

SWITZERLAND

REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION

A. IMPLEMENTATION OF THE CONVENTION

Formal Issues

The Convention was signed on 17 December 1997. The Bill on the ratification and implementation of the OECD Convention was approved by the States Council and the National Council in a final vote on 22 December 1999. The law was published in the Official Gazette (*Feuille officielle*) on 11 January 2000, and entered into force on 1 May 2000. Switzerland deposited the instrument of ratification with the OECD Secretary-General on 31 May 2000.

The provisions of the Criminal Code¹ (CC) dealing with bribery have been revised and reorganised under a new Title Nineteen entitled "Bribery", which includes new Articles 322^{ter} to 322^{octies}. The main modifications are the changing of active bribery into a serious indictable offence as is passive bribery, this modification entailing an extension of the prescription period for criminal prosecution, the application of the law on money laundering and the introduction of a new offence of bribery of foreign public officials (CC Art. 322^{septies}), which corresponds to bribery of Swiss public officials (CC Art. 322^{ter}). Finally, in totally revising the general part of the CC, the Federal Council has already submitted to Parliament a new provision on criminal liability of enterprises (Art. 102 draft-CC). This provision was adopted together with the complete revision of the general part of the Criminal Code by the States Council in December 1999, and is at present being examined by the Legal Affairs Commission of the National Council. This provision is therefore likely to be further amended.²

The Convention and the Swiss Legal System

Article 5 of the new Constitution lays down the compliance with international law by the Confederation and the cantons as a principle of State subjection to the rule of the law. According to Confederation constitutional law, Switzerland adheres to the adoption and incorporation system. Therefore, the principles, rules and norms of public international law which bind Switzerland acquire an internal validity without it being necessary to incorporate such international law into domestic law or that the State legislature make any implementation decision for such rules be enforceable internally. Because the principles, norms and rules of the Convention are not self-executing, they must be incorporated into domestic law to be applicable.

According to Swiss legal theory and case law, public international law takes precedence over canton law (with the exception of international treaties concluded by the cantons), Confederation orders, federal laws and orders of general application. In all cases, national law shall be interpreted in accordance with international law.

1. ARTICLE 1. THE OFFENCE OF BRIBERY OF FOREIGN PUBLIC OFFICIALS

In order to meet the requirements of Article 1 of the Convention, Switzerland has amended its Criminal Code on bribery to add Article 322^{septies} which applies to bribery of foreign public officials or bribery of public international law organisations. This article provides that any person who shall offer, promise or

¹ Swiss Criminal Code of 21 December 1937; RS 311.0

2. The report is based on the provisions at present in force of the general part of the Swiss Criminal Code and does not refer to any possible subsequent amendments.

grant any undue advantage to any person acting for a foreign State or an international organisation either as a member of a judicial or other authority, a civil servant, an expert, translator or interpreter employed by any authority, or an arbitrator or member of the military forces, for the benefit of such person or any third party, for the commission or omission of an act in relation to his official functions which is contrary to his duties or in the exercise of his discretionary powers, shall be punishable by a maximum term of five years' imprisonment. The offence of active bribery, which was a minor indictable offence under the old law, has become, like passive bribery, a serious indictable offence³.

1.1 Elements of the Offence

The specific elements of the offence set forth in Article 1 of the Convention are covered as follows:

1.1.1 Any person

According to the Swiss authorities, the provision on bribery of a foreign public official applies to *any person* where the objective and subjective elements of the offence and the general conditions for application of the CC are fulfilled (Articles 1 to 8 of the Criminal Code on the conditions as to time and place). The law now applies to natural persons. Under the revision of the general part of the CC⁴ it is proposed to introduce a new provision on criminal liability of enterprises (see *below 2*).

1.1.2 Intentionally

Under Swiss law, bribery of a foreign public official is an intentional act, since "unless otherwise provided expressly by the law, a person is punishable for an indictable offence only where such offence is committed intentionally. Any person who knowingly and willingly commits an indictable offence, commits it intentionally." (CC Article 18). According to the Swiss authorities, reckless acts are considered to be intentional. Since the new law includes no provision on intention, the law of general application applies.

1.1.3 To offer, promise or give

The Swiss legislation implementing the Convention adopted the terms of the Convention by providing in Article 322^{septies} that any person "who offers, promises or gives" shall be liable. It is not necessary that the public official accepts the offer for the offence to be committed. On the other hand, it is necessary that the offer, promise or gift be communicated to the servant, failing which the person shall be punishable only for attempted bribery.

1.1.4 Any undue pecuniary or other advantage

The new Article 322^{septies} (foreign official) and the new Article 322^{ter} (Swiss official) of the Criminal Code provide that the offence of bribery is committed by offering, promising or granting an "undue advantage"⁵.

3. CC Art. 9: « serious indictable offences are offences punishable by more than five years of imprisonment. Minor indictable offences are punishable by a maximum term of 5 years imprisonment.

4. Message of 21 September 1998 n° 98.038 on the amendment of the Swiss Criminal Code, the military criminal code and the Federal law on criminal liability of minors.

5. According to prevailing legal theory, undue advantages include all free material or immaterial advantages. Any legal, economic and personal improvements, capable of being objectively measured for the beneficiary constitute an advantage. The classic example is the payment of cash. The giving of objects or their enjoyment such as the gift of valuable objects, the provision of hired cars, the granting of discounts, the offer of travel and the waiving of pecuniary advantages (such as waiving or writing off negative debt) are also considered as material advantages. In practice, a series of fictitious transactions giving a legal

The expression "undue advantage" is specified in CC Article 322^{octies} figure 2 which provides that "advantages authorised by department regulations and advantages of minor value in conformity with social custom shall not be considered as undue advantages".

Thus, pursuant to Article 322^{octies} section 2 of the Swiss Penal Code, advantages of minor value in conformity with socially accepted practices are not considered as undue advantages. The Swiss authorities explain that this concerns advantages which, in the prevailing opinion of Swiss law, are insignificant and deemed to represent no risk of inciting public officials to behave in a manner inconsistent with their duties. The Swiss authorities also state that advantages of minor value are neither permitted under, nor a part of, Swiss socially accepted practices where they incite public officials to behave in a manner inconsistent with their duties, or are likely to influence them in the exercise of their discretion. The argument is valid provided the Swiss courts systematically adopt this concept and do not refer to social practices accepted in the foreign public official's country.

1.1.5 Directly or through intermediaries

The terms "directly or through intermediaries" of Article 1 § 1 of the Convention have not been expressly adopted by the new Swiss law. According to the Swiss authorities, this is because, under present law, indirect promises of advantage are covered by the law without being expressly mentioned⁶. The simple assimilation of bribery of national public officials into the law was therefore possible on this point.

According to the Swiss authorities, an advantage is indirect when it is not given to the recipient by the perpetrator but by a third party acting as assistant. Present law does not deal with the conditions of fulfilment, since it is sufficient that an advantage be promised. Concerning the criminal liability of the promisor and the recipient, it is unnecessary to know who gave or should give the advantage. The third party may, according to the circumstances, be either a co-perpetrator or a participant, or be used as an instrument for the commission of the offence.

According to the Swiss authorities it is not necessary that the public official be aware of the role of the intermediary for the offence of bribery to be constituted. On the other hand, the perpetrator controlling the bribery must be aware of the means and the persons used by him and of their roles.

1.1.6 To a foreign public official

According to the Swiss authorities, the different categories of foreign public officials laid down by the Convention are already covered by the Swiss law on bribery:

Formal Public Officials

In the Convention, any person holding a legislative, administrative or judicial office, whether appointed or elected, shall be deemed a public official in the formal sense. According to the Swiss authorities, these three categories of persons are covered:

appearance to criminal participation by the parties may give rise to differences of opinion: fees paid for advice which is not justifiable from an economic point of view, excessive invoices issued in commercial deals, loans granted under unusual conditions. Such transactions must be considered as material advantages where the advantage or the consideration is not economically equivalent and where the advantage appears in a manner which can be measured. See Stratenwerth, *Schweiz. Strafrecht*, Besonderer Teil II, 4e éd., Berne 1995 §57 N. 5; Trechsler N. 3 ad art. 315. See also Balmelli *Die Bestechungstatbestände des Schweizerischen Strafgesetzbuches*, Berne 1996 p. 131s.

⁶ In the decision ATF 100 IV 58, the court considered that a person is guilty of bribery not only when he himself grants an undue advantage, but also where he does so to a public official through a third party.

- Members of Parliament⁷ and other persons holding an elected office, under CC Article 322^{septies}, which makes it an offence to bribe "any persons acting for a foreign State or an international organisation as a member of an (...) other authority⁸". The Swiss authorities state that this applies to all levels of national or local office;
- Persons holding a judicial office, under the same CC Article 322^{septies}, which makes it an offence to bribe "any persons acting for a foreign State or an international organisation as member of a judicial authority (...), arbitrator";
- Persons holding an administrative office, under the CC Article 322^{septies}, which makes it an offence to bribe "any persons acting for a foreign State or an international organisation, as a member of an (...) other authority, civil servant⁹, or as expert, translator, or interpreter employed by an authority".

Other Public Officials

In the Convention, any "person carrying out a public function for a foreign country including for an enterprise or public organisation and any civil servant or official of a public international organisation" are material public officials. According to the Swiss authorities, these different categories of public functions exercised by persons regardless of the legal nature of the contractual relations between the public authority and the servant are covered:

- "Individuals who carry out public functions are deemed to be public officials" under Article 322^{octies}, para. 3;
- Any persons exercising functions in enterprise bodies governed or controlled by the State, such bodies being deemed as public officials by prevailing case law¹⁰;
- Public officials of international organisations expressly referred to in Article 322^{septies} CC which applies to persons "acting for a foreign State or international organisation". The Swiss authorities state that the term "international organisation" means any inter-governmental international organisation or international organisation set up by other public law bodies, including organisations for the promotion of regional economic integration such as the European Union.

1.1.7 For personal benefit or the benefit of a third party

Until now, Swiss law did not formally cover all cases where the advantage granted to the public official was granted for the benefit of a third party. This has now been remedied by CC Articles 322^{ter} and 322^{septies}.

7. Trechsel, op. cit., no 3 and art. 285.

8. Persons acting as a member of a (...) other authority are members of a non-judicial authority. Members of an authority also exercise official functions; however the characteristic dependence of civil servants is lacking (Cf. Günter Stratenwerth, Schweizerisches Strafrecht, Besonderer Teil II, Berne 1994, § 57, no 7). The authorities are public organisations such as national or local parliaments or executive bodies, commissions (e.g., schools), etc. Also included in the notion of authorities are law faculties, and the economics faculty of the university of Berne (ATF 107 IV 118) or the head of the General Etat-Major (ATF 114 IV 36).

9. The statutory definition of civil servant is provided in CC chapter 4 Article 110: "The term civil servant shall apply to the employees of public services or legal services. Persons who provisionally occupy a function or employment, or who carry out a temporary public function shall also be deemed as civil servants."

10. ATF 121 IV 216ss: the case of a person employed by the State under a private law agreement but who was subject to supervision and instructions by the State. On the other hand, this category does not include, according to Swiss authorities, cases of purely tax control by the State, or re-employment limited in time as a result of a recovery plan. See Message 99.026 §221.21.

1.1.8 In order that the official act or refrain from acting in relation to the performance of official duties

Article 322^{septies} of the Criminal Code provides the offence of bribery "for the commission or omission of any act in relation to [the] official activity [of the official] contrary to his duties or in the exercise of his discretionary powers". Pursuant to this provision, it seems that the implementing legislation does not apply to all cases where the undue advantage is offered, promised or given to foreign public officials in order that they carry out the duties of their functions. In the opinion of the Swiss authorities the offence of bribery of foreign public officials covers all cases where the official has any discretion whatsoever, and that it is in conformity with Commentaries 3 (which states that every public official has a duty to exercise judgement or discretion impartially) and 9 (on small "facilitation" payments) of the Convention. Further the Swiss authorities take the position that it is unlikely that anything other than small facilitation payments would be made for non-discretionary acts.

1.1.9/ 1.1.10 in order to obtain or retain business or other improper advantage in the conduct of international business

The Swiss provisions on bribery do not specifically mention the purpose of the bribery: whatever the purpose intended, including that of obtaining or retaining business or other improper advantage, this purpose is covered by the law. Similarly, the offence of bribery of a foreign public official is not limited to obtaining advantages in international business.

1.2 Complicity

Article 1(2) of the Convention requires the contracting parties to take the measures required to establish that complicity in, including by incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official shall be a criminal offence.

The CC deals with instigators and accomplices in Articles 24 and 25, which apply to bribery of both national and foreign public officials.

- An instigator is defined as any person who intentionally persuades another to commit an indictable offence. If the offence is committed he is liable to the same punishment as incurred by the person who perpetrates the offence (CC Article 24.1).
- An accomplice is any person who intentionally aids and abets in the commission of an indictable offence (the existence of subordination distinguishes him from a co-perpetrator¹¹). The court may (but is not bound to) reduce the punishment for the accomplice (CC Article 25)¹². The Swiss authorities state that the accessory principle applies according to the degree of completion, which means that instigation or complicity are complete when the offence reaches the stage of an attempt (the offence does not have to be completed for a participant to be punished). Where the principal act remains at the stage of an attempt, the instigator or the accomplice shall incur the punishment provided for an attempt. However, it is not necessary for the principal offender to be prosecuted.

The Criminal Code contains no specific provision regarding the giving of authorisation to commit an offence. However, the Swiss authorities state that any person who gives authorisation to another to bribe a

11 . A co-perpetrator is any person who intentionally collaborates in an decisive manner with other persons in the decision to commit an offence, or in its organisation or its commission, so as to appear as one of the main participants, which justifies him being punished as a main participant.

12 . Article 65 CC "Where the court considers that the punishment should be reduced, it will sentence to: (...)a six months to five year term of imprisonment instead of a longer term; a fine or shorter period of imprisonment instead of a six month to five year term" The draft amendment of the Criminal Code provides that the punishment shall always be reduced for accomplices.

public official is punishable either: as instigator where, by his authorisation, he has instigated the perpetrator to commit the act of bribery; as accomplice where he aids or encourages the perpetrator in his decision to commit the act of bribery; as co-perpetrator where he commits the act of bribery by intentionally collaborating in a decisive manner with the person to whom he has given the authorisation; as main perpetrator (mediate perpetrator) where he misleads the person to whom he has given the authority as to the real nature of the transaction and whom he uses as an instrument. The same applies to any person who encourages another to commit bribery and who is punishable either for encouraging another either actively or by mere omission (silence, failure to act) in his decision to commit bribery.

1.3 Attempt and conspiracy

Article 1(2) of the Convention requires each Party to take any measures required to establish that attempt or conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party.

Attempt

CC Articles 21, 22 and 23 in force distinguish incomplete attempt, failed offence (or complete attempt)¹³ and impossible offence. Articles 21 and 23 apply to formal offences and Articles 22 and 23 apply to *délits matériels*. Bribery of a foreign public official under CC Article 322^{septies} being a formal offence, CC Articles 21 and 23 apply.

In an incomplete attempt, the perpetrator does not fully accomplish his illegal act. Thus, Article 21 provides that the punishment may be reduced for any person who has commenced the commission of an indictable offence without fully accomplishing his act. Any person who, on his own initiative, abandons the full accomplishment of his illegal act, may be exempted from punishment for his attempt (Article 21, chapter 2).

An impossible offence (CC Article 23) is committed where the perpetrator has attempted to commit an offence by a means, or against an object, of a nature such that the commission of the offence is totally impossible. In this case, the court has full discretion to reduce the punishment.

According to the Swiss authorities, cases of attempted bribery should be relatively infrequent, since the law already punishes as a completed offence any offer of an advantage. An attempt would however be constituted where the offer of a bribe was not communicated to the public official¹⁴.

Conspiracy

Conspiracy in the English meaning does not exist under Swiss law. On the other hand, the law punishes any participation in a criminal organisation or any support of such organisation¹⁵. One of the elements constituting this offence is the intention of obtaining revenues by criminal means, which could be the case in bribery of foreign public officials.

13 . Under CC Article 22 a failed offence is constituted where the perpetrator has completed his illegal activity, but without achieving the result required for the indictable offence to be committed.

14 . The draft amendment of the general provisions of the Criminal Code is to simplify these provisions by no longer distinguishing between punishable attempt and renonciation.

15 . CC Article 260^{ter} § 1: "Any person who participates in an organisation which keeps secret its structure and members and which pursues the objective of committing violent criminal acts or of obtaining revenue by criminal means, or any person who supports such an organisation in its criminal activity, shall be punished by a maximum of 5 years imprisonment".

2. ARTICLE 2. LIABILITY OF LEGAL PERSONS

Under Article 2 of the Convention, each Party shall take the measures required in accordance with its legal principles, to establish liability for legal persons in the case of bribery of a foreign public official.

Swiss criminal law so far knows only very limited criminal sanctions against legal persons, namely the confiscation of patrimonial assets held by a third party. Swiss law also indirectly provides for civil and administrative sanctions against acts connected to bribery. In addition, there is no possibility of imposing criminal fines on legal persons. Corporate criminal liability is however to be introduced under the revision of the general provisions of the CC¹⁶ currently under discussion in parliament. The Swiss authorities expect to have in place laws creating the criminal liability of legal persons in conformity with the requirements of the Convention by 2002/2003.

2.1. Criminal Liability of Legal Persons

The draft Article 102 of the Criminal Code entitled "Liability of Enterprises" provides that:

"1. Where any indictable offence is committed within an enterprise in the exercise of commercial activities *intra vires* the objects of the enterprise and this act cannot be imputed to any particular person by reason of a lack of organisation in the enterprise, the enterprise shall be punished by a maximum fine of five million francs.

1bis. For offences under Articles 260^{ter}, 305^{bis}, 305^{ter}, 322^{ter} (P), 322^{quinquies} (P), 322^{septies} (P) of the present Code, an enterprise shall be punished independently of the liability of any individual if it can be established that the enterprise has not taken all reasonable organisational measures required to prevent such an offence.

2. The court shall set the fine in particular according to the seriousness of the offence, of the lack of organisation and of the damage caused and the economic capacity of the enterprise.

3. For the purposes of this Article, enterprises shall include legal persons, companies and individual enterprises."

Legal entities subject to criminal liability

§ 3 of the draft provision gives a legal definition of an enterprise and defines the scope of the Article which applies to legal persons¹⁷, companies and individual enterprises. According to the Swiss authorities, it applies not only to private law companies, but also public law companies (e.g., corporations managed by public authorities). However, the term "enterprise" excludes the application of criminal liability to the State or other local authorities (cantons, townships, etc.).

The meaning of criminal liability

According to the Swiss authorities, under Dr-CC Article 102, §§ 1 and 1bis, the enterprise cannot be sanctioned unless the offence is committed "in the course of its business *intra vires* the objects of the enterprise". This provision underlines the requirement of an intrinsic link between the legal person and the offence.

¹⁶ Message of 21 Septembre 1998 *supra*.

17 Article 52 of the Civil Code: " 1) Companies organised as corporations and establishments with a special object and a separate existence acquire legal personality by registering in the commercial register. 2) Corporations and public law establishments are exempted from this formality, as are non-profit making associations, ecclesiastic bodies and family trusts." Civil Code Article 60: "Political, religious, scientific, artistic, charitable and recreational organisations, associations or other not profit making bodies acquire legal personality when they state in their articles their intention of being organised as a corporation."

Invoking criminal liability

Under the Federal Council draft, Article 102 Dr-CC(1), the enterprise shall be liable only where an offence is committed in the course of operations of the enterprise and where the actual perpetrator cannot be identified by reason of inadequate organisation. These rules impose *subsidiary* criminal liability on the enterprise. The enterprise is therefore liable, provided the other conditions are fulfilled, only where no individual can be identified and accused¹⁸. The principle adopted here is the exclusion of multiple liability.

Although during its examination of the draft the States Council maintained the principle of subsidiary liability of the enterprise, it also introduced *primary* liability for the enterprise with scope limited to certain offences, including bribery of foreign public officials¹⁹ (Article 102 Dr-CC 1bis). Primary liability means that the liability is invoked independently of the liability of any individual and of his capacity (the position which the offender occupies in the enterprise is irrelevant: he may be any employee of the enterprise, and no intention or act by an enterprise body is required). Where acts of bribery can be imputed to an individual, such individual is liable, in addition to the enterprise where liable under Article 322^{septies}, and there may then be multiple liability. The individual may be prosecuted separately from the legal person, although no failure in organisation has been established within the legal person²⁰.

3. ARTICLE 3. SANCTIONS

The Convention requires the Parties to establish “effective, proportionate and dissuasive criminal penalties” comparable to the penalties applicable to the bribery of the Party’s own public officials. The Convention also requires that, in the case of natural persons, the criminal penalties include “deprivation of liberty sufficient to enable effective mutual legal assistance and extradition”. The Convention further requires each Party to take such measures as necessary to ensure that the bribe and the proceeds of the bribery of the foreign public official are subject to seizure and confiscation or that monetary sanctions of “comparable effect” are applicable. Finally, the Convention requires each Party to consider the imposition of additional civil or administrative sanctions.

The new provisions on bribery of the Criminal Code make bribery a serious indictable offence and provide for penalties of imprisonment for natural persons. The punishments incurred are identical for bribery of foreign public officials and national public officials.

3.1/ Criminal Sanctions for Bribery of National or Foreign Public Officials

3.2

Natural persons

Similarly to bribery of national public officials, bribery of foreign public officials is subject to a maximum term of imprisonment of five years²¹. The Swiss Criminal Code provides that in fixing the sentence within the limits set by the law, “the court shall determine the sentence according to the guilt of the offender,

18 . The fact that lack of organisation is due in many cases to negligence should not obscure the fact that an enterprise can set up organisational structures in with a view to preventing the imputation of criminal liability to individuals, e.g., to cause damage to the environment or to pay bribes. According to the Swiss authorities, such forms of organised non-liability are clearly covered by Dr-CC Article 102.

19 . The offences concerned are participation in a criminal organisation (CC Article 260^{ter}), money laundering and lack of vigilance in financial transactions (CC Articles 305^{bis} and 305^{ter}), and offences of bribery of Swiss and foreign public officials (CC Articles 322^{ter}, 322^{quinquies} and 322^{septies}).

20 . The Swiss authorities state that if the liability of the enterprise cannot be established under paragraph 1bis, no ancillary charges may be brought under paragraph 1.

21 . Bribery of foreign public officials is punishable by a maximum term of 5 years imprisonment. Under Article 35 of the Criminal Code: “ The term of imprisonment (...) shall be at least one year and not more than twenty years. (...)” And under Article 36, the term of imprisonment shall be from at least three days to a maximum of three years.

taking into account his motives, prior history and personal situation" (Article 63). Swiss law does not provide for fines for offences of bribery, except where an offender has acted for monetary gain, as this would be considered an aggravating circumstance²².

The Swiss Criminal Code also provides for ancillary sanctions applicable in addition to imprisonment, such as temporary disqualification from holding any official appointment or public office if the offence shows that the offender is unworthy of confidence (Article 51); the temporary disqualification for the convicted person to exercise his occupation, work or business where the indictable offence has been committed in the exercise, subject to official authorisation, of such occupation, work or business and where the offender has been convicted to a term of imprisonment exceeding three months, if the court has reason to fear further offences (Article 54); and finally, expulsion for foreigners (Article 55). Publication of the judgement is another possible measure (Article 61).

Legal persons

The draft provides for a maximum fine of five million Swiss francs (Dr-CC(1) Article 102). No minimum fine is provided. Under the draft, the court shall set the amount of the fine, taking into account four criteria to be jointly taken into account: the seriousness of the offence, of the lack of organisation and of the damage caused and the economic capacity of the enterprise. The Swiss authorities state that a fine is intended in most cases to punish negligence. Moreover, the fine, under Swiss law, has no function of confiscation. On the other hand, confiscation of assets resulting from the offence is possible without any limit as to amount: it applies to all assets acquired.

3.3 Penalties and mutual legal assistance

Double criminality is required for mutual legal assistance including coercitive measures. This condition can be fully fulfilled when Article 322^{septies} providing for the punishment of bribery of foreign public officials come into force.

At present Switzerland is already in a position to assist the victim State during criminal proceedings by mutual legal assistance. The ability to provide rapid assistance has been increased by the amendment of the Federal law on international mutual legal assistance in criminal matters (EIMP)²³.

3.4 Criminal Sanctions and Extradition

Under Article 35 1 EIMP "extradition may be granted if the documents supporting the application establish that the offence: a) is liable to a sanction of at least one year's imprisonment or other more serious sanctions under both Swiss law and the law of the applicant State, and b) does not come under Swiss jurisdiction". CC Article 322^{septies} provides that bribery of foreign public officials shall be punished by a maximum term of five years imprisonment. This punishment is therefore sufficient to enable extradition. The condition as to foreign law provisions should be noted. In addition, Article 2 of the European Extradition Convention of 13 December 1957 provides the same conditions of implementation. This Convention has been ratified by 38 States, including Switzerland.

22. Where an offender has acted for gain, CC Article 50.1 provides that the court may in addition sentence him to a fine without being subject to the statutory maximum of SF 400,000 (CC Article 48). Furthermore, Article 68.1 CC concerning combination of offences may apply.

23. Federal law of 20 March 1981 on international mutual assistance on criminal matters (EIMP) as amended 4 October 1996, entering in force on 1 February 1997, RO 1997, p.114 *et seq.* Message of Federal Council in the FF 1995 III 1 *et seq.*

3.5 Sanctions where legal persons are not subject to criminal liability

Criminal liability of enterprises being at present only envisaged under a draft law, Swiss law indirectly provides for civil and administrative sanctions and a criminal sanction which applies to enterprises as third parties to, but not as perpetrators of, the offence:

- *Civil law*: Under Article 52 of the Swiss Civil Code companies and establishments with an illegal object cannot acquire legal personality. Consequently, they must be dissolved and their assets transferred to the community (Article 57§3, Civil Code).

- *Administrative law*: Enterprises subject to State supervision which commit acts of bribery (e.g., banks) and enterprises which do not comply with administrative law are liable to sanctions (Article 39 *et seq.* of the law on administrative procedure). In addition, authorisations relating to official appointments can be temporarily withdrawn. Quotas may, where used illicitly, be limited or withdrawn. Sanctions are also provided in the application procedures for public procurement contracts: a tendering enterprise may be excluded from the procedure under Article 11 b) of the Federal law on public procurement contracts²⁴ (exclusion in the case of false information) and Article 11 e) (exclusion where agreements infringe competition law) The Swiss authorities state that until now there have been no cases of exclusion from public procurement contracts on the ground of bribery.

- *Criminal law*: The confiscation of patrimonial assets held by a third party is also possible as regards an enterprise (see *below* 3.6.).

3.6 Seizure and confiscation of the bribe and its proceeds

Under Article 3 § 3 of the Convention, "each Party shall take such measures as may be necessary to provide that the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable". Under Swiss law, there are no specific provisions on confiscation and seizure of bribes and their proceeds. The provisions of ordinary law apply in such cases.

Confiscation

Under CC Article 59, "the court shall order the confiscation of patrimonial assets proceeding from an offence or which were intended to persuade or reward the perpetrator of the offence, if they need not be restituted to the victim in re-establishing his rights". The amount or advantage offered with the intention of bribing, may be confiscated before or after its transfer, either from the perpetrator of the bribe or from the recipient, together with the proceeds of any transaction concluded as a result of bribery, provided that the bribery was the determining factor in the conclusion of the contract. Par. 2 provides that "where patrimonial assets are no longer available for confiscation, the court shall order their replacement by a compensatory claim by the State in an equivalent amount".

A problem arises as regards confiscation from legal entities of proceeds of the offence when bribery is committed within the entity and the proceeds of the transaction are vested directly in the entity. The legal entity cannot be deemed the perpetrator of the offence, but it will be considered as a "third party" in the meaning of CC Article 59-1 § 2, which lays down the conditions for confiscation from third parties. The third party shall have a good defence against confiscation only if he had no notice of the facts which justify confiscation and has provided appropriate consideration. Directly involved, the third party becomes party to the proceedings and may be subject to coercive measures with a view to confiscation. According to the Swiss authorities, with the adoption of CC Article 102 a legal person may be the perpetrator of the offence and therefore subject to direct confiscation under CC Article 59 1) 1) .

²⁴ Federal law of 16 December 1994 on public procurement, RS 172.056.1 and Order of 11 December 1995 on public procurement RS 172.056.11.

Seizure

According to the Swiss authorities, "the wide scope of confiscation under Swiss law can be guaranteed by protective measures (including seizure) under the codes of procedure". Seizure is provided in the codes of procedure of the Confederation and the cantons²⁵. For real property, the prosecution may order the freezing of the land register by the relevant authorities.

International co-operation in seizure and confiscation

Legal assistance as regards provisional and confiscatory measures is governed exclusively in Swiss law by the Federal law of 20 March 1981 on international assistance in criminal matters (EIMP) and by the applicable Conventions, in particular by Convention n° 141 of the Council of Europe concerning money laundering, tracing, seizure and confiscation of proceeds of offences. Article 63 EIMP provides that "acts of mutual assistance include (...) seizure²⁶, (...) transfer of objects or assets with a view to confiscation²⁷ or restitution to the owner." In urgent cases, interim measures can be ordered by the Police Federal Office as soon as requested. The requesting state will be granted a delay of eight days in which to transmit its request to Swiss authorities (art. 18, al. 2, EIMP).

3.8 Additional Civil and Administrative Sanctions

Under the draft on enterprise criminal liability, legal persons will not be subject to additional civil or administrative sanctions. According to the Swiss authorities, there is no overriding reason for developing a system of vague sanctions rather than a real criminal sanction since fines are the most appropriate sanction which can be imposed on enterprises. Imposing sanctions such as the dissolution of the enterprise or the prohibition to carry on any commercial business, would oblige the courts to take decisions, in addition to sanctions, which in many respects concern enterprise policy, and which would in many cases exceed their jurisdiction. The sanctions referred to in paragraph 3.5 do not directly concern cases of bribery, but are applicable because they are based on offences which often accompany acts of bribery, such as supply of false information.

The Swiss authorities state that the administrative sanctions for legal persons referred to in paragraph 3.5 are also applicable to natural persons.

4. ARTICLE 4. JURISDICTION

Article 4 of the Convention requires each Party to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory, whether or not a national of the said Party is involved. The Convention also requires States Parties which have jurisdiction to prosecute their nationals for offences committed abroad, to take such measures as may be necessary to establish their jurisdiction to do so in respect of the bribery of a foreign public official according to the same principles. The Commentaries state that the territorial basis for jurisdiction should be interpreted broadly so that an extensive physical connection to the bribery act is not required.

25. Article 65 *et seq.* of the Federal law of 15 June 1934 on criminal procedure. The 26 canton codes of criminal procedure include similar rules.

26. See EIMP Article 18

27. Upon application for mutual assistance by a foreign State, Switzerland may confiscate assets proceeding from an offence where the Swiss courts have jurisdiction. Such confiscation will therefore be based on domestic law. Switzerland may also enforce foreign confiscation orders under EIMP Articles 94 *et seq.* Confiscation or enforcement of a foreign confiscation order may also be ordered under the above-mentioned Convention with the States who are Parties. EIMP Article 74a also generally allows Swiss authorities to transfer assets to the foreign State with a view to confiscation in that State where that State has delivered a confiscation order concerning such assets or where it is highly probable that there is a relationship between those assets and the offences prosecuted in the foreign State.

4.1 Territorial jurisdiction

Article 3 § 1 of the Criminal Code provides that "this code shall apply to any person who has committed an indictable offence in Switzerland."

According to the Swiss authorities, the provisions concerning bribery of foreign public officials apply where the offence is committed wholly or partially on Swiss territory. Article 7 of the Criminal Code provides in particular that "1) An indictable offence is deemed to have been committed at the place where the offender committed the act and at the place where the result occurred. 2) An attempt is deemed to have been committed both at the place where the person made the attempt and at the place where the perpetrator intends the result to be produced"²⁸.

Pursuant to present case law of the Federal Courts, acts of participation committed in Switzerland in a main offence committed abroad are deemed to have been committed abroad. The Swiss authorities emphasise that Swiss participants in an act of bribery committed abroad may be prosecuted in Switzerland on the basis of article 6 of the Criminal Code. Foreign participants cannot be prosecuted in Switzerland but can be extradited to the country where the main offence was committed. The reform of the General Part of the Penal Code, as presently envisaged, would allow for the prosecution in Switzerland of the foreign participants.

4.2 Extraterritorial Jurisdiction

a) Nationality Jurisdiction

In addition to the territorial principle, Switzerland also recognises the principle of active personality. Under CC Article 6, the Swiss Criminal Code "applies to any Swiss national who commits in a foreign country any indictable offence which could give rise to extradition under Swiss law, if the act is also punishable in the State where it was committed and if the perpetrator resides in Switzerland or if he is extradited to Switzerland by reason of the offence. However, the foreign law shall be applicable if it is more favourable to the accused." Subject to these conditions, the offence of bribery of foreign public officials covers acts committed abroad by Swiss nationals.

b) Jurisdiction over Non-Nationals

Switzerland has extra-territorial jurisdiction which applies to bribery. Such a jurisdiction is based on the principle of active personality (see 4.2). Under the revision of the general part of the Criminal Code, it is proposed to extend the territorial scope in accordance with the principle of delegated jurisdiction. Article 7 Dr-CC provides therefore that any person who commits an indictable offence in a foreign country is subject to Swiss criminal law: "a) where the act is also sanctioned in the State where it was committed or if the place of commission of the act is subject to no criminal jurisdiction; b) if the perpetrator is in Switzerland or if he has been handed over to Switzerland by reason of this act; and c) if, under Swiss law, the act can give rise to extradition, but the perpetrator is not extradited." In addition, § 2 provides that, when the perpetrator is not a Swiss national and the indictable offence has not been committed against a

28. According to the Swiss authorities, the commission of the act in the meaning of CC Article 7 covers all types of conduct which make up the elements of an offence. The mere decision and preparation are not sufficient (ATF 104 IV 86), but the first step constituting the transition to attempt is sufficient (example: the departure for a foreign country in order to betray a secret, ATF 104 IV 181). The accomplishment of the act is also included in the notion of commission of the act (example: the withdrawal of money obtained by fraud, ATF 99 IV 124, 109 IV 3 s.). By analogy with these decisions of the Federal court, the Swiss authorities state that offering an undue advantage to a public official by telephone, fax or electronic message from Switzerland are criminal offences.

Swiss national, § 1 is applicable only if the extradition application has been rejected on a ground other than the nature of the act."

4.3 Consultation Procedures

Article 4 of the Convention states that where more than one Party has jurisdiction over an alleged offence concerning bribery of foreign public officials, the Parties involved shall, at the request of any Party, consult with a view to determining the most appropriate jurisdiction for prosecution. The Federal law on international material assistance in criminal matters (EIMP) provides rules concerning the delegation of criminal prosecution (Articles 85 - 93) and the delegation of enforcement of criminal judgments (Articles 94 -108).

Delegation of criminal prosecution

The condition of acceptance by Switzerland (Article 85 *et seq.* EIMP) is that "1. Upon application by the State where the offence has been committed, Switzerland may prosecute in its place any act committed abroad: a) if extradition is excluded; b) if the person prosecuted is accused in Switzerland of other more serious offences; and c) if the applicant State gives a guarantee not to prosecute the person for the same act after acquittal or after being subject to a sanction in Switzerland. 2. Prosecution of a foreigner who normally resides in Switzerland can also be accepted if his extradition is not justified and if such prosecution seems appropriate by reason of his personal situation and his rehabilitation."

Article 88 lays down conditions for delegation to a foreign country: "A foreign State may be requested to prosecute an offence subject to Swiss jurisdiction if its laws provide for prosecution and punishment of such an offence and if the prosecuted person: a) resides in that State, his extradition to Switzerland being inappropriate or excluded, or b) is extradited to this State and the transfer of criminal prosecution enables a better social rehabilitation."

Enforcement of decisions

The condition of acceptance by Switzerland (Article 94 EIMP) is that "1. Any final and enforceable decision of a foreign State may be enforced upon its request if a: a) the convicted person normally resides in Switzerland or has committed a serious offence in Switzerland; b) the conviction concerns an offence committed in a foreign country and which, if committed in Switzerland would be punishable, and if c) enforcement appears either opportune in Switzerland (for reasons similar to those which may lead to delegation of criminal prosecution, see above), or excluded in the requesting State.

2. The sanction given in the foreign country shall be enforced insofar as it does not exceed the maximum sanction provided by Swiss law for a similar offence. The sanction may be enforced even if it is less than the minimum provided by Swiss law (...)

4. Fines and court costs under Article 63 EIMP can also be recovered if the convicted person normally resides in a foreign country but owns property in Switzerland, and if the requesting State grants reciprocity."

Switzerland has ratified the European Convention on Mutual Assistance of 20 April 1959.

4.4 Effective Jurisdiction

An extension of the scope of Swiss law is provided under the revised general part of the CC (Article 7 Dr-CC). In the message of the Federal Council dated 21 September 1998, it is stated that "it can no longer justifiable today to apply Swiss law to offences committed in a foreign country only where the perpetrator or the victim have Swiss nationality or where the Swiss courts have jurisdiction under an international agreement to prosecute such offences. International solidarity being indispensable in the fight against criminality, our country must extend the scope of Swiss law to cases where extradition is prevented on

grounds other than the nature of the offence. Under the delegated jurisdiction principle, prosecution should be initiated by the State in the territory of which the perpetrator of the offence is residing "²⁹.

5. ARTICLE 5. ENFORCEMENT

Article 5 of the Convention requires the investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. It further requires that each Party shall ensure that investigation and prosecution "shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved".

5.1 Rules and Principles applicable to Investigations and Prosecution

Under Article 123 § 3 of the Federal Constitution³⁰, the court system, procedure and administration of justice in criminal matters come under the jurisdiction of the cantons. This means that Switzerland has 26 canton procedures in addition to a Federal law on criminal procedure³¹, a Federal law on administrative criminal law³² and a Federal law on military criminal procedure³³. The Swiss law of procedure does not include any rules governing only the prosecution of bribery. The following general principles are applicable in initiating and discontinuing such proceedings:

Initiation of criminal proceedings

Under the *maxime d'office* and legality principle the prosecuting authorities must examine all facts of a criminal nature brought to their attention and where sufficient presumption of guilt exists, they must initiate a prosecution. Any person may file a criminal complaint either in writing or orally with the relevant authority, including the police, declaring that he has knowledge of an offence.

The actual initiation of criminal proceedings is subject to the procedure of the canton involved: in certain cantons, initiation is effected by beginning the investigation of the case by the relevant authority; in other cantons, criminal procedure is initiated by a formal decision.

Adjournment or discontinuance of proceedings

Criminal proceedings are generally terminated either by discontinuance of the proceedings or by committal for trial.

Proceedings may be discontinued where it is clear that no offence has been committed or that there is not sufficient proof of such offence. Discontinuance may also be ordered on procedural grounds, e.g., statute of limitations or death of the accused. Appeal lies against a decision to discontinue. For details of such appeals, the applicable Code of Criminal Procedure should be referred to³⁴.

²⁹ Article 7 P-CP was adopted by the States Council (first chamber) on 14 December 1999. It is now being examined by the Legal Affairs Commission of the National Council as part of the revision of the general part of the CC.

³⁰ The Federal Constitution of the Swiss Confederation of 18 April 1999; RS 101

³¹ Federal law of 15 June 1934 on criminal procedure, RS 312.0

³² Federal Law of 22 March 1974 on administrative criminal law (DPA), RS 313.0

³³ Federal law of 23 March 1979 on military criminal procedure (PPM), RS 322.1

³⁴ Any parties and persons who participate in proceedings and whose rights have been affected by the decision may bring a criminal prosecution. The Swiss authorities include here any persons, enterprises or public bodies, victims of bribery and capable of bringing civil proceedings in criminal cases. In this respect, it should be emphasised that a person may bring civil proceedings in criminal cases whether its domicile or registered office is in Switzerland or abroad. In addition, according to the applicable Code of

Substantive law

The courts enjoy a measure of discretion in deciding whether to prosecute. CC Article 322^{octies} 1), provides that "where the guilt of the offender and the consequences of his act are of such minor importance that punishment would be inappropriate, the relevant authority shall discontinue prosecution and shall not remit the accused to a court nor inflict any punishment". The inclusion of this provision in Federal law was judged necessary by the Swiss authorities because only some of the cantonal procedure codes recognised the principle of procedural discretion.

According to the Swiss authorities, Article 322^{octies} 1) must be interpreted in such a manner that " an overall appreciation of the conduct, although in itself sufficient to constitute the offence considered, shows that by normal standards the act in question and the guilt of the perpetrator are considerably less serious". This difference should be so clear that the imposition of a criminal sanction would appear unjustified, from the point of view of both general and special prevention.

5.2 Economic, political or other considerations

According to the Swiss authorities, in referring to the procedural law of the cantons or the Federal procedure law, and to CC Article 322^{octies} 1) , the prosecuting authorities shall be guided only by legal considerations when initiating investigation or filing complaints. They shall not suspend proceedings on political grounds of protecting national economic interests, or for foreign policy considerations or by reason of the reputation of the person or enterprise involved.

6. ARTICLE 6. STATUTE OF LIMITATIONS

CC Article 70 provides that the period of limitation for criminal prosecution is ten years for offences subject to a term of imprisonment exceeding three years, which is the case for bribery of foreign public officials.

Under Article 71 of the Criminal Code "The statute of limitations runs from the date when the offender committed the offence; if the offence was committed on several occasions, from the date of the last offence; if the offences have continued during a certain period, from the date when such offences ceased".

The period of limitation shall be suspended by any active investigation by a prosecuting authority or by any judicial decision concerning the perpetrator. In the case of bribery of a foreign public official, suspension may extend the normal period by five years to a maximum of 15 years³⁵ (Article 72 of the Criminal Code).

7. ARTICLE 7. MONEY LAUNDERING

Article 7 of the Convention requires each Party which has made bribery of its own public officials a predicate offence for the purpose of the application of its money laundering legislation to do so on the same terms for the bribery of foreign public officials without regard to the place where the bribery occurred. CC Article 305^{bis} on money laundering provides that "any person who commits any act liable to prevent the identification of the origin, the discovery or the confiscation of patrimonial property which he knew or should have known, proceeded from a serious indictable offence shall be punished by imprisonment or fine."

Procedure, the consent of some other authority (Indictments Chamber, state prosecutor) may or may not be necessary for a decision to discontinue, whether appeal is filed or not.

35 . "Upon each interruption, a new period of limitation shall begin to run. Nevertheless, the prosecution may be barred when the normal period has been exceeded by more than half of the original period (...)."

7.1/ Bribery of Swiss and Foreign Public Officials

7.2

At present, both bribery of Swiss public officials and that of foreign public officials are considered as serious indictable offences under Swiss law (see CC Article 322^{ter} and 322^{septies}). These Articles create a basic offence for the purpose of applying the law on money laundering. Under Swiss law, the perpetrator of money laundering is also punishable when the predicate offence has been committed in a foreign country and when it is also punishable in the State where it was committed (CC Article 305^{bis} 3).

8. ARTICLE 8. ACCOUNTING

8.1 Maintenance of Books and Records

All the acts prohibited by Article 8 of the Convention (establishing off-the-book accounts, making off-the-book or inadequately identified transactions, recording non-existent expenditures, entry of liabilities with incorrect identification of their object, use of false documents) are generally prohibited by Article 957 of the Obligations Code (OC)³⁶. Under this Article, any person under an obligation to register his trade name in a commercial register must keep such books as are required by the nature and scope of his business. He shall keep them accurately and in such a manner that they show the financial position of the enterprise, its operating debts and debt-claims and the annual results.

8.2 Enterprises subject to Swiss Accounting Law

According to the Swiss authorities, any legal person registered in the commercial register is subject to the accounting rules (Article 957 OC). The requirement of keeping books depends on the obligation to register in the commercial register and not from the resulting registration. In other words, any enterprise which is subject to registration is in all cases obliged to keep books, even if it has not registered in the commercial register.

Under Article 934 §1 of the Obligation Code (OC), the requirement of registration applies to any person who carries on "any work in a commercial form" (ORC Articles 52 to 56³⁷). Commercial companies with gross revenues under SFr 100,000 are not subject to registration (ORC Article 45). On the other hand, registration is required, regardless of annual gross revenues, for any money, foreign exchange, securities, stock exchange or collection transactions, for the occupations of commission agent, agent, broker, for fiduciary and management offices, the transmission of news and the communication of any information in any manner whatever and in any form, and insurance companies (ORC Article 53 a together with Article 54).

According to the above-mentioned criteria, sole members of a firm in the meaning of OC Article 945 (individual enterprise) are also subject to registration and the obligation of keeping books.

8.3 Penalties for Omissions or Falsifications

Persons infringing the Swiss accounting law, including auditors, are subject to several types of criminal sanctions depending on the nature of the offence:

- *Non-compliance with the statutory book-keeping obligation:* CC Article 325 1) provides a sanction for any person who intentionally or negligently violates the statutory obligation of keeping books. Under CC Article 166 a breach of this book-keeping obligation is punishable by imprisonment or fine.

³⁶ The Federal law of 30 march 1911 supplementing the Swiss Civil Code (Obligation Code) (OC), RS 220

³⁷ Order of 7 June 1937 on the commercial register (ORC), RS 221.411

▪ *Forgery or omission*: CC Article 251 (forgery) punishes forgery or omission in the books and ancillary accounting documents. There is uncertainty as to whether other supporting documents used as evidence in accounting can be considered as "*titres*" in the meaning of CC Article 251. Forgery of "*titres*" is a serious indictable offence punished by a maximum term of 5 years imprisonment.

▪ *Forgery for the purpose of deception*: Where the forged accounts or forged balance sheet are used to deceive, this may constitute an offence against property (in particular CC Articles 146 and 152) or an insolvency offence and prosecution for debt offence (CC Articles 163, 166 and 170) may apply:

- Fraud under CC Article 146 constitutes a serious indictable offence punishable by a maximum term of five years imprisonment. Where the offender is an habitual offender, the punishment shall be a term of imprisonment of between three months and ten years.
- Under CC Article 152 giving false information on commercial companies is punishable by imprisonment (maximum three years) or by fine.
- CC Article 163 provides that in the case of fraudulent bankruptcy or accounting fraud, a maximum term of imprisonment of five years shall be applied.

9. ARTICLE 9. MUTUAL LEGAL ASSISTANCE

The OECD Convention requires each Party "to the fullest extent possible under its laws and relevant treaties and arrangements" to provide "prompt and effective" mutual legal assistance to another Party for the purpose of criminal investigations and proceedings brought by a Party concerning offences within the scope of the Convention and for non-criminal proceedings within the scope of the Convention brought by a Party against legal persons. The Convention further establishes dual criminality where it is a pre-requisite for mutual legal assistance. Lastly, the Convention requires Parties not to refuse mutual legal assistance for criminal matters on the grounds of bank secrecy.

9.1 Laws, treaties, and arrangements of mutual legal assistance

Unless otherwise provided by international agreements signed by Switzerland, the Federal law on international mutual assistance in criminal matters (EIMP) governs all procedures concerning international co-operation in criminal matters the principal procedures being:

- a. extradition of prosecuted or convicted persons (Part II);
- b. mutual assistance for foreign criminal proceedings (Part III);
- c. delegation of prosecution and punishment of an offence (Part IV, see *above* 4.3.);
- d. enforcement of foreign criminal decisions (Part V, see *above* 4.3).

Assistance in the meaning of the third part of the EIMP includes communication of information and procedural or official documents recognised under Swiss law, where they appear necessary for proceedings carried out in a foreign country and relating to a criminal offence or to recover the proceeds of the offence (Article 63 EIMP). Acts of mutual assistance include:

- a. notification of documents;
- b. obtaining evidence in particular through house or personal searches, seizure, discovery orders, expert reports, examining and confronting witnesses;
- c. delivery of files and documents;
- d. delivery of objects or assets with a view to confiscation or restitution to their owner.

The measures referred to in Article 63 EIMP entailing coercion as provided by the law of procedure cannot be ordered unless *the facts stated in the request correspond to the objective elements of an offence punishable under Swiss law* (Article 64 EIMP). They are enforceable in accordance with Swiss law. Such measures can also be made where the act is not punishable in Switzerland if they are intended to clear the prosecuted person.

Switzerland does not have a full legal base for mutual legal assistance in non-criminal actions against legal entities.

9.2 Dual Criminality

According to Swiss authorities, dual criminality is required for mutual legal assistance to be given in the sense of Article 63 EIMP. This requirement will be fully met once CC Article 322^{septies} enters into force, providing for the punishment of bribery of foreign public officials.

9.3 Bank Secrecy

According to the Swiss authorities, although bank secrecy is protected by Article 47 of the Federal law on banks and savings banks³⁸, this protection does not ensure absolute bank secrecy. Bank governing bodies, employees and agents are bound to testify and supply information to the authorities wherever Federal or canton law provides for such a duty (e.g., in criminal proceedings)³⁹. This also applies to foreign authorities where Switzerland provides mutual legal assistance to the State in question. Moreover, the Swiss Criminal Code (CC Article 305^{ter}, 2) gives a right to communicate if there is proof that the patrimonial assets could be of criminal origin⁴⁰.

Regarding activities connected with money laundering, Article 9 of the law on money laundering (Federal law of 10 November 1997 on the fight against money laundering in the financial sector) imposes the obligation of disclosure in particular on all financial intermediaries and bank directors. This requires that there is knowledge or a presumption based on reasonable suspicion that the patrimonial assets involved in the business transaction are connected with an offence within the meaning of CC Article 305^{bis} (money laundering), that they originate in a serious indictable offence, or that a criminal organisation exercises a power of disposition over these assets (the suspicion does not have to amount to a certainty)⁴¹.

38 Federal law of 8 November 1934 on banks and savings banks RS 952.0. Under this Article, the following rules apply: 1. Any person who as member of a corporate organ, employee, agent, liquidator or agent of the bank, observer of the Banking Commission or member of a corporate organ or employee of an audit institution, who discloses a secret communicated to him or of which he has knowledge by reason of his position or his duties, and any person who incites another to violate professional secrecy shall be punished by a maximum term of imprisonment of six months or a fine not exceeding SF50,000.

2. Where the offender has acted negligently, a maximum fine of SF30,000 shall be applicable.

3. The violation of secrecy shall be punishable notwithstanding the termination of the function or employment or cessation of activity by the holder of the secret.

4. The foregoing shall be subject to Federal and canton law providing for the obligation to inform the authorities and to give evidence in court proceedings.

39 . According to the Swiss authorities, the opening of accounts or deposits numbered or designated by a code is a purely internal matter for the bank and has no effect on the duty of identification, or that of testifying or informing the authorities.

40 . Article 305 ter on lack of vigilance in financial transactions and the right of communication: 1. Any person who, in the exercise of his occupation, accepts, keeps or helps to place or transfer patrimonial assets belonging to a third party and who omits to verify the identity of the economic owner with the vigilance required by the circumstances, shall be punishable by a maximum term of one year imprisonment or fine. 2. The persons referred to in paragraph 1 shall be entitled to communicate to the Swiss criminal authorities or the Federal authorities designated by the law, any evidence supporting the suspicion that such patrimonial assets proceed from a serious indictable offence.

41 . Article 305bis 1st : "Any person who commits any act likely to hinder the identification of the origin, the discovery or the confiscation of patrimonial assets which he knows or should know proceed from a serious indictable offence, shall be punishable by imprisonment or fine."

10. ARTICLE 10. EXTRADITION

10.1 Extradition for Bribery of a Foreign Public Official

In Switzerland, bribery of a foreign public official constitutes an extraditable offence under the Federal law on international mutual assistance in criminal matters which provides in Article 35 § 1 that extradition may be granted for offences punishable by a term of imprisonment of no less than one year, subject to the condition that the maximum punishment provided in the other State is at least one year and that the offence is not subject to Swiss jurisdiction⁴². Since CC Article 322^{septies} provides that bribery of foreign public officials shall be punishable by a maximum term of imprisonment of five years, this punishment is therefore sufficient to permit extradition.

10.2 Convention as a Legal Basis for Extradition

Switzerland does not subject extradition to the existence of any extradition Convention between Switzerland and the other Party. If Switzerland has no extradition Convention with the other country, extradition of a person from Switzerland is based on the rules of the EIMP.

10.3/ Extradition of Nationals

10.4

The extradition of a Swiss national without his consent is prohibited under Article 25.1 of the Federal Constitution⁴³. Article 7 EIMP elaborates the constitutional provisions by providing that no Swiss national may be extradited or transferred without his written consent to any foreign State to be subject to criminal prosecution or an enforcement measure. The consent is revocable until the transfer has been ordered. This rule does not apply to the transit or restitution of a Swiss national temporarily delivered to the Swiss authorities by another State.

Indictable offences committed by a Swiss national in a foreign country are prosecuted by the Swiss authorities under CC Article 6. Article 6 provides that the Swiss Criminal Code applies to any Swiss national who commits abroad an indictable offence extraditable under Swiss law if the act is also punishable in the State where it was committed and if the perpetrator resides in Switzerland or if he has been extradited to Switzerland by reason of his offence.

10.5 Dual Criminality

Article 10 § 4 of the Convention states that where a Party makes extradition conditional on the existence of dual criminality, such criminality shall be deemed to exist if the offence for which it is sought comes within the scope of Article 1 of the Convention. Under Article 35 § 1 of the Federal law on international mutual assistance in criminal matters, Switzerland makes extradition conditional on the existence of dual criminality⁴⁴. According to the Swiss authorities, the condition of dual criminality has been fully satisfied with the entry into force of CC Article 322^{septies}, which provides a fully adequate punishment for bribery of foreign public officials.

42. To determine whether the offence is punishable under Swiss law, it is not necessary to take account of the particular conditions of this law in matters of guilt and punishment (EIMP Article 35.§ 2).

⁴³ See note 8 *above*.

44. Under EIMP Article 35 § 1, extradition may be granted if the documents supporting the request show that *the offence is punishable by at least one year's imprisonment or a more severe sanction under Swiss law and the law of the requesting State*.

11. ARTICLE 11. RESPONSIBLE AUTHORITIES

Article 11 of the Convention requires Parties to notify the Secretary-General of the OECD of the authority or authorities acting as a channel of communication for the making and receiving of requests for consultation, mutual legal assistance and extradition.

On 31 May 2000, Switzerland notified the OECD Secretary-General that the responsible authority is the Federal Police Bureau.

B. IMPLEMENTATION OF THE REVISED RECOMMENDATION

3. TAX DEDUCTIBILITY

The revised Recommendation of 1997 strongly urges Member countries rapidly to apply the 1996 Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials, which is worded as follows: [the Council recommends] “that those Member countries which do not disallow the deductibility of bribes to foreign public officials re-examine such treatment with the intention of denying this deductibility.” Similarly, the Commentaries on the Convention state that “in addition to accepting the Revised Recommendation of the Council on Combating Bribery, a full participant also accepts the Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials, adopted on 11 April 1996, C(96)27/FINAL”.

Parliamentary action to amend the legislation on direct taxes of the Confederation, cantons and townships so as to exclude deductibility of bribes has led to the adoption by the Federal Chambers of the law of 22 December 1999 on the prohibition of tax deductions for bribes. The referendum time limit runs out on 20 April 2000. This is an outline law, the provisions of which should be adopted by the canton Parliaments and integrated into the canton tax law⁴⁵.

This law amends the Federal law of 14 December 1990 on direct Federal tax (LIFD) by prohibiting any person exercising an independent profit-making activity to deduct as expenses connected to such activity any "bribe in the meaning of Swiss criminal law, paid to Swiss or foreign public officials" (Article 27 3 LIFD). A second paragraph has been added to the LIFD provision (Article 59) which deals with expenditures justified by commercial custom which taxpayers may deduct from taxable profits (companies with share capital such as *sociétés anonymes*, *sociétés en commandite par actions*, *sociétés à responsabilité limitée*, *sociétés coopératives* as well as associations, foundations and other legal entities) This paragraph provides that "under Swiss criminal law, bribes paid to Swiss or foreign public officials shall not be considered as expenditure justified by commercial custom".

Under the law, the prohibition of deduction binds the taxpayer without any requirement of commencing criminal proceedings. The tax authorities review the situation of the taxpaying enterprise on the basis of the books and records supplied by the taxpayer or by third parties and filed with the tax return or subsequently at the time of the tax audit. The reference to the Swiss Criminal Code in defining bribes paid to Swiss or foreign agents clearly shows that the concepts of the Criminal Code are also valid in Federal and canton direct taxation.

45. The cantons are obliged to adapt their canton law to new provisions of the law of 14 December 1990 on the harmonisation of direct taxes of cantons and townships (LHID Articles 10, 1^{bis} and 25, 1^{bis}). The cantons should in theory have done so by December 2000. Failing which, the new provisions of the LHID excluding deductibility of secret commissions shall enter into force and be directly applicable to direct canton and town taxes of natural and legal persons.

Any enterprise which violates the prohibition as to deduction of bribes paid to Swiss or foreign public officials and which files inaccurate accounts in support of its tax return may be subject to the criminal provisions of the tax law punishing tax misappropriation and tax fraud.

EVALUATION OF SWITZERLAND

General Remarks

The Working Group complimented the Swiss authorities for taking important steps towards the thorough implementation of the Convention into Swiss legislation. Delegates thanked the Swiss authorities for the comprehensive and informative responses that significantly assisted in the evaluation process. To meet the requirements of the OECD Convention, the Swiss Parliament adopted on 22 December 1999 an amendment to the Penal Code, which includes the offence of bribery of foreign public officials, as well as a law prohibiting the deductibility of bribes. In addition, a proposal for the complete revision of the General Part of the Penal Code has been submitted by the Swiss Government to Parliament that provides for criminal liability of enterprises. A specific provision is included concerning their criminal liability for bribery in order to meet the requirements of articles 2 and 3 of the Convention.

The Working Group considered in light of the available documentation and explanations provided by the Swiss authorities that Switzerland's legislation as amended by the law of 22 December 1999 conforms to the Convention except in respect of liability of legal persons for bribery. The Working Group urged the Swiss authorities to speed up the adoption of adequate legislation so as to fully comply with the Convention's obligation also in respect of the liability of legal persons for bribery.

Specific Issues

1. Any undue pecuniary or other advantage

Pursuant to Article 322^{octies} section 2 of the Swiss Penal Code, advantages of minor value in conformity with socially accepted practices are not considered as undue advantages. The Swiss authorities explained that this concerns advantages which, in the prevailing opinion of Swiss law, are insignificant and deemed to represent no risk of inciting public officials to behave in a manner inconsistent with their duties. The Swiss authorities also stated that advantages of minor value are neither permitted under, nor a part of, Swiss socially accepted practices where they incite public officials to behave in a manner inconsistent with their duties, or are likely to influence them in the exercise of their discretion. The Working Group was of the opinion that the argument will be satisfactory if Swiss courts systematically adopt this concept and do not refer to social practices accepted in the foreign public official's country. The Group suggested that this issue could be re-examined during Phase 2 of the evaluation process.

2. Performance of official duties

Concern was expressed in the discussion of the Working Group that the implementing legislation does not apply to all cases where the undue advantage is offered, promised or given to foreign public officials in order that they carry out the duties of their functions. In the opinion of the Swiss authorities the offence of bribery of foreign public officials covers all cases where the official has any discretion whatsoever, and that it is in conformity with Commentaries 3 and 9 of the Convention. Further the Swiss authorities take the position that it is unlikely that anything other than small facilitation payments would be made for non-discretionary acts. The Group recommended that particular attention be given to the application of these provisions in the Phase 2 evaluation process.

3. Liability of legal persons

Swiss criminal law so far knows only very limited criminal sanctions against legal persons, namely the confiscation of patrimonial assets held by a third party. Swiss law also indirectly provides for civil and administrative sanctions against acts connected to bribery. In addition, there is no possibility of imposing

criminal fines on legal persons. The Working Group considered that this situation does not meet the requirement of the Convention that parties at least establish effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions, for the offence of bribery of foreign public officials (Articles 2 and 3).

The Swiss authorities stated that they have already introduced legislative proposals in Parliament to create the criminal liability of legal persons. The Swiss authorities emphasised that they expect to have in place laws creating the criminal liability of legal persons in conformity with the requirements of the Convention by 2002/2003.

The Working Group urged the Swiss authorities to implement Articles 2 and 3 of the OECD Convention as soon as possible. These issues would benefit from further discussion in the evaluation process.

4. Seizure and confiscation of the bribe and its proceeds

Swiss law so far knows only limited confiscation of bribes and the proceeds from legal persons, which only applies to enterprises as third parties to, but not as authors of, the offence. The Swiss authorities emphasised that, with the adoption of the law establishing criminal liability of legal persons, a legal person can be a perpetrator and as such be subject to direct confiscation.

5. Jurisdiction

Pursuant to present case law of the Federal Courts, acts of participation committed in Switzerland in a main offence committed abroad are deemed to have been committed abroad. The Swiss authorities emphasised that Swiss participants in an act of bribery committed abroad may be prosecuted in Switzerland on the basis of article 6 of the Criminal Code. Foreign participants cannot be prosecuted in Switzerland but can be extradited to the country where the main offence was committed. The Working Group took note that the reform of the General Part of the Penal Code, as presently envisaged, would allow for the prosecution in Switzerland of the foreign participants. The Working Group looks forward to this development.

6. Accounting

Questions were raised in general in relation to the framework for auditing standards required by the Convention. These questions concern possible discrepancies and loopholes in the implementation of the Convention in relation to principles and other rules governing accounting standards already established in the internal law. The Working Group recommended that this issue be examined horizontally at a future plenary.