?” and 14 June 2013 “Preventing corruption in the export trade” (see also reply to recommendation 9), speakers representing the Confederation drew attention to the recommendations for internal control and compliance mechanisms made in Annex II.

The “Compliance” round-table discussions (again, see reply to recommendation 9), which bring together representatives of the SECO and the FDFA as well as representatives of Swiss companies, Chur’s University of Applied Sciences (HTW) and Transparency International Switzerland, seek to encourage business associations and SMEs to set up adequate internal control and compliance mechanisms.

If no action has been taken to implement recommendation 7(c), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Text of recommendation 8(a):

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].

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

Several divisions of the Federal Tax Administration (FTA) brief their staff on the “OECD Bribery Awareness Handbook for Tax Examiners”. Investigators in the FTA’s Penal Affairs and Investigation Division are tasked with raising this subject in their discussions with the tax authorities of the cantons.

The 2007 FTA circular¹³ specifies, from the criminal and taxation viewpoint, the expenses that constitute bribes to foreign public officials, and gives some concrete examples. It also clarifies the procedures to be followed in a tax audit, with explicit reference to the “Bribery Awareness Handbook” of the OECD Committee on Fiscal Affairs. The circular also spells out the procedure for reporting cases of corruption that the tax authorities become aware of in the course of their duties to the law enforcement authorities (reporting after obtaining consent from the senior authority). Once the 2013 version of the “OECD Bribery Awareness Handbook for Tax Examiners” is available, this circular will be updated and a revised text will be published in 2014.

¹² <http://www.seco.admin.ch/themen/00645/00657/index.html?lang=fr>.

¹³ Circular No. 16 of 13 July 2007: <http://www.estv.admin.ch/bundessteuer/dokumentation/00242/00380/index.html?lang=fr>.

In their replies to a letter of 15 May 2013 from the State Secretariat for Economic Affairs, 13 cantons said that they had intensified their work on raising awareness on bribery, their detection techniques and the procedure to be followed in reporting to law enforcement authorities, notably through specific and ongoing training. Another canton had focused on raising awareness of bribery. Seven more cantons also mentioned the 2007 FTA circular (No. 16) concerning the ban on deducting hidden commissions.

The Swiss Tax Conference, a technical association formed by the tax authorities of the cantons and the confederation, is strongly committed to providing training courses in taxation which consists of three levels according to the necessary tax work and/or the necessary controls. Level 2 deals with, amongst other things, income tax and also therefore legal and illegal expenditures. It is within this framework that corruption payments are treated. To date, approximately 970 specialist commercial tax auditors (taxateurs spécialisés aux entreprises) have taken this training course.

The circular has been updated with the reference on the manual in the corresponding language (English/French) and – for Italian – on the respective page of the OECD.

If no action has been taken to implement recommendation 8(a), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Text of recommendation 8(b):

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

- (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].

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

The subject of bribery of foreign public officials will be pursued in greater depth by the Penal Affairs and Investigation Division of the Federal Tax Administration and the cantonal tax authorities. The measures taken have already seen results, in the form of reports of alleged foreign bribery to law enforcement authorities.

Nine cantons gave their comments in reply to the SECO letter of 15 May 2013. They consider they have taken appropriate measures to reinforce the intensity and frequency of official on-site inspections of local companies deemed susceptible to bribery of foreign public officials. Companies' susceptibility to commit acts of bribery was used as a criterion for conducting additional or routine audits in-house. Twelve other cantons decided against taking additional measures, because the companies in their jurisdiction operated chiefly at national level and the tax authorities did not have enough resources.

Throughout their investigations, the investigators of the Penal Affairs and Investigation Division present the cases to the tax authorities of the cantons and draw to the attention of the cantonal experts any questionable expenditure. Although the vast majority of these expenditures do not raise suspicions relating to corruption payments, this in-depth analysis has exposed some cases to the Office of the Attorney General. Furthermore, the investigators of the Penal Affairs and Investigation Division – of which the head

of the team has undertaken the evaluation of France – analyse payments from this perspective when accessing files from prosecuting authorities.

One case was reported by the Federal Tax Administration (FTA) to the Office of the Attorney General. In terms of the tax crimes aspects of the case, the accused were convicted of tax evasion. In another case, the OAG already had suspicions of corruption and reported the case to the FTA for verification of potential tax offences.

Since 1st January 2011, employees of the federal tax authorities – like all employees of the federal administration – are required to report to law enforcement authorities, to their superiors or to the Federal Audit Office all crimes and offences automatically prosecuted that they are aware of or which have been brought to their attention in the course of their work (Article 22a of the Federal Personnel Act).

If no action has been taken to implement recommendation 8(b), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Text of recommendation 8(c):

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

- (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].

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

On 15 May 2013, the State Secretariat for Economic Affairs (SECO) sent a letter to the cantons encouraging those which did not yet have a reporting obligation for their tax officials to consider introducing one. Eleven out of 21 cantons replied that an obligation of this kind was already in place for their tax authorities. Most of these 11 cantons cited their cantonal laws which imposed the reporting obligation for their tax officials. Ten other cantons said that the tax authorities' reporting obligation was an integral part of the general reporting obligation incumbent on civil servants. One canton had plans for an independent complaints office, whilst other cantons were considering amending their laws.

The cantons which have a duty to report: Zurich, Schwytz, Zoug, Soleure, Bâle-Ville, Schaffhausen, Appenzell Rh.-Ext., Aargau, Thurgau, Tessin and, Neuchâtel.

For the canton of Zurich,¹⁴ there is a legal requirement to report for all the cantonal and communal employees. In Appenzell Rh. Ext., there is a general requirement to report for the employees. The cantons of Zug,¹⁵ Tessin¹⁶ and Neuchâtel¹⁷ have a requirement to report for their canton tax officials in their cantonal legislation. We have received no information regarding the cantons of Schwyz, Solothurn,

¹⁴ Art.167 Abs.1 des Gesetzes über die Gerichts- und Behördenorganisation im Zivil- und Strafprozess (GOG).

¹⁵ Art.93 Gesetz über die Organisation der Zivil-und Strafrechtspflege (Gerichtsorganisationsgesetz GOG vom 26. August 2010).

¹⁶ Art. 31 ff. Legge sull'ordinamento degli impiegati dello stato e dei docenti (LORD del 15 marzo 1995).

¹⁷ Art. 22 Law on the status of public function (LSt of 28 June 1995). Obligation of holders of public office to alert the Public Ministry without delay when they acquire, in the exercise of their functions, knowledge of a continuing violation of duties.

Schaffhausen and Thurgau.

Each canton chooses to adopt a law and has different priorities with regards to other cantons. Some focus on the requirement to report by tax officials whereas others extend this requirement to all public officials.

If no action has been taken to implement recommendation 8(c), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Text of recommendation 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)].

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

Awareness-raising in companies, including SMEs

Switzerland attaches a high priority to continuing its efforts to raise companies' awareness of the risks of corruption in transactions abroad, notably the risks of bribery of foreign public officials. For the federal authorities, this is an ongoing exercise.

Over the past two years, the federal authorities and other players involved in countering corruption have continued their efforts to raise awareness of these risks among companies. Given that most large multinationals already have preventive measures and internal control mechanisms in place, the authorities are focusing on SMEs which operate outside Switzerland.

The brochure "Preventing corruption – Information for Swiss businesses operating abroad"¹⁸ is designed as a guide for companies. It outlines the problem of corruption in international trade and the relevant provisions of Swiss criminal law. It presents a number of specific cases, with a legal assessment of each, and indicates how companies can avoid and actively counter corruption. This brochure is distributed to companies at a variety of gatherings and events. The federal authorities also provide companies with information about Annex II to the revised 2009 OECD Recommendation for further combating bribery of foreign public officials in international business transactions.

Since the launch of Phase 3 of the evaluation of Switzerland, various events have been held to raise the awareness of companies, and SMEs especially, to the risks of bribery of public officials. Events of this kind will be repeated in future to protect companies against these risks.

On 23 April 2013, the State Secretariat for Economic Affairs (SECO), assisted by Transparency International Switzerland and the Chamber of Commerce Switzerland-Central Europe (SEC), held a

¹⁸ This brochure, prepared by the SECO in collaboration with the FDFA, FOJ, économieSwiss and Transparency International Switzerland, was last revised in 2008. See <http://www.seco.admin.ch/dokumentation/publikation/00035/00038/01711/index.html?lang=en>.

seminar for companies operating in central Europe entitled “Corruption in Central and Eastern Europe: a risk for Swiss SMEs?” On 14 June 2013, Swissmem¹⁹, the SECO, Chur’s University of Applied Sciences (HTW) and representatives of various Swiss companies held a meeting on the prevention of corruption in the export trade, for the benefit of SMEs in particular.

The SECO and the FDFA take part, together with various Swiss company representatives (whose responsibilities include compliance) and Chur’s HTW and Transparency International Switzerland, in the “Compliance” round-table discussions organised by Siemens Switzerland. These discussions are a forum for sharing information, defining good practice and helping SMEs with compliance issues and the preparation and implementation of collective measures. The next round-table discussion will take place on 6 February 2014.

The Interdepartmental Working Group on Combating Corruption (IDWG Combating Corruption) is pressing on with its work to raise awareness of corruption and prevent it. Over the past two years, numerous thematic workshops have been held, targeting specific groups in the public and/or private sector. In December 2011 a plenary meeting addressed the subject of commodities trading, currently a hot topic in Switzerland. Another plenary agenda item has been corruption in sport (workshop in June 2012).

In December 2012, a second plenary meeting of the IDWG looked at collective action. A measure by the Basel Institute on Governance was used as a basis for the discussion, with input shared by a representative of Siemens Switzerland. This company was shown to be a driving force in the development of initiatives of this kind, which also benefit SMEs.

Two workshops were held concurrently with the IDWG plenary meeting of 20 June 2013: the first on preventing corruption in the private sector (chemical and pharmaceutical industry), the second on preventing corruption in public and quasi-public procurement. Chemical and pharmaceutical companies (Novartis International, Clariant International Ltd and Givaudan) together with the Federal Roads Office (FEDRO), Swiss Post and Swiss Federal Railways (SBB/CFF), gave presentations of their anti-corruption arrangements whilst Swissmedic²⁰ described the measures it takes against corruption as the Swiss agency for the supervision and authorisation of therapeutic products.

On 28 February 2013, the Swiss-Asian Chamber of Commerce held a round-table discussion in Zurich, in partnership with Transparency International Switzerland, on the subject of “Re-learning the Fundamentals of ABC (Anti-Bribery & Corruption) in CSR”.

The Geneva Chamber of Commerce, Industry and Services held a seminar entitled “Corruption: how to react?” on 2 May 2012 in Geneva, in collaboration with Swisscham-Africa and the International Chamber of Commerce Switzerland.

Swisscham-Africa, Chur’s HTW and the ABB Technical College held an information meeting in Baden on 12 June 2013, on the subject of “Corruption abroad: a dangerous risk”.

On 29 November 2012, the UN Global Compact Network Switzerland held a workshop on the theme of “Implementing CSR – useful tools in practice” to explain to members and non-members of the network the range of tools available for combating corruption.

Transparency International Switzerland gave a presentation of the OECD Anti-Bribery Convention to

¹⁹ Swissmem is an association representing the Swiss mechanical and electrical engineering industry and associated technology-oriented sectors.

²⁰ Swiss Agency for Therapeutic Products.

companies, including SMEs, at the following events:

- 31 May 2012, Bern, “Corruption in international business and its legal implications”, Bern University of Applied Sciences;
- 20 September 2012, Lausanne, “Corruption in international business and its legal implications”, Association of Certified Fraud Examiners, Lausanne;
- 2 November 2012, Geneva, “The multiple facets of corruption: impacts and tools for business”, University of Geneva.

Transparency International Switzerland also regularly holds events for its “practitioners’ circles”, involving corporate representatives concerned with action against corruption. At these events, participants share their experience and explore the day-to-day challenges (topics addressed: best practice, tone at the top, corporate governance and compliance at FIFA, whistleblowing. Dates: April 2012, September 2012, January 2013 and June 2013).

Training courses and modules for federal and cantonal employees

The Federal Personnel Office (EPA/OFPER) routinely organises an optional induction day for new staff during which the prevention of corruption is discussed. This is also covered in the (optional) seminars run by Directorates I and II for staff at junior, middle and senior management level.

The secretariat of the IDWG, part of the Federal Department of Foreign Affairs (FDFA), is continuing its work of training. There are specific courses for consular and diplomatic staff, the directors of Swiss Business Hubs²¹, and ambassadors. Two workshops held as part of the annual Swiss Ambassadors’ Conference in August 2012 and August 2013 addressed the topic of “Corruption and development” and the relationship between corruption and security.

The IDWG also holds talks with the cantons in connection with the implementation of recommendations made to them by multilateral groupings, notably the OECD. Indeed, one of the main tasks of the IDWG is to co-ordinate strategies at national and international level. This requires close co-operation with the cantons. In 2013, the IDWG sought to intensify its dialogue with them, especially with the cantonal financial comptrollers’ offices. Thus, on 28 November 2013, the IDWG took part in a training seminar of the “Latin” Conference of financial comptrollers’ offices from the bilingual cantons and those in French-speaking Switzerland and Ticino. Representatives from some of the larger cities also attended. The IDWG repeated this seminar for the German-speaking cantons on 16 January 2014 in Zurich.

If no action has been taken to implement recommendation 9, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Text of recommendation 10(a):

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.

²¹ Swiss Business Hubs are responsible for promoting exports and Switzerland as an economic centre.

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

Regarding decentralised administrative entities whose staff is not covered by the Federal Personnel Act (BPG/LPers), the director of EPA/OFPER sent a letter of 12 May 2011 to all the departmental secretaries-general asking them to make the necessary amendments to specific laws, incorporating a provision identical to that in Article 22a BPG/LPers.²² When specific laws are amended, EPA/OFPER asks, at the stage of consulting the federal offices, that they be amended in this respect.

Article 22a of the Federal Personnel Act (BPG/LPers) has been incorporated into the Code of Conduct of Swiss Export Risk Insurance (SERV) (entered into force 12 June 2012). This Code applies not only to SERV staff, but also to the members of its Board of Directors. Revision of the Swiss Export Risk Insurance Act (LASRE/SERVG), currently under way, will incorporate Article 22a BPG/LPers into the Act. The revised version of LASRE/SERVG will probably come into force in the second half of 2015.

Quasi-public entities, such as Swiss Federal Railways (SBB/CFF), the Federal Roads Office (FEDRO) and Swiss Post – which do not come under the Federal Personnel Act and consequently are not bound by the obligation to report cases of corruption – have reported preventive measures to minimise the risks. These bodies have been encouraged by the Interdepartmental Working Group on Combating Corruption (IDWG Combating Corruption) to introduce a reporting obligation as provided for in Article 22a of the Federal Personnel Act.

Article 16 of the FINMA Code of Conduct contains rules broadly consistent with Article 22a of the Federal Personnel Act (BPG/LPers, RS/SR 172.220.1). This article is expressly tailored to FINMA as a decentralised unit of the federal administration. As a complement to Article 16 of the Code of Conduct, Article 38, paragraph 3 of the Financial Market Supervision Act (FINMASA, RS/SR 956.1) introduces an obligation for FINMA to report any crimes or common-law offences which come to its notice. This reporting obligation also applies to staff members as individuals.

If no action has been taken to implement recommendation 10(a), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Text of recommendation 10(b):

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

- (b) encourage the cantons that have not yet adopted such measures to consider instituting them.

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

The State Secretariat for Economic Affairs (SECO), in its letter of 15 May 2013, encouraged those cantons which did not yet have an obligation to report details of foreign bribery to consider introducing one. Fourteen cantonal governments replied that they already had a well-established reporting obligation. This

²² http://intranet.infopers.admin.ch/arbeitsgeber/01212/rechtliche_grundlagen/index.html?lang=fr.

obligation applies in cases of bribery of foreign public officials. Of these cantons, one planned to set up an office to handle complaints of corruption by 1 January 2014, and another intended to revise its rules on whistleblowing. Eight other cantons said that a specific obligation to report foreign bribery was already part of the general reporting obligation or that public officials of the cantons had little contact with foreign public officials.

If no action has been taken to implement recommendation 10(b), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Text of recommendation 10(c):

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

- (c) inform federal employees explicitly of their obligation to report all instances of corruption, including bribery of foreign public officials, and encourage the cantons to do the same for their own employees subject to such an obligation or for whom there are internal reporting mechanisms [2009 Recommendation IX (i) and (ii)].

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

On 5 September 2013, the Federal Personnel Office (EPA/OFPER) sent an e-mail headed “Preventing corruption and whistleblowing: don’t ignore it!” to all federal administration staff, reminding them that they had an obligation to report infringements and could “blow the whistle” on irregularities. The e-mail included the names of authorities which employees could contact, and a link to the EPA/OFPER website for further information.²³

Regarding decentralised administrative entities whose staff is not covered by the Federal Personnel Act, the director of EPA/OFPER sent a letter on 12 May 2011 to all the departmental secretaries-general asking them to make the necessary amendments to specific laws, incorporating a provision identical to that in Article 22a BPG/LPers. When specific laws are amended, EPA/OFPER asks at the stage of consulting the federal offices that they be amended in this respect.

The State Secretariat for Economic Affairs (SECO), in its letter of 15 May 2013, encouraged the cantons to consider explicitly informing their staff about their obligation to report infringements and foreign bribery, where an obligation or internal reporting arrangements of this kind were in place. Out of 20 cantons, 13 explicitly briefed their employees on their obligation to report all acts of corruption, including bribery of foreign public officials. Another canton set up an agency tasked with acting against corruption and, in the medium term, decided to form an office within the cantonal administration to handle cases of whistleblowing and see how effective it proved to be. Six other cantons replied that they already had a general reporting obligation, which thus covered the obligation to report acts of corruption, including bribery of foreign public officials. One of these cantons was following up a proposal to set up an independent complaints office.

²³ <http://intranet.infopers.admin.ch/arbeitsgeber/01212/index.html?lang=fr&amtid=2>.

If no action has been taken to implement recommendation 10(c), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Text of recommendation 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)].

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

A Bill on protection for workers reporting irregularities, requiring amendment of the Code of Obligations (CO), together with the Message relating to it, was adopted by the Federal Council on 20 November 2013 and was then laid before Parliament. The new rules cover all employment relationships in the private sector and public entities in which employment relationships are governed by private law or whose staff regulations make reference to the Code of Obligations. They acknowledge that reporting is lawful in terms of the obligation of loyalty and discretion and they define the criteria for lawful reporting. Thus workers may address themselves to their employer, then to the authority and, in the last resort, to the public, without breaching the terms of their contract and without committing any criminal offence.

Under the Bill, dismissal following lawful reporting of an irregularity is wrongful dismissal. The Bill retains the current penalty, namely compensation set by the courts but not exceeding six months' salary. The Federal Council put on hold its plan to increase this maximum to 12 months' salary following strong political opposition to the measure, but intends to continue deliberations on this matter. The Bill also expressly prohibits the other disadvantages which workers may suffer as a result of lawfully reporting irregularities. Depending on the case, workers may make a cease-and-desist application or ask for action against them to be acknowledged. They may also claim non-pecuniary damages.

The Bill and the messages relating to it were forwarded to Parliament at the end of November 2013. Parliamentary debates have not yet been scheduled and the Administration has no influence over on this timetable but if the debates were to take place according to their usual rhythm, entry into force of the provisions relating to whistleblower protection during the first half of 2016 could be possible.

If no action has been taken to implement recommendation 11, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Text of recommendation 12(a):

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)].

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

Swiss federal law on public procurement does not allow for the compilation of “black lists”. Consequently, a bidder cannot be excluded from a federal tendering procedure because he features on a list, unlike the procedures used by international development banks, for example. Work is currently under way to bring Swiss law into line with the revised plurilateral WTO Agreement on Government Procurement (adopted on 30 March 2012). The amending Bill will propose that being convicted of an act of corruption constitutes grounds for exclusion from the award of contracts. The Bill will be submitted for consultation by the federal offices in early 2014. The draft legislation is expected to be laid before the Swiss Parliament during the second half of 2014 where it will be dealt with under the normal parliamentary procedures.

In the area of development co-operation, contracts are awarded on the basis of a range of framework conditions. Administrative entities must be meticulous in ensuring that funds allocated to them are used and managed effectively. So every contract award must obey the principles of transparency, value for money, competitiveness and equality of treatment. The system of internal control is designed accordingly. For example, in the case of private contracts or invited bids, checks are made to see if there are any doubts concerning the intended partner. The internal system of economic co-operation and development quality assessment operated by the State Secretariat for Economic Affairs (SECO) and the Directorate for Development and Co-operation (DDC) will thus check (i) whether the intended partner is on the exclusion list of an international development bank and (ii) whether, after in-house assessment of contracts previously completed, the intended partner is “not recommended”.

For calls for tender governed by Swiss law, eligibility criteria will be added to exclude bidders who are currently being sued by the FDFA for irregularities or non-performance/poor performance of contract or who have been non-suited in such proceedings in the past.

Regarding criminal records for companies (the *casier judiciaire/Strafreger*), the Federal Council sent for consultation in October 2012 a draft bill²⁴ which provides for corporate convictions to be entered in the criminal record. The results of the consultation are currently being evaluated.

The *ordonnances pénales* are treated as a final court decision (Article 354 para. 1 let. C CPP) as is a judgement issued in accordance with the simplified procedure (Article. 362 para. 2 CPP). Therefore, these convictions should be registered on the future criminal record, whether in relation to a company or an individual.

If no action has been taken to implement recommendation 12(a), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

²⁴ See Criminal Records Act (draft bill), Article 68 ff.: <https://www.bj.admin.ch/content/dam/data/sicherheit/gesetzgebung/strafregister/vorentw2-f.pdf>.

Text of recommendation 12(b):

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

- (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].

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

Following this recommendation, the systematic procedure introduced by Swiss Export Risk Insurance (SERV) to prevent corruption has been strengthened. This procedure is set out, in graphic form, in Annex 4 “Presentation of the Corruption Prevention Process”. The review stages involved, followed in principle since 2007, are detailed below:

1. To begin with, SERV requires the applicant to sign a declaration of principle on corruption prevention (see Annex 5 “Prevention of corruption in the purchase of credit insurance, individual applicant”, for example). The applicant declares that the export contract has not been secured by means of a punishable act, in particular by bribery of foreign public officials. The wording of this declaration, used in processing the insurance application, is fully consistent with the OECD Council’s *ad hoc* Recommendation.
2. Any applicant suspected of corruption, or who has a conviction for corruption or is the subject of administrative proceedings for corruption, must submit a declaration as part of an in-depth examination (see Annex 6 “Prevention of corruption. In-depth examination procedure”). S/he must convince SERV that the anti-corruption provisions will be respected in connection with the insurance policy applied for. The applicant’s compliance department must expressly confirm the information provided. If the examination result is negative, SERV will not provide insurance cover and the application is refused.
3. In addition to these two checks, SERV verifies, in a third stage, that the applicant’s name does not appear on the black lists of multilateral development banks and that there is no mention of the applicant or his/her activities. If other elements create a presumption of corruption, the application is suspended and the enhanced due diligence process starts (see Annex 4, p. 2 “Representation of the enhanced due diligence process”). If this presumption is found to be true, the SERV Board of Directors is informed and the case is passed to the law enforcement authorities.

A confirmed act of corruption means refusal of the insurance application and the immediate suspension of cover under any other related current policies. If SERV has already paid out on a claim, the amount concerned must be refunded forthwith. If it cannot be established from the checking process that an act of corruption has indeed taken place, processing of the application or the claim continues as normal. The new SERV systematic procedure for preventing corruption is, moreover, constantly monitored and adjusted.

If no action has been taken to implement recommendation 12(b), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

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

Text of issue for follow-up (as described in the Phase 3 report):

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

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

As regards legal theory, one author is to be commended for listing the criteria which would allow companies to introduce a compliance system consistent with Swiss law; but there have been no significant doctrinal changes.²⁵

As regards legal practice, one conviction was obtained in 2011 against a financial institution, which has appealed against the judgment. The higher authority gave an interim ruling in which it held that Article 102 SCC (on corporate criminal liability) was a stand-alone rule attributing liability, so that the rules on petty offences do not apply.²⁶ In concrete terms, the period of limitation is thus not three years but seven (for a misdemeanour) and 15 (for a felony).

Text of issue for follow-up (as described in the Phase 3 report):

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].

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

Regarding legislative developments, a motion was introduced in Parliament at the end of 2011. This motion proposed that the application of Article 53 CP would be contingent upon proof of a genuine desire to make reparation. It also proposed to take account of the special case of victimless offences against public property. The Federal Council did not uphold this proposal, arguing that the law as it stood could

²⁵ Jean-Richard-Dit-Bressel, M. (2013), *Das Desorganisationsdelikt: Artikel 102 Absatz 2 des Schweizerischen Strafgesetzbuches im internationalen Kontext: beleuchtet de lege lata und als Ausgangspunkt für ein zweckmässiges Unternehmensstrafrecht de lege ferenda* (The organisational defect: Article 102, paragraph 2 of the Swiss Criminal Code compared with other countries' laws: discussion *de lege lata* and as a starting point for meaningful corporate criminal law *de lege ferenda*), Zurich, p. 329 ff.; but no significant changes: Niggli, M. A. and Gfeller, D. (2013), on Article 102 SCC, in Niggli, M. A. and Wiprächtiger, H. (eds.), *Basler Kommentar – Strafrecht I (Criminal Law I)*, Basel; Jean-Richard-Dit-Bressel, M. and Trechsel, S. (2013), on Article 102 SCC, in Trechsel, S. and Pieth, M. (eds.), *Schweizerisches Strafgesetzbuch – Praxiskommentar (Swiss Criminal Code – Practice Notes)*, 2nd edition, Zurich and St Gallen.

²⁶ See Annex 7: Excerpt from *Forum-poenale* 1/2013, p. 8.

already be interpreted along those lines.

It should be pointed out here that the Office of the Attorney General takes account of the aforementioned demands; firstly, offenders must show a genuine desire to make reparation. Secondly, in addition to making financial reparation, they must have taken preventive measures to ensure that no new offences will be committed (for example by making changes to their compliance system).

In concrete terms, in 2012 and 2013, CHF 480 000 were paid out by way of reparation and CHF 15 400 000 were seized in connection with decisions under Article 53 SCC.²⁷

Text of issue for follow-up (as described in the Phase 3 report):

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].

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

Regarding the penalties applied to natural persons convicted of the offence of bribery of foreign public officials, see the press release on the Siemens case (Annex 1.1) and the lists for “Summary punishment order” and “Article 53 SCC” (Annexes 8.1 and 8.2).

Text of issue for follow-up (as described in the Phase 3 report):

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].

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

Regarding the Office of the Attorney General, see recommendation 2(b) above.

As stated earlier, the cantons do not have jurisdiction in matters of foreign bribery. However, there are officials specially trained to deal with national corruption offences in those cantons that are particularly exposed due to their economic and financial make-up (Zurich and Zug).

Text of issue for follow-up (as described in the Phase 3 report):

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

²⁷ See Annex 8.2: List, Article 53 SCC.

[Convention, Articles 3 and 6].

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

Regarding case law, it is worth noting the finding of one higher cantonal court which held that Article 102 paragraph 2 SCC (on defective organisation) was a rule attributing liability and not a stand-alone rule identifying an offence. In concrete terms, where there is a conviction under Article 102 paragraph 2 SCC, the statutory period of limitation is determined by the predicate offence.²⁸ For foreign bribery, the limitation period is thus 15 years.

Text of issue for follow-up (as described in the Phase 3 report):

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)].

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

Work is currently under way to bring Swiss law into line with the revised plurilateral WTO Agreement on Government Procurement (adopted on 30 March 2012). The amending Bill will propose that being convicted of an act of corruption constitutes grounds for exclusion from the award of contracts. The Bill will be submitted for consultation by the federal offices in early 2014. The draft legislation is expected to be laid before the Swiss Parliament during the second half of 2014 where it will be dealt with under the normal parliamentary procedures.

Regarding criminal records for companies (the *casier judiciaire/Strafregister*), the Federal Council sent for consultation in October 2012 a draft bill²⁹ which provides for corporate convictions to be entered in the criminal record. The results of the consultation are currently being evaluated.

²⁸ *Forumpoenale* 1/2013 p. 8 ff.; see also Hilf, M. (2013), "Herausforderungen der neuen Normen über Produkthaftpflicht und -sicherheit für das Unternehmensstrafrecht" (Challenges of the new product liability and assurance standards for corporate criminal law), in Bühler *et al.* (eds.), *Unternehmensstrafrecht und Produktsicherheit (Corporate Criminal Law and Product Safety)*, Zurich, p. 14, footnote 12.

²⁹ See Criminal Records Act (draft bill), Article 68 ff.: <https://www.bj.admin.ch/content/dam/data/sicherheit/gesetzgebung/strafregister/vorentw2-f.pdf>.