



SWITZERLAND: PHASE 2

FOLLOW-UP REPORT ON THE IMPLEMENTATION OF THE PHASE 2 RECOMMENDATIONS

**APPLICATION OF THE CONVENTION ON COMBATING
BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL
BUSINESS TRANSACTIONS AND THE 1997 REVISED
RECOMMENDATION ON COMBATING BRIBERY IN
INTERNATIONAL BUSINESS TRANSACTIONS**

This report was approved and adopted by the Working Group on Bribery in International Business Transactions on 2 May 2007.

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SUMMARY AND CONCLUSIONS BY THE WORKING GROUP ON BRIBERY

a. Summary of findings

1. At the Working Group's meeting in March 2007, Switzerland presented its written follow-up report, outlining its response to the recommendations that the Working Group on Bribery made during the phase 2 examination in 2004. The Working Group welcomed the information provided by the Swiss authorities in the course of this exercise and recognized Switzerland's efforts to implement the recommendations made by the Working Group. The Working Group noted, however, that most of the recommendations that the Group made during the phase 2 examination have not yet been fully implemented.

2. The Group acknowledged Switzerland's efforts to raise awareness about the Convention and the foreign bribery offence, called for in Recommendations 1a and 1b. The Swiss authorities explained that they endeavoured to maintain and to strengthen the momentum that the phase 2 examination itself had triggered as Switzerland understood awareness raising as a long-term undertaking that was conducted in cooperation with various partners. These partners included the federal authorities, the 26 Cantons, and professional associations, notably those involved in export and investment promotion, and Transparency International Switzerland. The Working Group considers that further awareness raising efforts are required to fully implement the two recommendations that address this matter; these measures should target specifically small and medium-sized enterprises and authorities at cantonal level.

3. As a further preventive measure, the Working Group had called upon Switzerland, in the phase 2 evaluation, to enhance the transparency of corporate accounts and the independence of auditing bodies, and to encourage the Swiss Institute of Certified Accountants and Tax Consultants to amend the auditing standards (Recommendation 2a). Now, the Working Group agreed that the independence of auditing bodies will be strengthened by the comprehensive re-organisation of the institution of auditing once it has entered into force, likely on 1 January 2008, according to the Swiss authorities.

4. In turn, the Group noted that the transparency of company accounts has not yet been enhanced and that the auditing standards have not yet been amended. Switzerland explained that uniform accounting rules were being developed, and that they will be brought before Parliament in 2007. Switzerland further stated that the Swiss Institute of Certified Accountants and Tax Consultants is expected to amend its auditing standards as of the entry into force of the new auditing legislation (1 January 2008).

5. Three recommendations of the phase 2 report call upon Switzerland to consider establishing formal obligations to report indications of possible acts of foreign bribery to the competent judicial authorities. The phase 2 report notably suggested that Switzerland consider establishing such an obligation for federal authorities and public officials, and to encourage cantonal authorities to do the same at their level (Recommendation 3a). At federal level, the Swiss Government will prepare a respective proposal for submission to Parliament in 2008. The Government has also engaged in consultations on the matter with the Cantonal Governments since 2005. The Working Group found that through these efforts, Switzerland has fully implemented the Recommendation.

6. The Working Group's phase 2 report had also recommended that Switzerland consider establishing a formal obligation for company auditors to report to prosecutorial authorities indications of possible acts of foreign bribery (Recommendation 3d). The considerations on the matter have not led Switzerland to include such an obligation into its new Auditing Law, but satisfy, in the eyes of the Working Group, the Recommendation made during the phase 2 examination.

7. Another recommendation addressed to Switzerland seeks to enhance the likelihood of detection of foreign bribery by the tax authorities by means of a circular that explains the nature and tax aspects of the foreign bribery offence; the recommendation also calls for a revision of the disclosure rules (Recommendation 3b). The Working Group considers that Switzerland has partly implemented this recommendation by preparing a draft circular that, according to the Swiss authorities, will also clarify disclosure rules. The Swiss authorities informed the Group that approval and subsequent dissemination of the circular were pending at the time of the written follow-up report in March 2007.

8. As a further measure to foster the detection of foreign bribery offences, the Working Group had recommended, in the phase 2 report in 2004, that Switzerland examine measures to ensure effective protection of whistleblowers, especially employees in the private sector (Recommendation 3c). In March 2006, the first chamber of Parliament mandated the Swiss Government to prepare a bill that addresses the protection of whistleblowers; the second chamber is expected to follow in June 2007. The Swiss Government will subsequently draft such a bill and will submit it to Parliament likely in 2008. The Working Group considers that through these steps Switzerland has partially implemented Recommendation 3c.

9. As a fifth measure to increase the likelihood that foreign bribery offences be detected in Switzerland, the Working Group recommended that the authorities raise awareness of supervisory authorities responsible for the fight against money laundering, so that these bodies resort to the full range of sanctions available to deter money laundering related to foreign bribery (Recommendation 3e). The Working Group noted that at the occasion of the review of the Financial Action Task Force in late 2005 the supervisory authorities were made aware of the panoply of sanctions provided for in the Anti-Money Laundering Act. In this context, Switzerland informed the Working Group that the consolidation of the supervisory bodies for banks and non-bank financial intermediaries to create a Federal Financial Market Supervisory Authority was underway. The Working Group hence considers that Switzerland has partly implemented the recommendation.

10. In its report on the phase 2 review of Switzerland, the Working Group noted that the possibilities for appeals with regard to mutual legal assistance requests tended to draw out procedures and hence recommended that these appeal processes be streamlined to bolster the effectiveness of the prosecution of foreign bribery offences (Recommendation 4a). The Group heard the explanations from Switzerland that cantonal appeals bodies had been dismantled and that appeals against initial rulings involving international mutual legal assistance were now handled by a single specialized body at the federal level. Further, a law adopted in June 2005 and in force since 1 January 2007 restricts appeals by setting additional conditions; the new rules also prescribes short delays, and appeals do not automatically have suspensive effect. The Working Group deems that Switzerland has, through these measures, partially implemented the recommendation and agrees that at the time of the follow-up report in March 2007 it was too early to assess the impact of these reforms on the effectiveness of the prosecution of foreign bribery offences.

11. Regarding the recommendation to consider whether enterprises convicted of bribing foreign public officials should be temporary or permanently disqualified from participating in public procurement contracts, and to consider a similar approach for export credits (Recommendation 4b), Switzerland explained that it had adopted measures as required by the 2006 Recommendation on Bribery and Officially Supported Export Credits. The Group agreed that this action met the requirement expressed in the

recommendation as far as export credits are concerned. As regards sanctions in the domain of public procurement, Switzerland explained that measures were still underway and that it was confident that this part of the recommendation will eventually be implemented. The Group concluded that Recommendation 4b has been partially implemented.

b. Conclusions

12. Based on the findings of the Working Group with respect to Switzerland's implementation of the phase 2 recommendations, the Working Group concluded that Switzerland had fully implemented recommendation 3a and 3d, and partially implemented the remaining eight recommendations the Working Group had made in the phase 2 review.

13. Noting that some of these measures that Switzerland has taken in response to the recommendations that the Working Group had made in the phase 2 review had not been finalized at the time of the written follow-up report, the Working Group invited Switzerland to report orally, two years after the written follow-up examination, i.e. by March 2009, on the implementation of the recommendations that the Group considers to be not yet fully implemented.

WRITTEN FOLLOW-UP TO PHASE 2 REPORT

Name of country: Switzerland

Date of approval of Phase 2 Report: 24 December 2004

Date of information: 5 February 2007

Part I: Recommendations for Action

Text of recommendation:

1. With regard to awareness-building efforts to promote the OECD Convention and the offence of bribing a foreign public official under the anti-bribery provisions of Swiss law, the Working Group recommends that Switzerland:
 - a) Pursue and amplify its awareness-building efforts directed at the private sector, paying particular attention, in co-operation with the relevant economic players, to small and medium-sized enterprises operating internationally [Revised Recommendation, Articles I and V.C.i)].

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

Switzerland considers that building private-sector awareness of the corruption issue – and bribery of foreign public officials in particular – is a long-term effort. In this regard, the competent federal authorities work actively with major partners in the economy, civil society and the scientific community; these joint endeavours have been further stepped up since the Phase 2 review. As suggested in the most recent (October 2006) edition of the *Transparency International Bribe Payers Index*, the efforts of these partners have not been in vain: the Index shows Switzerland, among the 30 leading exporting countries, as the one whose companies are least inclined to pay bribes.

Publication of the Phase 2 report, in February 2005, prompted the holding of a press conference in Bern to provide information and build awareness among the public and among economic players¹. Taking part in the press conference were the State Secretary for Economic Affairs, the Chair of the OECD Working Group on Bribery, a member of the board of the Swiss economy's umbrella organisation (*economiesuisse*) and the President of *Transparency International Switzerland*. The event was widely reported in the press and on radio and television. Priority was given to contacting associations and organisations representing SMEs, whose official

¹ <http://www.seco.admin.ch/aktuell/00277/01164/01980/index.html?lang=fr&msg-id=10409> [in French; also available in German and Italian].

publications also relayed information about the report and its recommendations.

The informational brochure *Preventing Corruption - Information for Swiss Businesses Operating Abroad*, which was published in 2003 in four languages by the federal authorities in collaboration with *economiesuisse* and *Transparency International Switzerland*, continues to enjoy considerable success. Over 20 000 copies have been distributed, and the brochure is consulted widely on the Internet. A revised version is in the pipeline and will be released in 2007. This too will be widely distributed and promoted through a major publicity campaign.

Since the Phase 2 review, a number of events dedicated to preventing bribery in international economic transactions have been held in Switzerland, with substantial participation by SMEs. These include seminars conducted in the second half of 2006 by both *ICC Switzerland* and *Transparency International Switzerland*, in which the federal authorities competent for the OECD Convention also took part, and which were well received.

Along with explanations about the applicable legal standards, a large part of these seminars was devoted to the mechanics of precisely how a company can implement a ban on acts of corruption. Specialists outlined ways to introduce and effectively start up systems to prevent bribery and monitor compliance. The supply of specialized services has expanded considerably in Switzerland over the past two years, and the information available would suggest that a growing number of companies are incorporating anti-corruption measures into their compliance processes.

Since the Phase 2 review, the federal authorities have been systematically including the bribery issue, and the ban on bribing foreign public officials, among the economic missions of senior Swiss representatives abroad. These awareness-building efforts are directed both at representatives of the private sector who participate in those missions and at Swiss companies doing business abroad.

In August 2006, new instructions were issued regarding the role of the Swiss diplomatic and consular network in dealing with cases of active corruption of foreign public officials. Among those receiving the instructions were the Swiss Business Hubs in the 15 leading markets for Swiss companies. The instructions indicate, *inter alia* to Swiss representations abroad, how to help prevent companies from paying bribes and how to report signs of acts of corruption.

Over the past two years, the Swiss National Contact Point for the *OECD Guidelines for Multinational Enterprises* has also stepped up its efforts to make businesses aware of the bribery issue. As part of its informational and advisory activities, it has taken every opportunity to remind businesses that, in Switzerland, to bribe a foreign public official, in contrast to actions governed by other principles of behaviour for companies doing business abroad, is not only the subject of a recommendation but a punishable offence as well.

Swiss Export Risk Insurance (SERV)², pursuant to the new 2006 OECD recommendation, has decided that beginning in 2007 it will send all companies applying for insurance significantly more comprehensive information on the risks and illegality of bribery, of foreign public officials in particular³. During the first half of this year, seven half-day workshops have been scheduled in order to showcase, *inter alia*, SERV's new measures to fight corruption. Others will follow.

² See Recommendation 4b.

³ <http://www.serv-ch.com/en/ethical-principles/corruption/index.html>.

In the framework of the United Nations Global Compact Network Switzerland⁴, which was established in March 2006, the theme of corruption is taken very seriously. According to the Network's Office, the prevention of corruption and the behaviour to adopt vis-à-vis instances of corruption are subjects about which companies belonging to the Network have expressed the greatest need for information and sharing experience.

Frequent media reports on international bribery cases over the past two years, and especially the criminal prosecutions initiated in Switzerland in connection with the United Nations "Oil for Food" programme, have also been a major factor in heightening private-sector awareness of the ban on bribery abroad. A number of well-known companies based in Switzerland are among those cited in the Volcker Committee report.

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

Not applicable.

Text of recommendation:

1. With regard to awareness-building efforts to promote the OECD Convention and the offence of bribing a foreign public official under the anti-bribery provisions of Swiss law, the Working Group recommends that Switzerland:
 - b) Pursue its efforts to raise awareness within the public administration, paying attention in particular to cantonal and federal employees who could play a role in detecting and reporting acts of bribery [Revised Recommendation, Articles I and VI. ii)].

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

Like building awareness of the bribery issue in the private sector, doing so within the public administrations is viewed by the Swiss authorities as an ongoing task.

At the federal level, the Phase 2 review prompted broad expansion of the circle of participants in the government's advisory group on corruption. Over thirty federal offices now belong to the group, which meets two or three times a year, including once with representatives of the private sector and civil society, and which plays a major role in awareness-building. During the round table discussions – a procedure that has by now become firmly entrenched – the offices in turn outline what they have been doing to counter corruption. Work at the OECD is brought up and discussed regularly. Members of this network have been exchanging more and more information electronically.

⁴ <http://www.unglobalcompact.ch/en/index.html>.

At the end of each of the past two years, surveys were taken of the offices represented on the Confederation's advisory group on corruption, as well as of the general secretariats of all the ministries, in order to take stock of measures taken, or to be taken soon, to build awareness of corruption, and of bribery of foreign public officials in particular. The surveys revealed that prevention efforts were continued, if not stepped up, in many agencies of the federal government in 2005 and 2006; these efforts encompassed structures and processes, internal rules and instructions, services available to whistleblowers, and training programmes.

Regarding promotion of the OECD Convention and awareness among federal employees who could play a role in detecting and reporting acts of bribery, let us cite the following achievements.

As already mentioned under Recommendation 1a, new instructions on "the role of the Swiss diplomatic and consular network in dealing with cases of active corruption of foreign public officials" were issued in August 2006. They inform Swiss representations abroad about the applicable legal standards and tell them how to help prevent corruption and respond to evidence of corrupt acts. In 2007, a poll will be taken to assess the impact of these instructions and maintain the required level of vigilance.

In addition, the Federal Department of Foreign Affairs has bolstered the training programme for new diplomatic and consular officials with a special module covering the fight against bribery of foreign public officials. Since 2006, this training has included practical exercises and case studies.

In 2006, the Swiss Agency for Development and Cooperation adopted a new strategy on "Fighting Corruption". Accordingly, a Compliance Office was set up with the twofold mission of preventing corruption and receiving evidence of corruption at home or abroad. Based on the information it receives, the Compliance Office oversees the operation of existing prevention systems and proposes improvements if necessary.

At the beginning of 2007, Swiss Export Risk Insurance (SERV) was given new legal and organisational foundations⁵. These innovations also provided an opportunity to further improve the prevention of corruption and the awareness of SERV staff of bribery issues in international business transactions. The new arsenal includes an insurer's handbook on anti-bribery measures and enhanced due diligence processes in response to certain information or evidence of bribery.

Further improvements to bribery prevention and staff awareness were achieved with the re-organisation and centralisation of the Confederation's public procurement at the beginning of 2007⁶. Among the aims were to stipulate powers and processes more clearly and make them more transparent, and to enhance the effectiveness of internal control systems. At the same time, the Competence Centre for Federal Public Procurement bolstered its training activities for public procurement specialists. Since 2005, the Centre's core courses have included theoretical and practical training in the fight against corruption. In addition, a workshop for senior staff members on the same topic was held for the first time (in 2006).

In 2006, the Directorate-General for Customs launched a bribery awareness campaign, focused specially on the work of customs investigative services, which are most likely to be exposed to

⁵ See Recommendation 4b.

⁶ See Recommendation 4b.

problems of bribing foreign public officials, in each of its four geographical units.

Also in the first half of 2007, a vast campaign will be launched to brief all of the some 37 000 federal government employees. A leaflet will attune them to the risks of bribery, how to prevent it, and possible responses to evidence of corruption. A new Internet page will provide comprehensive information on the subject.

The report of the Phase 2 review was also distributed to the 26 *cantons*, highlighting the recommendation about awareness-building at that level of government. Since then, a dialogue has been instituted between the central body that represents the cantons vis-à-vis the Confederation (the Conference of Cantonal Governments, CCG) so as to encourage their efforts to prevent bribery. For its part, over the past two years the CCG has raised these issues repeatedly with the competent cantonal authorities, *inter alia* through briefings and a survey based on the OECD Convention. The survey showed that the cantons too had been committed to preventing corruption in 2005 and 2006, even if their efforts did not take the same form in each canton. Several cantons deemed that periodic review of the measures taken was useful and important.

Furthermore, in 2006, representatives of the Confederation and the cantons jointly attended two meetings on the subject of bribery. The first was a joint seminar of Financial Control Agencies and the second a conference of Swiss territorial auditors.

Lastly, Switzerland will be reviewed in 2007 by the Group of States Against Corruption (GRECO) – a review that will combine the first and second rounds of evaluation. With this in mind, all of the offices concerned have been asked to make their contributions, preparing responses to the questionnaire, and will be invited to a hearing during the on-site visit scheduled for next September. In this connection, a letter and a questionnaire have been sent out to all of the cantons. This exercise obviously also helps build awareness among federal and cantonal public officials.

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

Not applicable.

Text of recommendation:

2. With respect to other preventive measures, the Working Group recommends that Switzerland:
 - a) Pursue its efforts to ensure greater transparency in corporate accounts and the independence of auditing bodies, and encourage the Swiss Institute of Certified Accountants and Tax Consultants to complete promptly the on-going process of amendment of auditing standards [Convention, Article 8; Revised Recommendation, Article V.A.iii); Annex to the Revised Recommendation, paragraph 7].

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

In December 2005, the Swiss parliament adopted a total re-organisation of the institution of auditing⁷. The new regulations bring Swiss auditing statutes into line with international developments and in particular bolster the independence of auditing bodies. The re-organisation will probably enter into force on 1 January 2008.

Unlike under current legislation, the future audit requirement will no longer depend on a company's form of incorporation, but on its economic importance. A strict "ordinary audit" will be required of all public companies and firms of a certain size, while a "restricted audit" will be required of others⁸. The independence and competence of auditing bodies will be buttressed by legal requirements that are clearer and stricter⁹. In addition, an independent supervisory authority will ensure that only qualified individuals perform auditing services, and it will oversee the auditing bodies of public companies. Following the appointment of its board of directors and managing director at year-end 2006, the new supervisory authority will begin its activities in the second half of 2007.

With regard to the transparency of financial accounts, the Swiss government in December 2005 put a preliminary draft revision of the law governing stock corporations and accounting law¹⁰ up for public consultation. Among its aims are to institute uniform accounting rules for all forms of private-law companies. Based on the feedback received¹¹, the government will submit a message to Parliament in the second half of 2007.

Regarding the accounting standards of the Swiss Institute of Certified Accountants and Tax Consultants, the disputed provision is to be found in the 2001 edition of the auditing standards [note 2.4 to Standard No. 9 ("Fraud and auditing of annual accounts")]. This paragraph is incompatible with current and future law alike. The Swiss Institute of Certified Accountants and Tax Consultants has confirmed that these auditing standards will be abolished when the new law on auditing enters into force. At that time, only the 2004 version of the Swiss Auditing Standards, which is a translation of the International Standards on Auditing (ISA), will be valid.

⁷ *Code of obligations*, Amendment of 16 December 2005, Articles 727-731a, in: *Feuille fédérale* 2005 6809, <http://www.admin.ch/ch/f/ff/2005/6809.pdf> [in French]; as well as: Federal Law on the Licensing and Supervision of Auditors, of 16 December 2005, in: *Feuille fédérale* 2005 6867, <http://www.admin.ch/ch/f/ff/2005/6867.pdf> [in French].

⁸ Articles 727 and 727a of the Code of Obligations.

⁹ Articles 727b ff.

¹⁰ Preliminary draft revision of the Code of Obligations relating to company law and accounting law: www.ejpd.admin.ch/etc/medialib/data/wirtschaft/gesetzgebung/aktienrechtrevision.Par.0007.File.tmp/VEfranz05113%20revOFJ_version%20finale%20Version%20EDA.pdf [in French]:

Explanatory report on the preliminary draft:

www.ejpd.admin.ch/etc/medialib/data/wirtschaft/gesetzgebung/aktienrechtrevision.Par.0008.File.tmp/rapportexplicatifcomplet_version%20finale30.11.pdf [in French].

¹¹ Feedback may be consulted via the following website [in French]: <http://www.ejpd.admin.ch/bj/fr/home/themen/wirtschaft/gesetzgebung/aktienrechtsrevision.html>. [Translator's note: Limited information in English is available at: <http://www.ejpd.admin.ch/bj/en/home/themen/wirtschaft/gesetzgebung/aktienrechtsrevision.html>].

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

Not applicable.

Text of recommendation:

3. With regard to detection, the Working Group recommends that Switzerland:
 - a) Consider the establishment in federal legislation of a formal obligation for any federal authority, civil servant or public official, including those in charge of export credits, to report indications of a possible act of bribery to competent authorities, and engage consultations with the cantons so as to encourage them to institute a similar obligation in cantonal legislation where such an obligation is currently lacking. [Revised Recommendation, Article I].

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

At the federal level, this recommendation of the Working Group was taken up by the upper house of the Swiss parliament (the Council of States). In March 2006, on a proposal by its Legal Affairs Committee, the Council of States adopted a motion¹² directing the government to examine the introduction of an obligation that employees of the Confederation notify the competent authority if, in the course of performing their official duties, they have firm cause to suspect that an illegal act has been committed¹³. In November 2006, the relevant committee of the lower house (the National Council) also endorsed this proposal, which the National Council will probably take up at its March 2007 session. Once the motion is definitively adopted, the government, which has already expressed its support, will prepare a report and proposals which will be put up for consultation before being submitted to Parliament – probably in 2008.

At the cantonal level, consultations on the Working Group's recommendations were begun in 2005 with the Conference of Cantonal Governments. The Conference has forwarded the relevant information to the competent authorities in the cantons and has conducted a full survey into the obligation to report evidence of illegal acts, including bribery. Based on input from the cantons, it can be said that at least half of Switzerland's 26 cantons have a blanket reporting obligation applicable to all government employees; that in several other cantons such an obligation exists, but is limited to certain categories of employees; and that some cantons are evaluating new measures. Contacts on the subject between the Confederation and the cantons are continuing.

¹² Along with a mandate in respect of whistleblowers (see Recommendation 3c).

¹³ *Bulletin officiel du Conseil des États*, Spring 2006 session, 11th meeting; http://www.parlament.ch/ab/framezet/f/s/4711/218820/f_s_4711_218820_218988.htm [in German and French].

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

Not applicable.

Text of recommendation:

3. With regard to detection, the Working Group recommends that Switzerland:
 - b) Proceed, in accordance with Switzerland's expressed position, to the drafting of a circular for federal and cantonal tax authorities specifying the nature and tax aspects of the foreign bribery offence, so as to encourage detection of acts of bribery abroad, and to review disclosure rules to ensure that officials discovering suspicious facts report them to the competent judicial authorities [Revised Recommendation, Article IV].

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

Such a circular has been prepared by the Federal Tax Administration. It seeks to address the Working Group's recommendation insofar as it will make the tax authorities at both the cantonal and federal levels more attentive to both the tax and criminal aspects of bribery – of foreign public officials in particular. In addition, it will clarify the channels to be used to report evidence of bribery to the judicial authorities.

Given the Swiss federal structure, consultation and approval of a new circular for tax authorities at all levels can take a certain amount of time. In the case of this particular circular, a first draft was put up for consultation in mid-2006. The comments made during that phase have been incorporated into a revised version submitted until March 2007 to the competent bodies. The new directive should be approved and published promptly.

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

Not applicable.

Text of recommendation:

3. With regard to detection, the Working Group recommends that Switzerland:
 - c) Examine measures to ensure effective protection for persons cooperating with enforcement authorities, and especially for employees who in good faith report suspected acts of bribery so as to encourage such persons to report them without fear of dismissal [Revised Recommendation, Article I; Annex to

the Revised Recommendation, paragraph 6].

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

In March 2006, the upper house of the Swiss parliament (the Council of States) adopted a motion directing the government to present Parliament with a bill containing the following (excerpts)¹⁴:

- The conditions under which people in a business who report illegal acts – such as bribery – shall be protected against unfair dismissal or other forms of discrimination should be stipulated explicitly in the Code of Obligations.
- In this context, it should be explored, *inter alia*, whether the legal sanction currently in place is sufficiently effective in preventing an employer from making an unfair dismissal. If not, harsher consequences need to be proposed.
- Whistleblowers whose labour relations are governed by public law should be afforded equivalent protection.

This motion, which amends and clarifies a previous parliamentary initiative¹⁵, was approved by the Federal Council (government) in March 2006 and by the relevant committee of the lower house of parliament (the National Council) in November of the same year. The National Council will probably be taking it up at its March 2007 session. Once the motion is definitively adopted, the Federal Council will prepare a draft bill which will be put up for consultation before it is submitted to Parliament – probably in 2008.

In addition, new measures to protect witnesses and other participants in criminal trials are set to be introduced and will be included in the future Swiss Code of Criminal Procedure, which is currently being dealt with by Parliament¹⁶. This draft federal act on criminal procedure – a law that will ultimately replace all existing cantonal legislation in this area – provides for special measures to protect witnesses. These measures are not limited to witnesses, but will extend to experts as well as persons close to witnesses or experts if there is a serious danger of life or limb, or if the trial imposes a significant difficulty on them. It will even be possible to guarantee anonymity through appropriate measures, subject to approval by a judge other than the one presiding over the trial. If need be, the Confederation and the cantons will be able to ensure that the protective measures remain in place after the trial is over.

Moreover, in a report of 9 June 2006¹⁷, the government acknowledged that further provisions had to be adopted in order to institute witness protection outside trials, in the context of international co-operation in particular. It has directed the Federal Department of Justice and Police to identify

¹⁴ *Bulletin officiel du Conseil des États*, Spring 2006 session, 11th meeting; http://www.parlament.ch/ab/frameset/f/s/4711/218820/f_s_4711_218820_218988.htm [in German and French].

¹⁵ Motion 03.3212 (Remo Gysin) of 7 May 2003; http://search.parlament.ch/f/cv-geschaefte?gesch_id=20033212 [in French ; also available in German].

¹⁶ http://search.parlament.ch/f/cv-geschaefte?gesch_id=20050092 [in French].

¹⁷ *Rapport donnant suite au postulat du 21 février 2005 de la Commission de la politique de sécurité du Conseil des États* (05.3006), FF 2006, pp. 5421ff [in French].

the legal conditions required for implementing measures to protect witnesses outside trials.

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

Not applicable.

Text of recommendation:

3. With regard to detection, the Working Group recommends that Switzerland:
 - d) Given the important role of the auditing of accounts in detecting suspicious transactions related to the bribery of foreign public officials, consider extending mandatory reporting obligations for auditors contained in the draft bill to amend the Code of Obligations, by establishing an express obligation for auditors to report to the prosecutorial authorities any evidence of possible corrupt practices by the entities whose accounts they audit in the event that the entities' executive bodies, after being duly advised, refrain from taking action [Revised Recommendation, Article V iv)].

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

The new Swiss auditing law, adopted by Parliament in December 2005¹⁸ and set to enter into force on 1 January 2008, contains no blanket obligation that the auditing body report to the judicial authorities any violations it detects in performing its duties. However, the obligation to report irregularities to the company's other bodies was clarified and strengthened.

For example, (the new) Article 728c of the Code of Obligations provides that if, in the course of an "ordinary audit", the auditing body finds violations of the law, but also of corporate rules or regulations, it must so notify the Board of Directors in writing, and in serious cases, or if the Board fails to take adequate measures after notification, the general meeting of shareholders as well. If the Board of Directors prevents the auditing body from addressing the general meeting, the auditing body itself is empowered to convene a meeting without referring to the Board (Article 699.1 of the Code of Obligations).

The importance of this toughening of the reporting obligation is compounded by the fact that the obligation will henceforth extend to a wider circle of businesses, and that the independence of auditing bodies has been consolidated. A Board of Directors to which the auditing body has reported violations is required, pursuant to good corporate governance, to act and if necessary to report the facts to the judicial authorities. If the Board fails to do so, a shareholder may do so in its place. It should be noted that shareholders are under no obligation of discretion vis-à-vis the directors or the company and may at any time report wrongdoing to the prosecuting authorities.

¹⁸ For the references to the relevant legislation, see response to Recommendation 2a.

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

Not applicable.

Text of recommendation:

3. With regard to detection, the Working Group recommends that Switzerland:
- e) Raise the awareness of supervisory authorities about the importance of utilising the full range of available sanctions so as to punish more dissuasively any infringements of vigilance requirements established with regard to the fight against money-laundering and of the obligation to report suspected money laundering related to foreign bribery [Convention, Article 7; Revised Recommendation, Article I].

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

The range of sanctions provided for in the Money Laundering Act was examined and described in detail by the Financial Action Task Force (FATF) in its third mutual evaluation report on Switzerland, which was published in November 2005¹⁹. At the time of that review, all of the supervisory authorities were once again made aware -of the importance of utilising the full range of available sanctions, especially as concerns FATF Recommendation 17. The report acknowledges the solidity of the Swiss implementation system while noting that more sanctions could be imposed.

In February 2006, the Swiss government presented Parliament with a draft bill on an integrated supervision of financial markets, which would consolidate the supervisory bodies for banks and non-bank financial intermediaries (the Federal Banking Commission, the Federal Office of Private Insurance, the Money Laundering Control Authority)²⁰ into the Federal Financial Market Supervisory Authority (FINMA). Creation of the integrated authority will lead to greater harmonisation of the rules, including sanctions and their enforcement. The imposition of penalties will thus be bolstered.

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

Not applicable.

¹⁹ <http://www.fatf-gafi.org/dataoecd/29/11/35670903.pdf> [complete report in French];
www.fatf-gafi.org/dataoecd/60/30/35529139.pdf [summary in English].

²⁰ <http://www.efd.admin.ch/dokumentation/medieninformationen/00467/index.html?lang=en&msg-id=2729>.

Text of recommendation:

4. With regard to prosecution and sanctions, the Working Group recommends that Switzerland:
- a) Pursue the efforts undertaken to bolster the effectiveness of the prosecution of offences relating to the bribery of foreign public officials, by considering measures to streamline the process of appeal with respect to mutual judicial assistance requests [Convention, Article 5 9; Revised Recommendation, Article I; Annex to the Revised Recommendation, paragraph 8].

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

As part of the comprehensive re-organisation of the federal judiciary, it had been decided, in a push for centralisation, to dismantle cantonal appeals bodies and to direct all appeals against initial rulings involving international mutual judicial assistance to a single body made up of specialised judges – the Federal Criminal Court in Bellinzona²¹. Thanks to this centralisation, the cases brought before the court can be processed more effectively, with enhanced material consistency.

In June 2005, the Swiss parliament adopted a new law on the Federal Supreme Court²², which entered into force on 1 January 2007. Under the new regulations, only those appeals involving extradition, confiscation, transfer of goods or securities, conveyance of information deemed secret and particularly important cases (all conditions having to be met) may still be brought in the second instance to the Federal Supreme Court in Lausanne (limitation of the grounds for appeal: see Article 84 of the Federal Supreme Court Act). In the interest of speed, appeals must be lodged within ten days of the judgement of the Federal Criminal Court (Article 100). The Supreme Court must in turn decide whether to take up the appeal within 15 days of receipt (Article 107). Appeals do not generally have suspensive effect, except if a decision involves closure, conveyance of information deemed secret or the transfer of goods or securities. On request, the investigating judge may rule otherwise regarding the suspensive effect (Article 103).

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

Not applicable.

²¹ Article 28 of the Federal Criminal Court Act of 4 October 2002;
<http://www.admin.ch/ch/f/as/2003/2133.pdf> [in French].

²² <http://www.admin.ch/ch/f/as/2006/1205.pdf> [in French].

Text of recommendation:

4. With regard to prosecution and sanctions, the Working Group recommends that Switzerland:
 - b) In order to strengthen the overall effectiveness of sanctions for the offence of bribery of foreign public officials, consider, in the context of the amendment of the federal law on public procurement, the temporary or permanent disqualification from any public procurement of enterprises convicted of bribing foreign public officials, and consider a similar approach for export credits [Convention, Article 3.4; Revised Recommendation, Article II.v) and Article VI.ii)].

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

The federal law on *public procurement* is currently undergoing extensive revision. In this context, the Working Group's recommendation was discussed with the competent authorities. The proposed legislation, which is still in the drafting stage, is expected to incorporate the recommendation. It will be put up for public consultation in 2007 and then submitted to Parliament.

In this context, it may be noted that the Confederation's procurement was centralised at the beginning of January 2007. The number of purchasing departments was scaled back from 42 to three: the Federal Office for Building and Logistics, which buys for the federal civil administration; armasuisse, which handles procurement for the army; and the Swiss Government Travel Centre. Along with centralisation, strategic control of government procurement and centralised purchasing statistics have been introduced. Together with other provisions of the Organisation of Federal Procurement Order, which was adopted in November 2006²³, these changes will allow better control over bribery-related risks, with improved detection and punishment of businesses and suppliers convicted of bribing domestic or foreign government employees.

The recommendation to Switzerland regarding *export risk guarantees* was formulated more broadly than in other Phase 2 reports. In order to ensure equal treatment for the various guarantee agencies, Switzerland brought the matter before the OECD Working Party on Export Credits and Credit Guarantees. In April 2006, the Working Party adopted a stronger version of the Action Statement on Bribery and Officially Supported Export Credits, and in December 2006 the Action Statement was converted to an OECD Recommendation.

Against this background, Switzerland took a series of measures. In December 2005, Parliament adopted the new legislation on Swiss Export Risk Insurance (SERV)²⁴. Under Article 13.2 of the law, no insurance may be provided if the export transaction in question violates any Swiss or foreign laws. Article 8 of the implementing order, which the government enacted in October 2006²⁵, stipulates that the applicant shall pledge to provide all important information for the conclusion of the insurance contract, including information on corruption and the environment.

²³ <http://www.admin.ch/ch/f/rs/1/172.056.15.fr.pdf> [in French].

²⁴ <http://www.admin.ch/ch/f/as/2006/1801.pdf> [in French].

²⁵ Order of 25 October 2006 on Swiss Export Risk Insurance; <http://www.admin.ch/ch/f/as/2006/4403.pdf> [in French].

These provisions entered into force on 1 January 2007, at the same time as the new SERV structures²⁶.

Putting these provisions and the (2006) OECD Recommendation into practice to discourage bribery in connection with officially supported export credits, on 1 January 2007 SERV introduced a new form that applicants for insurance are required to fill out. In it, the applicant must, *inter alia*, certify that (i) the export contract has (or will) not be obtained by means of illegal acts, including bribery; (ii) neither the applicant nor any agent thereof involved in the contract appears on a publicly accessible blacklist compiled by an international financial institution; and (iii) neither the applicant nor any agent thereof involved in the contract is currently charged with bribery or has been convicted of bribery in the previous five years²⁷. On the basis of the explanations provided and the type of export contract, SERV will decide if one of its anti-bribery experts should conduct an enhanced due diligence inquiry.

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

Not applicable.

²⁶ <http://www.serv-ch.com/en/index.html>

²⁷ <http://www.serv-ch.com/en/principes-ethiques/corruption/index.html>

Part II: Issues for Follow-up by the Working Group

Text of issue for follow-up:

5. The Working Group will follow up on the issues listed below, in light of evolving practice, in order to check:

- a) With respect to the liability of legal persons, whether, taking into account the notion of defective organisation, the application of article 100quater of the Criminal Code provides for effective, proportional and dissuasive sanctions for foreign bribery [Convention Article 2, 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:

To our knowledge there has not yet been any ruling involving a company charged with acts of corruption or any other acts under Article 102 of the Criminal Code (formerly Article 100quater).

Text of issue for follow-up:

5. The Working Group will follow up on the issues listed below, in light of evolving practice, in order to check:

- b) Whether, recognising the positive efforts undertaken, Switzerland continues to make available to the prosecutorial authorities of the Confederation the necessary resources to ensure the effective enforcement of the offence of bribery of foreign public officials [Convention Article 5, Revised Recommendation, Art. I; Annex to the Revised Recommendation, paragraph 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:

In 1999, the Swiss parliament had adopted measures to improve the efficiency and legality of criminal prosecution (the “efficiency plan”). To that end, new powers and increased resources were given to the Confederation. These new structures should lead, *inter alia*, to greater effectiveness in combating international crime, including corruption, and should take the burden off small and medium-sized cantons that were ill-equipped to tackle complex cases involving economic or organised crime.

The timetable drawn up in 2000 had called for eight to ten years to develop these new institutions. In 2003, however, in conjunction with a budget-cutting programme, the Swiss parliament decided to suspend funding for the plan until the end of 2006. Instructions for

additional savings were added in 2005.

As a result of these measures, out of the 804 new posts initially provided for in the plan, only 577 had been created by year-end 2005, 85 of which in the Office of the Attorney General (MPC), 360 in the Federal Criminal Police (the main unit of the Federal Office of Police – fedpol), 92 in other fedpol divisions, 26 in the Office of Federal Examining Magistrates and 16 in the central IT departments.

In February 2006, the Federal Department of Justice and Police commissioned a group of external and in-house experts to analyse the criminal prosecution situation at the federal level. In its report (“the Uster Report”), the group noted that criminal prosecution worked properly at the federal level, but it signalled the need to make certain improvements and presented a number of options for pursuit of the “efficiency plan”. In addition, in June 2006, in the wake of a press campaign that was critical of the criminal prosecutions undertaken by the Confederation, an administrative inquiry concerning the MPC and the Federal Criminal Police was mandated. This inquiry concluded (in the “Lüthi Report”) that no administrative measure was required, but that – in line with the findings of the Uster Report – certain adjustments needed to be made, especially as regards collaboration between the parties involved in criminal prosecution at the federal level, and with the cantons. Both reports were submitted in September 2006 and subsequently published.²⁸

On the basis of these reports, the Swiss government in December 2006 approved the orientation proposed in “Model 2” of the “Uster Report”. This model recommends a targeted transformation of the “efficiency plan”, incorporating the experience to date. It calls on the Confederation, with existing resources (2005 level), to continue to focus its efforts on complex, far-reaching cases under federal jurisdiction proper, including cases of bribery of foreign public officials. “Elective” federal jurisdiction in criminal cases, *i.e.* involving international economic crime within the meaning of Article 337.2 of the Swiss Criminal Code (formerly Article 340.2) should also be used more extensively. A detailed report exploring this option in greater depth is being prepared by a task force headed by the former State Councillor of the canton of Zug, Hanspeter Uster. A formal proposal regarding future work will be presented to the federal government during the summer of 2007.

One of the main demands formulated in both reports is to abolish the Office of Federal Examining Magistrates. As the reports confirm, the division of investigations at the federal level between the MPC and the Office of Federal Examining Magistrates leads to duplication of effort and constitutes the greatest impediment to effective criminal prosecution. The necessary legal foundations are the new Swiss Code of Criminal Procedure, which will unify criminal procedure and is due to enter into force in 2010, and the new law on the organisation of authorities, which is set to take effect on 1 January 2009. In order to solve the problem as soon as possible, early entry into force of the new Swiss Code of Criminal Procedure as it relates to the Confederation alone (but not the cantons) at the beginning of 2009 is currently under study.

Regarding bribery cases undertaken by the competent federal judicial authorities since the Phase 2 review, the following may be noted:

In 2005 and 2006, 23 cases were initiated for *bribery of foreign public officials*

²⁸ <http://www.ejpd.admin.ch/ejpd/fr/home/dokumentation/mi/2006/2006-12-151.html> [in French, with links to German and Italian versions].

(Article 322septies, Criminal Code), 17 of which in connection with the United Nations' "Oil for Food" programme. Nineteen cases are still in the investigative stage and four were closed, including three involving "Oil for Food". Over this period, no charges were pressed and no rulings were handed down.

Over the course of those two years, federal prosecutors also launched 18 cases for *active or passive corruption of Swiss public officials* (Article 322ter-sexies, Criminal Code), all of which are still in the investigative stage. In addition, three cases led to charges, two ended in rulings, and four were closed.

Text of issue for follow-up:

5. The Working Group will follow up on the issues listed below, in light of evolving practice, in order to check:

- c) Whether enforcement of Article 322^{septies} of the Criminal Code by the judicial authorities leads to: (i) a broad interpretation of the definition of the exercise of the official functions of a head of state; (ii) its application in cases involving solicitation by the foreign public official; and (iii) an application of the notion of foreign public official that includes heads of state and a country's highest authorities [Convention, Article 1].

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

Since the Phase 2 review, there has not, to our knowledge, been any ruling involving a country's head of state or other high-ranking official.

Nevertheless, the federal authorities are convinced that the notion of "member of a judicial or other authority" used in Article 322septies of the Criminal Code also refers to all members of the executive branch of government, such as heads of state and a country's highest authorities. Similarly, solicitation by the person bribed in no way diminishes the punishability of the briber.

Broad interpretation of the definition of official functions has, moreover, been confirmed in case law. For example, Federal Criminal Court ruling SK. 2005.10 of 20 February 2006²⁹ stipulates in whereas clause 2.5 that:

"The required link between improper advantage and the beneficiary's violation of his duties does not necessarily imply that the violation was committed in the performance of official functions. Under both the old and the new law, it is enough that the violation was made possible because of the official position of the person taking the bribe (*Feuille fédérale* 1999, p. 5078 and cited references). It is therefore immaterial whether the official has acted independently, within the

²⁹ http://www.bstger.ch/pdf/SK_2005_10.pdf [in French].

limits of his powers, or whether he exploited his hierarchical position to exert a decisive influence to the benefit of those who provided him with an improper advantage.”

Text of issue for follow-up:

5. The Working Group will follow up on the issues listed below, in light of evolving practice, in order to check:

- d) The application of the notion of socially accepted practices, including the question of whether it is excluded from the scope of application of Article 322^{septies} of the Criminal Code in accordance with the opinion expressed by Switzerland [Convention, Article 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:

The federal authorities have no knowledge, since the Phase 2 review, of any case involving bribery of national or foreign public officials that has been suspended or that has resulted in acquittal through invocation of the notion of socially accepted practices (see, for example, the Federal Criminal Court judgement of 20 February 2006, conclusion of whereas clause 2.2, cited under 5c). Nor do the federal authorities have any knowledge of cases in which the social practices of the country of the foreign public official were invoked.

Text of issue for follow-up:

5. The Working Group will follow up on the issues listed below, in light of evolving practice, in order to check:

- e) Whether, excluding the case of small facilitation payments, an official’s acceptance of an improper advantage constitutes the basis for the offence of bribery [Convention, Article 1 (1)].

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

Since the Phase 2 review, the Federal Supreme Court addressed the issue of improper advantage in a case of mutual judicial assistance³⁰. The case involved the mayor of a foreign city alleged to have abused his official position to favour private companies in a variety of ways. In

³⁰ Judgement 1A.145/2005 of the Federal Supreme Court of 20 October 2005 (in German only); <http://www.bger.ch/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.htm>, then search for the judgement by number.

return, he had derived pecuniary benefits in the form of shares and dividends, which he had then deposited in Switzerland. As established by the Court during its review of the condition of reciprocal punishability, improper advantage within the meaning of Article 322quater of the Swiss Criminal Code may well take the form of such pecuniary benefits.

Text of issue for follow-up:

5. The Working Group will follow up on the issues listed below, in light of evolving practice, in order to check:

- f) Whether the current basis for territorial jurisdiction, in light of the rule that the commission in Switzerland by a foreigner of an act of instigation, authorisation or complicity in the bribery of foreign public officials committed by a foreigner is deemed to take place abroad, is sufficiently effective to combat the bribery of foreign public officials [Convention, Articles 4(1), 4(4)].

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:

To our knowledge, since the Phase 2 review there has been no ruling in this area.