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# **Guidelines to the Federal Act on Private Security Services provided Abroad (PSSA)**

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# I. INTRODUCTION

The Federal Act on Private Security Services provided Abroad of 27 September 2013 (PSSA) entered into force on 1 September 2015. The Ordinance on Private Security Services provided Abroad of 24 June 2015 (OPSA) entered into force together with the act. The OPSA was revised in the autumn of 2020 and entered into force on 1 January 2021. The revised ordinance defines the terms used in the OPSA more clearly and, where possible and appropriate, aligned them with the terminology of the Federal Act on War Material of 13 December 1996 (War Material Act, WMA) and the Federal Act on the Control of Dual-Use Goods and of Specific Military Goods of 13 December 1996 (Goods Control Act, GCA). The objective of this revision was to make the PSSA easier to understand for the companies concerned, while delineating its scope more clearly. This revision thus resulted in services being exempted from the previous declaration requirement if they are provided in close connection with an export under the WMA or GCA (*→ III.2.a Exemptions from the requirement to declare an activity connected with war material pursuant to the WMA or the goods pursuant to the GCA*).

These guidelines aim to provide guidance for private companies and private persons to which the act and ordinance apply.

The scope of the PSSA is set out and the key terms explained in section II of these guidelines.

Section III explains the declaration requirement introduced by the act and the related declaration procedure for reporting to the competent authority.

Section IV discusses the other legal obligations imposed on the companies concerned, in particular mandatory accession to the International Code of Conduct, the 'Know Your Customer' principle, cooperation and retention obligations, and obligations regarding subcontracting.

Section V deals in particular with those activities which are categorically prohibited by law. This concerns services provided in conjunction with direct participation in hostilities or the commission of serious violations of human rights.

Finally, section VI provides an overview of the measures that the competent authority can undertake to ensure implementation of the act and the penalties that may be anticipated in the event of offences against it.

**Important: These guidelines only provide general guidance for the companies and private persons concerned and cannot replace thorough consultation of the texts of the applicable act and ordinance in individual cases.**

## II. SCOPE AND DEFINITIONS

### 1. Who is subject to this act?

The PSSA applies to all companies (legal entities and business associations) and natural persons as well as their employees, those mandated by them, the recipients of instructions or other personnel who:

- a) 'provide, from Switzerland, private security services abroad' (Art. 2 para. 1 let. a PSSA);

*(→ III.1.a) The provision of private security services (Art. 2 para. 1 let. a PSSA)*

- b) 'provide services in Switzerland in connection with private security services provided abroad' (Art. 2 para. 1 let. b PSSA);

*(→ III.1.b) The provision of 'connected' services (Art. 2 para. 1 let. b BPS))*

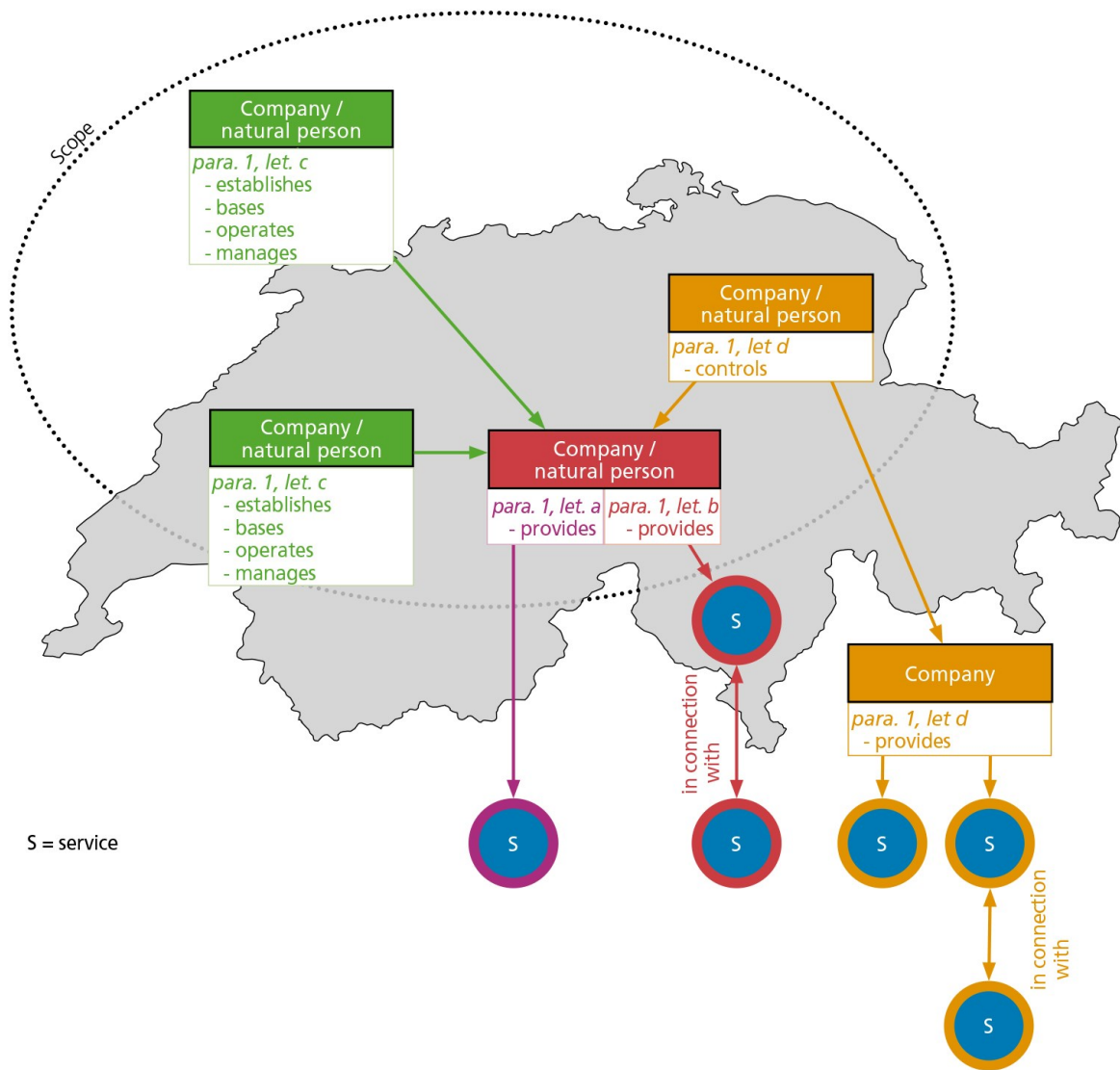
- c) 'establish, base, operate or manage a company in Switzerland that provides private security services abroad or provides services in connection therewith in Switzerland or abroad' (Art. 2 para. 1 let. c PSSA);

*(→ 0 Establishing, basing, operating or managing a company Pursuant to Art. 2 para. 1 let. b PSSA, the identity of the company has to be declared as such as well as every service provided in Switzerland that is in connection with a security service provided abroad. (→ II.7 **Error! Reference source not found.** When is a service in Switzerland deemed to be 'in connection' with a private security service provided abroad?)*

*Establishing, basing, operating or managing a company (Art. 2 para. 1 let. c PSSA)*

- d) 'exercise control from Switzerland over a company that provides private security services abroad or provides services in connection therewith in Switzerland or abroad' (Art. 2 para. 1 let. d PSSA).

*(→ III.1.d) Controlling a company (Art. 2 para. 1 let. d PSSA)*



## 2. What are 'private security services'?

Art. 4 let. a of the act contains a list of private security services subject to the declaration requirement. However, this list is not exhaustive. Services which involve elements of several of the activities listed in Art. 4 let. a PSSA (*→ II.3.a) Mixed services*) must also be declared, as must partial services which form an integral part of a service set out under Art. 4 let. a PSSA. (*→ II.3.b) Integrated services*).

As a declaration does not result in any disadvantages for the company, it is recommended that a declaration is carried out in the event of doubt. This establishes the necessary legal certainty for the company.

The following activities, in particular, must be declared:

a) The protection of persons in complex environments

The **'protection of persons'** means **ensuring the personal security of** one or more persons (protected persons) against attacks by third parties. This includes, for example, the protection of government officials or security escorts for humanitarian aid workers.

Consulting services associated with the protection of persons may also be subject to the declaration requirement if they are an integral part of the operational security concept (→ II.3.b) *Integrated services*).

This activity is only subject to the declaration requirement in a complex environment (→ II.4 *What is a 'complex environment'?*). However, it should be noted that this only applies to assignments involving the protection of persons. If further services are provided which could also be included under another activity (for example, the searching of persons), the entire activity is deemed a mixed activity subject to the declaration requirement (→ II.3.a) *Mixed services*).

b) The guarding or surveillance of goods and properties in complex environments

The **'guarding or surveillance of goods or properties'** means **ensuring their security** by means of security measures. This type of service also includes the **transportation of valuables**.

Consulting services associated with the protection of property may also be subject to the declaration requirement if they are an integral part of the operational security concept (→ II.3.b) *Integrated services*).

For the purposes of this act, these security services are relevant only if they are provided in a complex environment (→ II.4 *What is a 'complex environment'?*).

However, it should be noted that this only applies to outright guarding or surveillance tasks. If further services are provided which could also be included under another activity (for example, entry checks or the searching of persons), the entire activity is deemed a mixed activity subject to the declaration requirement (→ II.3.a) *Mixed services*).

c) Security services at events

The task of **security services**, as referred to in the PSSA, is the individual or collective **management** of persons at events or gatherings to ensure that the latter are held in an orderly manner, that the law and the organisers' rules are respected, and that there is no trouble or incident. Events may be of a sporting, artistic or cultural, political or other nature. For example, activities include managing crowd flow and movement, distributing attendees to the various available spaces, checking that attendees hold an invitation or ticket, and ensuring compliance with rules of behaviour.

Security services as referred to in Art. 4, let. a, no. 3 PSSA are not subject to the declaration requirement if they are provided on the territory of a **European Union** or **European Free Trade Association** member state, apart from in the two specific cases that are described below.

Where the deployment of security services as referred to in Art. 4, let. a, no. 3 PSSA also provides for the **use of restraint**, such as checking, detaining or searching persons, searching premises or



containers, and seizing objects, as set out in Art. 4 let. a no. 4 PSSA, these activities must be stated explicitly. In such cases, the overall service pursuant to Art. 4, let. a, no. 3 PPSA must be declared irrespective of where it was provided (→ II.3.a) Mixed services).

Services connected with security services that are provided for armed or security forces (such as an assignment to support the police at demonstrations) are deemed to be **operational support** as referred to in Art. 4 let a, no. 6 PSSA, and must be declared as such, irrespective of where they are provided (→ II.2.f) Operational or logistical support for armed or security forces).

d) The checking, detention or searching of persons, searching of premises or containers, and seizure of objects

The '**checking of persons**' usually involves measures to determine a person's identity.

The '**searching of persons**' entails the examination of clothing as well as the body surface and bodily orifices, for example, for dangerous objects. The '**searching of premises or containers**' includes the searching of a vehicle's boot or luggage.

The '**detention of persons**' is any action through which the person concerned is deprived of their freedom, at least temporarily.

The '**seizure of objects**' is the temporary or permanent confiscation of objects without the consent of the person concerned.

All such activities are essentially coercive measures, which generally may not be taken by private individuals unless they have the **consent of the person concerned**, or **official powers have been conferred upon them** under the law. Where this is not the case, whether or not they are consistent with the objects of the act must be examined particularly thoroughly. The activities described here are categorically subject to the declaration requirement, even if they are provided outside of a complex environment.

e) Guarding, caring for, and transporting prisoners; operating prison facilities; and assisting in operating camps for prisoners of war or civilian detainees

The guarding, caring for, and transporting of prisoners and operating prison facilities are security services pursuant to this act, irrespective of the form or period of deprivation of freedom and of the location abroad where the service is provided. In addition to the actual **operation of prison facilities** of all kinds, this also includes all services involving the direct **care, control** or **questioning of prisoners**, but not generally purely support services not directly related to the deprivation of freedom. Such **support services** are subject to the declaration requirement only if they are provided **in relation to the deprivation of freedom of prisoners of war, civilian internees** or **other persons** within the scope of an armed conflict pursuant to the Geneva Conventions and their Additional Protocols. (For the definition of armed conflict, see the common articles 2 and 3 of the Geneva Conventions (GC) I–IV.) With regard to the protection of detained persons in relation to armed conflict, see in particular Art. 3 GC I–IV, Arts. 45 and 75 Additional Protocol I to the Geneva Conventions [AP I], Arts. 4 and 5 Additional Protocol II to the Geneva Conventions [AP II]. For the

special provisions of prisoners of war, see GC III, and for the special provisions on civilian internees see Arts. 41, 78 and 79 et seq. GC IV.

Beyond the applicable national law, the **relevant human rights provisions under international law must always be taken into account** with regard to services in connection with persons deprived of their freedom. The particular provisions of international humanitarian law on the protection of prisoners, civilian internees and other persons deprived of their freedom in relation to armed conflict must be adhered to not just by the parties to the conflict themselves but also by any private security service providers commissioned by them. Violation of these provisions can result in criminal liability pursuant to the Swiss Criminal Code (SCC), independently of the PSSA. It should be noted in particular that prisoner-of-war camps and camps for civilian internees must be under the direct authority of an officer or an official of the detaining State. The delegation of this task to private entities is not permitted (Art. 39 GA III and Art. 99 GA IV).

These activities described are categorically subject to the declaration requirement, even if they are provided outside of a complex environment.

#### f) Operational or logistical support for armed or security forces

Definition of operational support for armed or security forces (Art. 1a, para. 1 OPSA)

**Operational support** as referred to in Art. 4 let. a, no. 6 PSSA is defined as activities performed by private companies for armed or security forces in connection with their essential functions in the context of ongoing or planned operations.

An activity is deemed performed **for armed or security forces** if the latter are the recipients of the service in question. The contract does not necessarily have to have been awarded directly by the armed or security forces themselves. It may also have been awarded to the Swiss company through a local private or public-sector entity. The important thing here is that armed or security forces are the *de facto* recipients of the service concerned (→II.5 When is a service provided for 'armed and security forces'?).

The **essential function of the armed forces** is to defend a country and to protect its national interests by military means. Subsidiary operations, such as those undertaken by Swiss Armed Forces at major events, for example, are not considered part of this essential function. The **essential function of security forces** is to uphold security, peace and public order, and to ensure respect for the law. The details of these functions may vary depending on the specific mission of the security force, or the subject of protection. Border guards and marine security forces are two examples here. For an activity to be considered operational support for armed or security forces, it must also be performed **in the context of ongoing or planned operations**. If a company provides training that includes a manoeuvre planned as part of a specific mission, that training is also considered operational support.

'**Armed or security forces**', as described in the act, is interpreted **in the broader sense**. The term refers to a state's armed or security forces, or to non-state groups which consider themselves to be a government or a state authority, as well as to those taking part in an armed conflict within the meaning of the Geneva Conventions and Additional Protocols I and II.

#### **Examples**

- ***A private Swiss company provides personnel to foreign armed forces for mine clearance as part of a military operation, e.g. clearing a frontier zone in preparation for a military intervention. Mine clearance operations for civilian purposes, such as clearing arable land, would not be covered by this article, because they are not linked to a planned operation by armed forces, and do not form part of their essential functions.***
- ***A Swiss company helps a city police force abroad to contain demonstrations and therefore ensure public order.***

#### Definition of 'logistical support for armed or security forces' (Art. 1a, para. 2 OPSA)

For an activity to be classified as **logistical support** as referred to in Art. 4, let. a, no. 6 PSSA, it must be **closely connected with the essential functions** of armed or security forces. Unlike the definition of operational support, which is deliberately broad, the existence of a **close** connection is intended to avoid all services that relate to essential functions being subject to the declaration requirement.

A close connection with the essential functions of armed or security forces exists, for example, where a force receives support with tank maintenance. However, if such maintenance covers vehicles that are not specifically for military use (e.g. a civilian off-road vehicle), the services are not in close connection with the essential functions of armed forces.

Unlike operational support, logistical support does not involve activities that are directly connected with ongoing or planned operations on the part of armed or security forces.

The following activities are deemed specifically to be logistical support.

- *Art. 1a, para. 2, let. a OPSA: the **servicing, repair and upgrading** of war material as defined in the WMA, or of goods as defined in the GCA*

The activities described in this definition are very similar in terms of content, but their actual substance differs. For example, servicing a good involves its maintenance, reconditioning, inspection and overhaul. Managing spare parts for the good in question is also a part of this. Meanwhile, repair involves repairing new and existing damage. An upgrade describes a change to the function or capacity of a good in order to improve performance. All of these activities must be closely connected with the **essential functions of armed or security forces** to be considered logistical support as referred to in Art. 4 let. a no. 6 PSSA.

For a service to fall under the PSSA, it must be provided for **goods covered by the GCA or the WMA**. As the way in which a good is classified is an effective indicator of those services, that are closely connected with the essential functions of armed or security forces.

The usual warranty-related obligations (see Art. 197 et seq. CO) are not deemed to be services within the meaning of let. a. Goods installation services are not subject to the declaration requirement laid down in the PSSA.

#### **Example**

- ***The civilian version of a particular type of helicopter can be considered a purely civilian good. As such, it falls outside of the scope of export control legislation. However, as soon as the helicopter meets certain military specifications, it is covered by the GCA or, if it carries weaponry, by the WMA. In the latter two cases, repairs to the helicopter would be closely connected with the essential functions of armed or security forces abroad, and would therefore be subject to the declaration requirement.***

- *Art. 1a, para. 2, let. b OPSA: the **conversion** of goods into war material as defined in the WMA or into goods as defined in the GCA*

Conversion in the sense of let. b refers to the modification of the function or capacity of goods that are not originally subject to control to turn them into war material as defined in the WMA or into goods as defined in the GCA. It also covers the modification of goods as defined in the GCA to turn them into war material as defined in the WMA.

#### **Example**

- ***A Swiss enterprise exports a civilian aircraft that is not subject to the GCA. It is then converted abroad so that it can be used for army reconnaissance flights. Equipped in this way, the aircraft would be subject to the GCA. This type of conversion would be considered logistical support, as it is provided to armed or security forces in close connection with their essential functions.***

- *Art. 1a, para. 2, let. c OPSA: the implementation, operation or maintenance of **infrastructures***

The implementation, operation or maintenance of infrastructures fall within the scope of the PSSA (logistical support) providing they are **closely connected with the essential functions** of armed or security forces.

It should be noted here that the term 'infrastructure' refers to both physical infrastructure and cyber-infrastructures.

#### **Examples**

- *A company develops mobile military bases for foreign armed forces, and also sets them up abroad. A mobile military base that is configured specifically to the requirements of armed forces is essential to the latter's operations. However, services provided by a bricklayer building the walls of barracks abroad are not closely connected with the essential functions of armed forces, and therefore do not constitute logistical support in the sense of the PSSA.*
- *In view of its close connection with their essential functions, the construction of a military communications system for armed forces is also covered by the definition given above, while the construction of mobile communication antennas for civilian communications providers is not connected in any way with armed or security forces.*

- *Art. 1a, para. 2, let. d OPSA: **supply management***

Supply management covers all of the services required to ensure supplies that are **closely connected with the essential functions** of armed or security forces. Specifically, this comprises order and purchasing management, as well as delivery, storage, distribution or substitution of goods intended for an armed or security force, such as weapons, ammunition, means of communication, vehicles, etc.

#### **Example**

- *In the interests of guaranteed operational availability, on behalf of an armed force a company takes over a combat simulation system, its management, spare parts storage, the organisation and distribution of materials required for simulations (such as combat simulation vests), and the inspection of the materials concerned. This activity is closely connected with the essential functions of the armed force.*

- Art. 1a, 2, let. e OPSA: the **transport, storage and transshipment** of war material as defined in the WMA or of specific military goods as defined in the GCA

The transport, storage and transshipment of goods is a classic logistical service, providing these activities are **closely connected with the essential functions** of an armed or security force. These services fall outside of the scope of the PSSA unless the goods in question are classified as **war material** as defined in the WMA, or **specific military goods** as defined in the GCA. This is because the way in which a good is classified is an effective indicator of those services that are closely connected with the essential functions of armed or security forces as they concern transport, storage and transshipment.

#### Examples

- **A company moving weapons from one depot to another on behalf of a foreign armed or security force is deemed to be a logistical support service, because the activity is closely connected with the essential functions of that armed or security force. However, the transport of weapons towards the front would fall under Art. 8 PSSA, and thus be prohibited because it could constitute a direct participation in hostilities.**
- **A company moving an IMSI catcher for a military force does not fall under the PSSA because it constitutes a dual-use good, and therefore neither war material nor a specific military good. However, if the good were to be moved as part of an operation, the service would be deemed to constitute operational support.**

- Art. 1, para. 2, let. f OPSA: the **transport** of armed forces or security forces personnel

The transport of persons also involves a service that is **closely connected with the essential functions** of armed or security forces.

### Examples

- *In view of its close connection with the essential functions of armed forces, an airline transporting armed forces personnel on a charter flight as part of a military relief exercise falls under the PSSA. However, if foreign armed forces reserve a charter flight via a Swiss travel agency in order to attend an officers' ball, it does not constitute a service as defined in the PSSA, because the flight is not closely connected with essential armed forces functions.*
- *Transport on scheduled train, bus or airline services is not considered closely connected with the essential functions of armed or security forces either, and is therefore not subject to the declaration requirement.*

### g) Operating and maintaining weapons systems

#### Definition of operating weapons systems

The term '**weapons system**' is considered a subset of **war material** as defined in the WMA. This reflects current practice, because a category of goods may not be created if it is inconsistent with export control legislation. The **operation** of a weapons system consists of providing **personnel for its use**. Taking a broad interpretation of 'armed or security forces' (see remarks relating to Art. 1a), it makes sense to place operating and maintaining weapons systems (Art. 4, let. a no. 7, PSSA) **for armed and security forces** in the context of services relating to Art. 4, let. a, nos. 6 and 8, even though this is not explicitly provided for in law.

### Example

- *A Swiss company provides personnel to a foreign armed force as part of the deployment of an air defence system for a joint artillery and air force exercise.*  
*This service is limited to operating a system as part of an exercise only, because operating a weapons system as part of active armed or security forces operations would constitute operational support as referred to in Art. 1a, or might be prohibited under Art. 8 PSSA as participation in hostilities.*  
*However, this provision does not apply to the demonstration of a weapons system at an arms fair, or as part of a business transaction (such as business advice), because in this context it is not deemed to be a service for armed or security forces.*

### Definition of maintaining weapons systems

Reflecting the remarks of the previous sub-section, the term 'weapons system' corresponds to the definition of war material contained in the WMA. However, applied in the sense of Art. 4, let. a, no. 7 PSSA it is limited to the maintenance of weapons systems for **armed and security forces**.

Please refer to the remarks on logistical support for an explanation of the activities concerned (**servicing and repairs**).

#### **Example**

- ***A Swiss company repairs armoured and armed vehicles belonging to a foreign armed force. It is worth noting here that the repair of armed vehicles that have been used and damaged in an armed conflict that is still ongoing would constitute operational support in the sense of Art. 1a para. 1, or may be prohibited under Art. 8 as participation in hostilities.***

### h) Advising or training members of armed or security forces

#### Definition of advising members of armed or security forces

As it is the case with logistical support, **advisory** services must be **closely connected with the essential functions** of armed and security forces (→ II.2.f) Operational or logistical support for armed or security forces).

Advising members of armed and security forces as referred to in Art. 4, let. a, no. 8 PSSA covers **technical, tactical** and **strategic** advice. Tactical advice concerns the deployment of military or police resources in operational situations, while strategic advice aims to determine a basic framework for action towards a specific objective and to define the means necessary to achieve it.

#### **Examples**

- **A company advising foreign security forces on locating and pursuing members of a criminal organisation is providing tactical advice.**
- **A company which advises a foreign country's armed forces on the evaluation and selection of a weapons system that suits their needs is providing strategic advice.**

Sales advice provided by a company in respect of its own products does not constitute advice within the meaning of this provision.



Furthermore, the customer service usually associated with a sales agreement (e.g. the answering of general technical questions from customers by telephone or email) is not generally deemed subject to the declaration requirement.

#### Definition of training members of armed or security forces

Reflecting the previous sub-section, **training** services as referred to in Art. 4, let. a, no. 8 PSSA must be **closely connected with the essential functions** of armed and security forces, and also be of **technical, tactical** or **strategic** in nature.

#### **Examples**

- ***If a company that specialises in the production of communication systems trains the members of a foreign armed or security force in the use of its product to scramble radio signals, it is deemed to be technical training that is closely connected with the essential functions of the recipient.***
- ***If a company trains foreign security services in fighting terrorists in an urban setting, it is deemed to be tactical training that is closely connected with the essential functions of the recipient.***

Product demonstrations given as part of business negotiations are not included under training, even if they involve briefing armed or security forces on how the product works. The handling of an assault rifle is one example here.

#### i) Intelligence activities, espionage and counterespionage

'Intelligence' refers to the targeted and systematic **acquisition and transfer of information of a strategic/political, scientific, economic or military nature**. It therefore covers a variety of activities.

Espionage is the systematic secret acquisition of information about particular persons in the interests of foreign authorities. These intelligence activities in the fields of politics, business and the military to the disadvantage of Switzerland, and military intelligence activities to the disadvantage of a foreign state, are prohibited in Switzerland pursuant to Arts. 272, 273, 274 and 301 of the Swiss Criminal Code. While the wording of the legislation in other states differs from these provisions, every state essentially prohibits espionage on its territory.

The collection and analysis of information by private companies is not prohibited by law, however. The companies operating in this sector employ various **methods of obtaining information**. A distinction is made between services based exclusively on publicly accessible information (OSINT), and on that which is not publicly accessible and is obtained through human sources (HUMINT), electronic media or image material (SIGINT, COMINT, IMINT).

Public sources consist of generally known or freely accessible information which may be accessed by anyone without specialist knowledge, e.g. press articles, public directories or subscriptions to specialist publications.

Services which fulfil **all of the following conditions** are deemed to be intelligence services subject to the declaration requirement:

1. The service provider relies on non-public information in its research. Any investigation that is based on human-sourced or protected information (e.g. by password, encryption or classification) is subject to the legal declaration requirement. Information may be protected by banking, doctor-patient, business or official confidentiality/secretcy regulations, etc.
2. The activity is performed abroad. In this context, the intelligence activity is deemed provided abroad if the principal or recipient of the intelligence information has their registered office or residence abroad, or the activity requires the physical presence of the contractor, a sub-contracted service provider or its employees abroad (→ II.6 When is a service 'provided abroad'?).
3. The principal or recipient of the information is a politically exposed person, a foreign state, a legal person in Switzerland or abroad, or one of its agents.
4. The information concerns a politically exposed person, a foreign state, a legal person in Switzerland or abroad, or one of its agents.
5. The information is of a political, economic or financial nature. The acquisition of information about purely personal matters is not subject to the declaration requirement.

Also exempt from the declaration requirement set out in Art. 10 are investigations

- to which the natural or legal persons concerned have expressly given their consent;
- which are conducted on the basis of a legal obligation. This would be the case, for example, if a Swiss bank verified the origin of funds and the previous convictions of a potential foreign customer; or
- conducted on behalf of Swiss natural or legal persons concerning another Swiss natural or legal person, even if these investigations are carried out by the contractor, its employees, or a sub-contracted service provider abroad.

### 3. What are mixed or integrated services?

The private security market is continually evolving. The provision of private security services differs depending upon the nature of the activity, the clientele, legal provisions and the local situation. A service provided may *de facto* contain elements of several activities listed in Art. 4 let. a PSSA, on one hand, while the *modi operandi* of service provision by private companies may differ significantly on the other.

How the activity is designated contractually is irrelevant to the application of the law. What matters is which actual elements are contained in the assignment and the specific form of implementation.

#### a) Mixed services

If a service provided contains elements of several activities set out in Art. 4 let. a PSSA de facto, these elements taken by themselves are decisive in characterising the activity in its entirety and must be detailed individually in the declaration. An assignment concerning the guarding or surveillance of properties (Art. 4 let. a no. 2 PSSA) may also involve the checking and searching (Art. 4 let. a no. 4 PSSA) of incoming and outgoing persons that goes beyond guarding or surveillance. In this case the company is subject to the declaration requirement on the basis of both articles, which means that the entire service must be declared based on the one with the most extensive scope of application. This means that a surveillance assignment which also involves elements of the checking and searching of persons or objects is subject to the declaration requirement, even if it is provided outside of a complex environment.

Other significant examples of mixed activities are found in the field of **maritime security**. This field of activity primarily concerns the protection of persons and the guarding or surveillance of goods. However, these activities may, in view of the special characteristics of the maritime context, also always contain elements of the checking, detention or searching of persons, searching of premises or containers and the seizure of objects or the transporting of prisoners without this being foreseeable prior to the provision of the service. Maritime security services are therefore always subject to the declaration requirement irrespective of where they are performed and whether a complex environment exists at this location.

#### b) Integrated services

The way in which a security service is provided depends up on a large number of factors, such as the security situation locally, local legislation and the requirements and wishes of the principal. It may be expedient for private security services to be jointly provided by various actors. The principal may delegate various sub-elements of the service to different companies or to a combination of state and private actors. Such integrated activities differ from sub-contracting (→ IV.5 Obligations regarding the transfer of contracts to third parties (sub-contracting)) in that while with sub-contracting the assignment is awarded to a security service provider which then assigns it to a sub-contracted company, with integrated activities the principal assigns the various elements of service provision to different actors.

An example of such integrated activities is **consulting services in the field of security**.

Purely theoretical consulting by private companies in the field of security is not generally classified as a security service within the meaning of the PSSA. However, differentiation must be made between the theoretical drawing-up of a security concept and its practical implementation and monitoring. In the case of the latter, the consulting service may constitute an integral part of the operational security concept and therefore be classified as part of the security service to be provided (usually the protection of persons and/or property in accordance with Art. 4 let. a nos. 1 and 2 PSSA).

The declaration requirement in accordance with Art. 10 PSSA applies to this consulting service in such cases.

The following indicators are used by the authority to assess whether the consulting service constitutes an integral part of the operational service concept:

- Ability to issue instructions: the consulting company has the *de facto* possibility to influence the behaviour of the security personnel deployed on the ground, for example by issuing instructions to the security company.
- Participation in the implementation of the security concept: the coordination and control of the local security services are effectively assigned to a consultant who may also act as an intermediary vis-à-vis the local authorities.

If a consultant regularly visits or spends long periods of time on site, it must be assumed to a greater extent that the consulting service constitutes an integral part of the private security service within the meaning of Art. 4 PSSA.

#### 4. What is a 'complex environment'?

A complex environment is characterised by **three cumulative conditions** (Art. 1 OPSA). It is an area

- a. that has been or is affected by unrest or instability owing to a natural disaster or armed conflict;
- b. where significant damage has been done to the constitutional structures; **and**
- c. where the state authorities are no longer able to cope with the situation or only to a limited extent.

The term 'area' may refer to a country as a whole or to a particular region of one or more countries.

The first condition stipulates that the area must be affected by unrest or instability owing to natural catastrophes or armed conflict pursuant to the Geneva Conventions and the Additional Protocols I and II. Whether 'unrest' exists has to be verified on an individual basis. One criterion, in particular, is the extent to which the state is able to handle, for example, repeated instances of violence, uprising or organised crime. The ordinance refers to two possible causes of instability: a natural disaster (for example, an earthquake or an epidemic) or an international or non-international armed conflict pursuant to the Geneva Conventions and the Additional Protocols I and II.

The second condition requires constitutional structures to have suffered significant damage. This is the case if the legal system is no longer complied with, for example, if state authority is not exercised in accordance with the principle of legality the principle of the separation of powers is no longer ensured or the fundamental rights of the individual are not guaranteed. The damage must be significant, i.e. extensive.

The third condition stipulates that the state authorities can no longer cope with the situation or only to a limited extent. This condition is met when the operational state structures no longer function or are unable to manage the situation.

With regard to activities that ensure **security on board aircraft**, a complex environment can be assumed if the guarding of persons outside of the aircraft is intended and a complex environment exists at the location where passengers board or exit. The same applies if the activity concerns the guarding of the aircraft or the area around the aircraft and, if it is on the ground, is located in a complex environment.

## 5. **When is a service provided for 'armed and security forces'?**

Services such as logistical support, advice and training are subject to the declaration requirement only if they are provided for armed or security forces. As mentioned above in section II.2.f, 'armed or security forces' as described in the act is interpreted in the broader sense. The term refers to a state's armed or security forces, or to non-state groups which consider themselves to be a government or a state authority, as well as to those taking part in an armed conflict within the meaning of the Geneva Conventions and Additional Protocols I and II.

Thus, the provision of these **services to private** recipients is **essentially exempt** from the declaration requirement, even if these private-sector recipients might themselves provide services to state entities.

This principle **does not apply** to the following situations:

- A private recipient company has been brought in for purely legal reasons, e.g. owing to requirements set by the public-sector principal for the nationality of the service-provider.
- The services to the private recipient company are provided on or in sites or premises, or in respect of equipment, belonging to state armed or security forces.
- The recipient company is structured under private law but controlled by a state.

In such cases, the activity is subject to the declaration requirement if the service is provided for the **armed and security forces in connection with their function**.

## 6. **When is a service 'provided abroad'?**

A service is provided abroad if the activity itself takes place or takes effect abroad. For example, if foreign armed or security services personnel are trained by an instructor who is physically in Switzerland, the service is deemed to be provided abroad because the effect – or added value – of that training is generated abroad. The same applies to intelligence activities that take place in Switzerland but are sent to a principal or recipient headquartered or resident abroad. This

interpretation is essentially congruent with Art. 8 Swiss Criminal Code, which states that an act is considered to be committed at the place where it was committed or at the place where it has taken effect.

Private security services carried out on behalf of foreign embassies, consular posts and permanent missions in Switzerland are not deemed to be performed abroad. The embassy grounds are deemed the territory of the host state (in this case Switzerland) according to general legal interpretation despite the fact that diplomatic representations enjoy immunity for their personnel and premises (Decisions of the Swiss Federal Supreme Court 109 IV 156).

While Swiss federal law is applicable on board of Swiss seagoing vessels, the territorial waters of other states and the high seas are deemed abroad. A vessel flying the Swiss flag is therefore not a 'piece of Switzerland'. A security service provided aboard a vessel flying the Swiss flag is consequently deemed to be 'provided abroad'. The same also applies to aircraft which are registered in Switzerland but are located outside of Swiss territory (incl. air space).

## 7. **When is a service in Switzerland deemed to be 'in connection' with a private security service provided abroad?**

The term 'service in connection with a private security service' covers recruiting or training security personnel for private security services abroad (Art. 4 let. b no. 1 PSSA) and providing personnel, directly or as an intermediary, for a company that offers private security services abroad (Art. 4 let. b no. 2 PSSA). This definition is conclusive. The security personnel must be recruited and trained specifically for private security services abroad. This provision does not cover the recruitment of personnel solely for the performance of administrative tasks in Switzerland for a security company subject to the act. (→ II.2 **Error! Reference source not found.** What are 'private security services'?)

Where a company that is based in Switzerland plans and organises training for personnel that is provided as a **service in connection with a private security service** as referred to in Art. 4, let. b, no. 1 PSSA, that training is considered to have been **provided in Switzerland** in accordance with Art. 2, para. 1 let. b PSSA, even if it has physically taken place abroad. This is because it was planned and organised in Switzerland. This training is therefore subject to the declaration requirement.

### a) What do 'recruiting' and 'training' mean?

The term 'recruiting' refers to the hiring of personnel for a security service provider. The term 'training' covers, for example, training camps for combat missions, weapons training but also instruction on mission strategies and tactics or training in the fields of logistics, transmission, intelligence gathering or counterespionage. The personnel do not have to be recruited or trained in relation to a specific mission. It must nevertheless be evident that the recruiting or training takes place in relation to the provision of security services abroad. This would be the case, for example, if

the training takes place abroad, or if the personnel live abroad and come to Switzerland to attend the training course.

The **training** of personnel to protect persons and to guard goods and property must always be declared, irrespective of the foreign location where the security service is to be provided.

**Recruitment** is deemed to take place in Switzerland if a substantial part of that activity is performed in Switzerland, for example when the company holds recruitment interviews in Switzerland or concludes employment contracts here. In this case, the company must act with the specific objective of recruiting or training security personnel for activities that are to be performed abroad.

b) What do 'providing personnel as an intermediary' and 'providing personnel directly' mean?

'**Providing personnel as an intermediary**' refers to activities whereby a company provides services out of Switzerland in connection with the search for personnel for a security service provider in Switzerland or abroad, with the objective of facilitating a formal or informal employment relationship. '**Providing personnel directly**' is where a company 'loans' its own personnel to another company that provides private security services abroad, whether temporarily or long term.

The personnel themselves do not have to reside in Switzerland. Recruitment can also take place abroad.

## 8. What does 'establishing, basing, operating or managing' a company mean?

In contrast to control over a company, 'establishing, basing, operating or managing' within the meaning of the PSSA refer not only to control the company, but also to specific activities that are necessary for the company to begin operating. Establishing or basing a company describes the activity of a natural or legal person that, as the founder, sets up a private security company in Switzerland pursuant to the Swiss Code of Obligations, has such a company entered in the commercial register, or bases it in Switzerland in another way. The company *per se* can be declared from the point at which it is established or based in Switzerland. The company must submit a declaration as soon as it plans to provide specific security services for the first time (→ II.1.c *Establishing, basing, operating or managing a company*). A connection with Switzerland is deemed to exist if these activities are conducted in Switzerland. This would be the case, for example, if a company were to establish a base in Switzerland and, from that base here, manage a company founded abroad for the purpose of providing private security services there.

However, this act does **not cover** persons and companies that simply provide services in connection with a company's foundation or head office, and **support their establishment or basing** in Switzerland. This applies, for example, to law firms that draw up contracts and articles of

incorporation, act as property agents, or apply for authorisations. While participation in the declaration procedure may be delegated to a legal representative, responsibility for complying with the declaration requirement remains with the natural or legal person that establishes, bases, operates or manages such a company.

## 9. What does 'control' of a company mean?

The term covers all kinds of holding structures through which a company exercises control over a private security company operating abroad. The term is to be understood in a broad sense. It may also concern a subsidiary which is controlled by a company that is in turn controlled by its parent company. The control may also be exercised by a natural person (for example, a majority shareholder).

The provisions on **control over a company** (Art. 5 para. 1 PSSA) are based on the concept of the holding company (see Art. 963 Code of Obligations [CO]). Such control exists when a company

- a. directly or indirectly holds a majority of the votes in the highest decision-making body thereof;
- b. directly or indirectly holds the right to appoint or remove a majority of the members of the highest executive or management body thereof; or
- c. pursuant to the articles of incorporation, foundation charter, a contractual agreement, or similar instrument, is able to exert a controlling influence thereon.

The provisions on the **control of business associations** (Art. 5 para. 2 PSSA) are based on Art. 6 para. 3 let. a–c Federal Act on the Acquisition of Immovable Property in Switzerland by Foreign Non-Residents (ANRA). Control exists if

- a. another company is a member with unlimited liability of that business association;
- b. the controlling company, as a general partner in the business association, contributes funds in an amount exceeding one third of the equity of the business association; or
- c. the controlling company furnishes the business association or the general partners thereof with reimbursable funds in an amount exceeding one half of the difference between the association's assets and its liabilities towards third parties.



### III. DECLARATION REQUIREMENT AND PROCEDURE

#### 1. What does the declaration requirement refer to?

a) The provision of private security services (Art. 2 para. 1 let. a PSSA)

Companies that provide private security services abroad from Switzerland are subject to the declaration requirement. The company must be declared as such as well as every individual private security service (→ **II.2 Error! Reference source not found.** What are 'private security services?'), that is to be provided abroad (Art. 4 OPSA). If a person or group of persons domiciled in Switzerland exerts an influence over or assumes **significant responsibility** in the management of a **foreign security company** (at the strategic, operational or organisational level), their **function** and their **activities** within this company are subject to the declaration requirement set out in Art. 10 PSSA.

b) The provision of 'connected' services (Art. 2 para. 1 let. b BPS)

Pursuant to Art. 2 para. 1 let. b PSSA, the identity of the company has to be declared as such as well as every service provided in Switzerland that is in connection with a security service provided abroad. (→ **II.7 Error! Reference source not found.** When is a service in Switzerland deemed to be 'in connection' with a private security service provided abroad?)

c) Establishing, basing, operating or managing a company (Art. 2 para. 1 let. c PSSA)

In the case of Art. 2 para. 1 let. c PSSA, the identity of the natural person or legal entity that establishes, bases, operates or manages a company pursuant to Art. 2, para. 1, let. a and b, (→ **II.8 Error! Reference source not found.** What does 'establishing, basing, operating or managing' a company mean?) and that of the operationally active company that is being established, based, operated or managed have to be declared. In most cases, the establishing, basing, operating or managing legal entity or natural person will subsequently take over the operational activity (Art. 2 para. 1 let. a or b PSSA) or control the operationally active company (Art. 2 para. 1 let. d PSSA). If this is not the case, the establishing, basing, operating or managing natural person or legal entity does not have to declare those activities which have already been declared by the operating company a second time. The declaration concerning the establishing, basing, operating or managing of a company pursuant to Art. 2 para. 1 let. a and b may be submitted when a service as described in Art. 4 let. a. and b is provided for the first time.

d) Controlling a company (Art. 2 para. 1 let. d PSSA)

Pursuant to Art. 2 para. 1 let. d PSSA, the controlling legal entity or natural person (→ **II.9 Error! Reference source not found.** What does 'control' of a company mean?) must declare their own controlling activity and the activities of the controlled company. Activities that have already been declared by the controlled company in Switzerland do not have to be declared a second time by

the controlling legal entity or natural person. However, if the controlled company is based abroad, the controlling company must declare all activities of the controlled company.

## 2. Exemptions from the declaration requirement

- a) Exemptions from the requirement to declare an activity connected with war material pursuant to the WMA or with goods pursuant to the GCA (Art. 8a OPSA)

According to Art. 8a OPSA, certain services are **not subject to the declaration requirement** if they are **closely connected with an export** pursuant to the WMA or GCA.

### Exemptions for logistical support for armed or security forces (Art. 8a, para. 1 OPSA)

Goods exports often go hand in hand with certain services for armed or security forces, such as the **servicing, maintenance** or **repair** of the exported goods.

If the company has previously exported the good in question in compliance with the provisions of the GCA or WMA, and now wishes to provide one of the aforementioned services **in close connection** with this good, the provision of that service is **not subject to the declaration requirement** provided, in accordance with the GCA or WMA, an export authorization for the good in question would still be granted when the activity is performed. The wording 'in accordance with the GCA or the WMA' covers both authorised exports and exports covered by the WMA or GCA and which, exceptionally, are exempt from authorisation.

With regard to knowledge of whether the **export would still be lawful** when these activities are performed, it is worth highlighting a number of points. If there is a valid export permit, the provision of a service in connection with these activities as referred to in Art. 8a is, in itself, lawful. If there is no valid export permit (because the good in question has already been exported from Switzerland, for example), or if the export does not require authorisation, **companies are responsible for checking** whether export would still be lawful at the time the service is provided, if necessary by **contacting SECO in writing**. The date of provision is essentially determined by the date on which the activity begins. However, if an activity is ongoing for several years, there should be regular checks to determine whether or not the export of the goods in question is still lawful. This applies in particular if the situation has changed considerably.

Companies must also check for themselves that the close connection that is required between the service and the export genuinely exists. In the event of doubt, they are strongly advised to contact SECO .

**Example**

- ***The export of an aircraft classified as a specific military good, and its subsequent maintenance by the same Swiss company, is an example of an activity that does not need to be declared, providing the export itself is still lawful.***

***That said, this activity remains subject to the declaration requirement if the company is also intending to maintain fighter aircrafts that have not been exported from Switzerland.***

Exemptions for advising and training members of armed or security forces (Art. 8a para. 2 OPSA)

**Advice** and **training** given on the servicing, maintenance, repair, development, manufacture or use of a good are also exempt from the declaration requirement laid down in the PSSA if the good can be exported in compliance with national legislation, i.e. on the basis of the WMA or the GCA, or if no authorisation is required. These activities for armed or security forces may concern **both physical goods and intellectual property (technologies)**. Here too, the exemption applies only if there is a close connection between the service and the exported good.

Where both advice and training are concerned, this exemption provision applies not only where export and service provision take place at the same time. If the good in question has been exported by a company in the past in compliance with the GCA or WMA, and this company now wishes to provide one of the services closely connected with this good, as mentioned above, the execution of this service is not subject to the declaration requirement, providing the **export would still be lawful** when the activity is undertaken.

In such case, the company has an obligation to check whether the **planned service is closely connected** with the goods to be exported, or if the goods export in compliance with the GCA and WMA would still be lawful when these activities are performed.

### Examples

- *If the export of an armoured vehicle from Switzerland is authorised, training on the maintenance of that vehicle is not subject to the declaration requirement laid down in the PSSA if the vehicle or its spare parts can still be exported.*
- *Advice concerning the manufacture of an unarmed drone on the basis of technical plans deemed to be a technology pursuant to the GCA, and which have been exported in compliance with this act, are not subject to the declaration requirement if the export of those plans remains lawful.*
- *If a company wishing to export a communications system pursuant to the GCA is simultaneously training members of the armed or security forces in the use and repair of the product as part of a three-day course, this activity is not subject to the declaration requirement.*

*However, if the company trains more members of the armed or security forces as part of a course on signal intelligence lasting several months, the activity is subject to the declaration requirement, even if some of the material used for training were exported from Switzerland, because the service does not have a close connection with the exported good.*

### Exemptions for advising and training activities connected with the transfer of intellectual property and its associated rights (Art. 8a para. 3 OPSA)

Like the cases described in the preceding section, advice and training for armed and security forces that are generally provided in connection with export-controlled **intellectual property** (including the related expertise), and its associated rights, in compliance with the WMA are also exempted from the declaration requirement laid down in the PSSA if the transfer in question is always authorised on the basis of the WMA.

In such case, the company has an obligation to check whether the planned service is closely connected with the intellectual property that is to be exported, or if the **export** of the intellectual property in compliance with the WMA **would still be lawful** when this activity is performed. In the event of doubt, the company is strongly advised to contact the competent authorities in writing.

### Example

- ***If the transfer abroad of technical plans for tank manufacture is approved, advice on the production of that tank is not subject to the declaration requirement laid down in the PSSA as long as the plans in question may be transferred.***

→ As indicated in the preceding sections, the **company** has an obligation to check whether the **criteria** for the services in question to benefit from an **exemption pursuant to Art. 8a OPSA are met**. To be certain that it is acting lawfully, the company may consult the authority concerned, either when submitting the **export application** or at any other time. It should do so in writing, providing **details of the intended services**: the nature of that service (e.g. logistical support, advice or training), its scope or level, and the location at which it is to be provided.

- b) Specific cases that do not fall under the exemptions listed in Art. 8a OPSA.

#### Services connected with goods that are not of Swiss origin

The exemption provided for in Art. 8a does not apply if no control pursuant to the GCA or WMA has been conducted. In other words, if the company provides services connected with goods that **do not originate from Switzerland**, the services in question are **evaluated on the basis of the PSSA**. They must therefore be declared.

#### Operational support services

Paragraphs 1 to 3 of Art. 8a OPSA do not apply if the company is planning to perform an activity that constitutes **operational support** for armed or security forces in (*→ II.2.f Operational or logistical support for armed or security forces*) the sense of Art. 1a para. 1 OPSA. As this provision states, this service is provided in the context of ongoing or planned armed or security forces operations. Furthermore, if the operational support is provided at the front, it may constitute direct participation in hostilities, as described in Art. 8 PSSA. (*→ V.1 Direct participation in hostilities*) The declaration may be submitted using the SECO **ELIC system**, or directly to the competent **FDFA** authority (see in this regard the Brief Instructions for Art. 8a OPSA in Elic and on the FDFA's PSSA website). This also applies, if the requirements for the application of Art. 8a are not fulfilled.

- c) Exemption for international organisations

**International organisations with a headquarters agreement in Switzerland**, which enjoy immunity, are exempt from the declaration requirement. This applies, for example, to the International Committee of the Red Cross (ICRC), which is deemed an international legal personality based on the agreement between the Swiss Federal Council and the ICRC on the legal position of

the ICRC in Switzerland of 19 March 1993 (SR 0.192.122.50). The ICRC and its employees enjoy immunity within the scope of their activities in Switzerland.

d) Exemption for training in international public law

However, advising or training members of armed or security forces abroad **exclusively on respect for and adherence to international law**, in particular human rights and international humanitarian law, are not security services pursuant to the act and are therefore not subject to the declaration requirement. The activities of academic experts who advise foreign states on matters concerning the interpretation of international humanitarian law, or the work of non-governmental organisations that train foreign armed or security forces in the field of human rights or international humanitarian law, for example, are not subject to the declaration requirement. Activities according to Art. 4 PSSA extending beyond this are nevertheless security services pursuant to the act.

e) Partial exemption for services provided in EU and EFTA member states (Art. 3 PSSA)

A **restricted declaration requirement** (Art. 3 PSSA) applies to activities in the **territories of the Member States of the European Union** (including the French overseas departments, the Azores, Madeira, the Canary Islands, Ceuta and Melilla, Gibraltar and the Åland Islands), **Iceland, Liechtenstein** and **Norway**.

**The protection of persons, the guarding** or surveillance of goods and properties and **security services at events** are not subject to a declaration requirement in these countries (Art. 3, para. 1, PSSA). Services in Switzerland that facilitate such activities abroad for the companies concerned are not subject to the declaration requirement either (Art. 3 para. 2 PSSA) (→ II.7 Error! Reference source not found. When is a service in Switzerland deemed to be 'in connection' with a private security service provided abroad?; II.8 Error! Reference source not found. What does 'establishing, basing, operating or managing' a company mean?; II.9 Error! Reference source not found. What does 'control' of a company mean?)

### 3. Subject, deadlines and responsibility

a) Which documents have to be submitted to the authorities?

The authorities provide declaration forms that indicate which information and documents have to be submitted to the authority. These forms and the related explanations are available on the website of the authority and can also be directly requested from the authority. (→ III.3.d Error! Reference source not found. Which authority is responsible?) The documents are to be **submitted** in an orderly form to ensure quick and efficient evaluation of the declaration. A declaration is only deemed to have been received once it has been submitted to the authority in **full and with all the information** stipulated by law.

Where the declaration requirement applies, documents containing the following information must be submitted (Art. 10 paras. 1 and 2 PSSA; Art. 7 PSSA; Art. 4 et seq. OPSA):

a. With regard to the **company** (see **Information on the company** form):

1. Company name and further basic information;
2. The surname, first name, date of birth, nationality and certificate of residence of the members of the company management and supervisory bodies;
3. Purpose, areas of business, areas of deployment abroad and main customer categories of the company;
4. Information on the organisational structure;
5. Proof of accession to the Code of Conduct (companies that have become members of the International Code of Conduct Association (ICoCA) are deemed to have acceded to the International Code of Conduct for Private Security Service Providers) (→ IV.1. Accession to the International Code of Conduct for Private Security Service Providers);
6. Commercial register extract (if available) or other information on the company and its registered office and legal form;
7. Internal controlling system set up by the company for personnel;

b. With regard to the intended **activity** (see **Activity declaration** form):

1. Nature of the intended activity;
2. Service provider (if the service is provided by a subsidiary or sub-contractor);
3. Place abroad where the activity is to be performed;
4. Scope and duration of the deployment;
5. Number of persons deployed;
6. Particular risks that the activity entails;

c. With regard to the **persons** who carry out operational **management or coordination tasks in relation to the declared activity** or who are **armed**:

1. Surname, first name, date of birth, certificate of residence and function;
2. Information on the verification of the good standing of such persons by the company;
3. Information on basic and advanced training in fundamental rights and international humanitarian law;
4. Description of how the persons are armed, and of other material carried;
5. Information on basic and advanced training appropriate to the intended activity, i.e. in the use of weapons and aids, as well as the use of force and other police measures;

6. Information on the authorisation required under the relevant law to export, carry and use weapons, weapons accessories and ammunition;
- d. With regard to the **identity of the principal** and/or the recipient of the service, if it concerns:
1. A foreign state or its institutions;
  2. An international organisation or its institutions;
  3. A group that regards itself as the government or as a state institution, or its institutions;
  4. An organised armed group or its units participating in an armed conflict within the meaning of the Geneva Conventions and the Additional Protocols I and II;
  5. A high representative of a foreign state or of an international organisation, a leader or a senior executive of a group under letters c and d, irrespective of whether the person concerned acts in the course of their duties or as a private individual.

b) When does the declaration have to be made?

Where a declaration is made, the deadlines for the declaration and review procedures must be adhered to (*→ III.4 Procedure for evaluation of declarations*).

Only once the company has received notification from the authority that no grounds exist to initiate a review procedure (Art. 11 para. 1 PSSA), or that the review procedure has not resulted in any restriction of the declared activity, can the activity be performed.

It should be noted that the declaration procedure may take longer than 14 days owing to queries from the authority about unclear or incomplete declarations on the part of the company (*→ III.4.a) What happens after the declaration by the company?*). In such cases, too, however, the declared activity may not be performed until further notice. It is therefore recommended that the declaration be made in good time before the activity begins.

c) Does the declaration requirement apply on a one-off basis?

Generally, a declaration concerning the company itself need only to be made once. The declaration concerning an intended activity, i.e. per mandate, is also one-off in principle.

However, changes must be declared immediately in the event of **a significant change in circumstances** (Art. 10 para. 3 PSSA). This is the case, for example, if the state in which or for which the service is provided enters into an armed conflict, or the local human rights situation deteriorates significantly. This also applies if the contractual conditions which define the details of service provision have been amended substantially. A declaration on the changed circumstances must be made, if the company cannot exclude the possibility of the authority reaching a different conclusion to that concerning the original declaration, owing to the changed circumstances regarding the activity. Change concerning the management personnel or principal (the latter subject to mandatory identification) must always be declared. Any departure or exclusion from the ICoCA (Art. 11 OPSA)



must also be declared. If an existing, already declared mandate is to be extended, the company must only declare the extension of a declared activity (Art. 7 OPISA).

If the private security services described in Art. 4 let. a, nos. 1-9 PSSA are provided in standardised form, the information concerning the principal, the recipient, the nature of those services, the personnel deployed and the domestic geographical context may be supplied together in a **framework declaration**.

This must **essentially be renewed every six months**. Depending on the circumstances or the nature of the services in question, the competent authority may determine a shorter or longer term of validity. While the framework declaration is in effect, the company must communicate to the competent authority all significant changes in circumstances which might affect that authority's evaluation of the conditions under which the services are provided.

d) Which authority is responsible?

Responsibility for implementing the act and its ordinance lies with the Export Controls and Private Security Services Section (ECPS).

Address:

Federal Department of Foreign Affairs FDFA

State Secretariat

Division for International Security DIS

Export Controls and Private Security Services Section

Effingerstrasse 27

3003 Bern

Tel.: +41 58 46 46988

Fax: +41 58 46 43839

Email: [spsd@eda.admin.ch](mailto:spsd@eda.admin.ch)

## 4. Procedure for evaluation of declarations

The procedure pursuant to PSSA can essentially be divided into two stages: the declaration procedure and the review procedure. The declaration procedure begins with the receipt of the company's declaration by the competent authority. The authority evaluates the declaration within a specific period and notifies the company whether a review procedure will be initiated. If it does not initiate a review procedure, the company can perform the activity.

However, if the competent authority deems an in-depth review necessary, it will notify the company that a review procedure will be initiated. During this review procedure, the competent authority

obtains further information on the intended activity by means of administrative and judicial assistance. After completion of this review procedure, the authority decides whether an activity may be performed based on Art. 14 PSSA. The competent authority notifies the company if no prohibition is declared. If the authority intends to declare a prohibition, it grants the company the right to a hearing before issuing the decision.

a) What happens after the declaration by the company?

The authority notifies the company within 14 days after receipt of the declaration whether the declared activity provides grounds to initiate a review procedure (Art. 12 PSSA). If the declaration is incomplete or unclear, the company will be requested to provide clarification. In such cases, the 14-day period commences only once the declaration has been completed by the company. The company is notified if a review procedure is initiated. At the same time, the company is informed that the declaration may be **withdrawn without charge** within a period of five days. In this case, however, the activity may not be performed in the future.

In exceptional circumstances a company can contend that the service has to be provided in an emergency situation, for example, to prevent danger to the life and limb of third parties. If these requirements are met, the authority notifies the company within two days if possible as to whether a review procedure will be initiated (Art. 8 OPSA). The decision on the granting of approval for an accelerated procedure is at the authority's discretion.

**Should the circumstances change after a declaration has been received**, the company must notify the authority immediately (→ III.3.c) Does the declaration requirement apply on a one-off basis?. The authority can also initiate a review procedure at a subsequent point for an initially authorised activity if the actual circumstances have changed significantly since the declaration or if the authority becomes aware of new facts (Art. 13 para. 1 let. b PSSA).

This applies both to an activity that has not been subject to a review procedure as referred to in Art. 12 PSSA, and to an activity which has been authorised after a review procedure has been concluded, and notification as referred to in Art. 13 para. 4 has been sent to the company (Art. 13 para. 1 let. b PSSA).

The activity cannot generally be performed for the duration of the review of the declaration (Art. 11, para. 1, PSSA). (→ VI.3.c) **Error! Reference source not found.** Offences against the duty to declare and the duty to refrain from activities (Art. 23 PSSA).

b) In what circumstances should the company anticipate a review procedure?

The authority initiates a review procedure if indications exist that the declared activity jeopardises the internal and external security, the foreign policy objectives or the neutrality of Switzerland or adherence to international law, in particular human rights and international humanitarian law (Art. 13 para. 1 in conjunction with Art. 1 PSSA). The authority will pay special attention to activities in crisis or conflict areas, to services which could be of use to bodies or persons in the event of human rights violations, to the operational or logistic support of armed or security forces and to

services which could be of use to terrorist groups or criminal organisations (see also → III.4.f) When does the authority issue a prohibition?).

The competent authority also initiates a review procedure if it becomes aware of a violation of Swiss law or international law (Art. 13 para. 1 let. d PSSA).

The authority also initiates a review procedure if it becomes aware of an activity that has not been declared. In such cases, the competent authority notifies the company concerned and provides it with the opportunity to submit a statement in that regard within ten days (Art. 13 para. 1 let. c and para. 2 PSSA).

### c) Consultation and adjudication by the Federal Council

According to Art. 8b OPSA, when the responsible authority (the FDFA State Secretariat) decides to initiate a review procedure, it must **consult SECO and the DDPS** and reach an agreement with them that the declared activity is aligned with the objectives of the PSSA, or that it must be prohibited. The Federal Intelligence Service is consulted as part of this review procedure.

If it is not possible for the FDFA State Secretariat, SECO and the DDPS to reach agreement, the FDFA must submit the matter to the **Federal Council for a ruling**. Should the Federal Council conclude that the declared activity must be prohibited, it will instruct the FDFA to issue a ruling to this effect, which is subject to appeal (Art. 47 para. 6 of the Government and Administration Organisation Act of 21 March 1997 [GAOA; RS 172.010]). Otherwise, where the Federal Council sees no grounds to prohibit a service, it will instruct the FDFA to conclude the review procedure. The FDFA State Secretariat will inform the company concerned of the outcome of the review procedure in accordance with Art. 13 para. 4 PSSA.

As part of the consultation process, the FDFA State Secretariat, SECO and the DDPS must also determine whether the declared **activity** has a **significant impact** on Swiss foreign or security policy. If this is the case, the FDFA must submit the **matter at issue to the Federal Council**. The Federal Council's decision-making power in this case is justified by the political reach of that decision. For example, an activity is liable to have a significant impact, if prohibiting it would have serious repercussions for Switzerland's good relations with the foreign state in which the private security service is to be provided.

### d) How long does the review procedure take?

The act provides for a period of 30 days for the review procedure (Art. 13 para. 4 PSSA) which may be extended **depending upon the complexity of the circumstances**. The activity subject to the declaration requirement cannot generally be performed during the review procedure (Art. 11 para. 1 PSSA). The act nevertheless stipulates in Art. 11 para. 2 PSSA that the authority can authorise the performance of the activity for the duration of the procedure **by way of exception** if there is overriding public or private interest in doing so. The decision on whether overriding public or private interest exists is at the discretion of the authority.

e) What costs are incurred for the company?

The declaration procedure is free of charge. Fees are levied for the review procedure, for prohibitions and any control measures (Art. 17 PSSA). The fees are calculated based on the time taken and an hourly rate of between CHF 150 and CHF 350 applies depending upon the function level (Art. 10 OPSA).

f) When does the authority issue a prohibition?

The competent authority prohibits activities that contradict (Art. 14 para. 1 PSSA) the aims of the act (Art. 1 PSSA). As part of the proportionality evaluation, it assesses, on an individual-case basis, the risks that an activity entails with regard to the aims of the act, and thereby takes account of economic freedom.

According to Art. 1 PSSA (Aim), the act should contribute to:

- a) safeguarding the internal and external security of Switzerland;
- b) realising Switzerland's foreign policy objectives;
- c) preserving Swiss neutrality;
- d) guaranteeing compliance with international law and, in particular, human rights and international humanitarian law.

#### Internal and external security

Any activity that may jeopardise the internal or external security of Switzerland is prohibited. This is the case, for example, if a security service may benefit an international criminal or terrorist organisation, or if the service contributes to the proliferation of ABC weapons and their means of delivery (taking into consideration Switzerland's position and obligations in this regard).

#### Foreign policy objectives

Switzerland's foreign policy objectives are determined in Art. 54 para. 2 of the Federal Constitution. It states that the Confederation must ensure that the independence of Switzerland and its welfare are safeguarded; it must assist in the alleviation of need and poverty in the world, and promote respect for human rights and democracy, the peaceful co-existence of peoples as well as the conservation of natural resources. The authority prohibits any activity that adversely affects these foreign policy objectives. Where the safeguarding of independence is concerned, the authority will review whether the declaring company performs an important function for Switzerland, or whether the provision of its service results in a restriction of Switzerland's decision-making scope as an independent state. With regard to Switzerland's welfare, the authority considers whether the declaring company exerts relevant influence over the country's economic welfare, and whether prohibiting the service would lead to considerable damage to the declaring company. On the other hand, activities are deemed irreconcilable with Switzerland's foreign policy objectives if they adversely affect the federal government's development projects or humanitarian aid programmes, and thus run counter to the aim of alleviating need and poverty in the world, or to respect for human rights and the promotion of democracy. Should different objectives according to Art. 54

para. 2 of the Federal Constitution (FC) be equally relevant to the decision, the competent authority shall make the necessary assessment.

### Neutrality

As a neutral country, Switzerland is obliged to act impartially and to exercise restraint towards parties involved in armed conflict. The support of an activity that undermines this obligation to impartiality and restraint by destabilising the balance of powers and may constitute Swiss support for one conflicting party at the expense of the other would damage Switzerland's neutrality. The provision of services that would call the credibility of Switzerland's neutrality policy may also be prohibited.

### International law

Switzerland supports respect for international law in various ways at international level. Any activity which runs contrary, for example, to the principles of international humanitarian law and human rights, and any activity that jeopardises Switzerland's efforts in this area is deemed irreconcilable with Switzerland's policy and interests in this field. This is the case specifically where there are substantial indicators that the recipient or principal of the service violates fundamental obligations under international law, or the recipient or principal violates human rights or international humanitarian law and there is an adequate causal relationship between the service that is to be provided and the violation of international law in question (i.e. the service must contribute recognisably to the violation of human rights).

Art. 14 para. 1 let. a to f PSSA, lists activities where the authority has to carry out an especially thorough review to ensure conformity with the aim of the act.

The authority must also prohibit an activity in full or in part if a company has committed serious human rights violations in the past and has made no provisions to ensure there is no recurrence thereof, if it deploys personnel who do not possess the required training or if it does not comply with the provisions of the Code of Conduct for Private Security Service Providers (Art. 14 para. 2 PSSA).

Services provided in connection with direct participation in hostilities (Art. 8 PSSA) or the commission of serious violations of human rights (Art. 9 PSSA) are already prohibited by law (→ **Error! Reference source not found.. Error! Reference source not found.Error! Reference source not found.**).

g) Can a company oppose a prohibition?

A prohibition is issued in the form of a substantiated decree which can be contested at the Federal Administrative Court pursuant to Art. 50 Administrative Procedure Act (APA) within 30 days.

## IV. FURTHER OBLIGATIONS

### 1. Accession to the International Code of Conduct for Private Security Service Providers

Art. 7 PSSA stipulates that all companies that are subject to this act must accede to the International Code of Conduct for Private Security Services. Art. 2 OPSA further states that companies which are members of the International Code of Conduct Association (ICoCA) are deemed to have acceded to the International Code of Conduct (see box). All requirements and changes concerning membership are published on the ICoCA's website (<http://www.icoca.ch/>).

If membership of the ICoCA is not possible for reasons which the company cannot be held accountable for, the company has to **obtain confirmation of this from the ICoCA**. In such cases, the company submits this confirmation issued by the ICoCA to the authority instead of the proof of accession to the code of conduct. However, for the establishing, basing, operating or controlling company this is only possible if the operating company (established, based, operated, managed or controlled company) has itself acceded to the code of conduct.

#### **The Code of Conduct and the Code of Conduct Association (ICoCA)**

The International Code of Conduct for Private Security Service Providers was drawn up in a process involving representatives of private security companies, states and NGOs and was adopted in 2010. In a first step, private security service providers were given the opportunity to sign the code of conduct. In 2013, the International Code of Conduct Association (ICoCA) provided for by the code was founded by the signatory companies as well as by states and non-governmental organisations. The Association is entrusted with the control and supervision of compliance with the code.

The bodies of the ICoCA are the General Assembly, the Board of Directors and the Secretariat. The General Assembly consists of all members from the three pillars of the organisation – private security service companies, states and NGOs. The Board of Directors consists of 12 elected members whereby each group may provide four members.

### 2. Know your customer

The company has a **duty to know the identity of the principal** or the recipient of the service. This duty derives from Arts. 5 and 11 OPSA. The question of the identity of the ultimate client, and how this affects attorney-client privilege, arises in the context of the declarations to the ECPS section about private intelligence services. Indeed, it often happens that lawyers will engage private intelligence firms on behalf of their clients, who are the recipient of the service, and then invoke professional confidentiality obligations as a reason not to disclose the client's identity.

However, Art. 11 of the Ordinance also requires the service provider to know the identity of the principal, the client or the service recipient. The company performing the activities under the PSSA must, by law, document its activities. It must be able to provide the competent authority with information and documents on its contractual relationship at all times.

Furthermore, the company is **required to report to the authority the identity** of its principals or service recipients if they are a **foreign state**, an **international organisation**, a **group** that regards itself as a government or as a state institution, an organised **armed group** participating in an armed conflict, high representatives of a foreign state or international organisation, or leaders or senior executives of one of the aforementioned entities. The declaration requirement exists irrespective of whether the person concerned acts in the course of their duties or as a private individual (Art. 5 OPISA).

It is therefore important in this regard that companies are familiar with their obligations and, where working through an intermediary, that they require the identity of their ultimate client to be disclosed. Otherwise, there are grounds to **initiate a review procedure**. It should be remembered that, pursuant to Art. 11 OPISA, the company must be able to provide the State Secretariat with information and documents at all times, specifically with regard to the identity of the principal and of the provider and recipient of the service. The authority may also demand a copy of the contract concluded with the principal. Any company refusing to cooperate is liable in particular to the sanction provided for in Art. 24 PSSA, which is a fine up to 100,000 Swiss francs.

### 3. **Duty of cooperation**

The company is obliged to provide the authority with all information required and must submit the necessary documents for verification of the activities that fall under this act (Art. 18 PSSA). If the company does not fulfil these duties even upon request from the authority, the authority can undertake various oversight measures, including the inspection of the company's premises, the examination of relevant documents and the seizure of material (Art. 19 PSSA). In the event of continued infringement of the duties of cooperation, criminal proceedings may be initiated for violation of the duty of cooperation (Art. 24 PSSA).

### 4. **Duty to preserve records**

The company is obliged to document its activities. It must be able to provide the following information and documents at any time:

- a. The identity and address of the principal, the provider and the recipient of the service;
- b. A copy of the contract concluded with the principal;
- c. Identity of the persons responsible for the implementation of the contract;
- d. Details of the resources deployed, in particular weapons;

- e. Evidence of contract execution, such as contract documents and the relevant authorisations.

The members of the management are also obliged to preserve this information and these documents for ten years, including beyond any cessation of business (Art. 11 OPISA).

## 5. Obligations regarding the transfer of contracts to third parties (sub-contracting)

A service provision mandate may be transferred from one company subject to this act to another company. However, when transferring a private security service, a company must ensure (→ II.2 **Error! Reference source not found.** What are 'private security services'?) that the company taking over the mandate adheres to the same obligations, even if it is located abroad and would not otherwise fall under the scope of this act. Accordingly the activities of the sub-contracted company must also be declared. It must also accede to the Code of Conduct for Private Security Service Providers (→ IV.1 **Error! Reference source not found.** Accession to the International Code of Conduct for Private Security Service Providers). 'Transfer' means that the mandated company works for the mandating company within a contractual relationship. The exact contractual relationship is irrelevant as is whether the mandating takes place on a one-off or repeated basis.

The activities of the sub-contracted company must also be declared, and all information that is relevant to the evaluation by the authorities must be provided: the identity of the responsible persons at the sub-contracted company, an attestation of compliance with the Code of Conduct, an overview of activities, the nature and place of performance of the sub-contracted activity, and information on the personnel deployed to provide the sub-contracted service.

If the company which takes over the mandate fails to comply with the provisions, the authority can prohibit the transfer (Art. 14 para. 3 PSSA). A violation of a prohibition issued by the competent authority is liable for prosecution (Art. 22 PSSA) (→ VI.3.b **Error! Reference source not found.** Offences against prohibitions by the competent authority (Art. 22 PSSA)).



## V. LEGAL PROHIBITIONS

### 1. Direct participation in hostilities

The activities that are prohibited by law are dealt with below. The provision of personnel for direct participation in hostilities is prohibited by law (Art. 8 PSSA). The provision states:

#### **Art. 8 Direct participation in hostilities**

<sup>1</sup> It is prohibited:

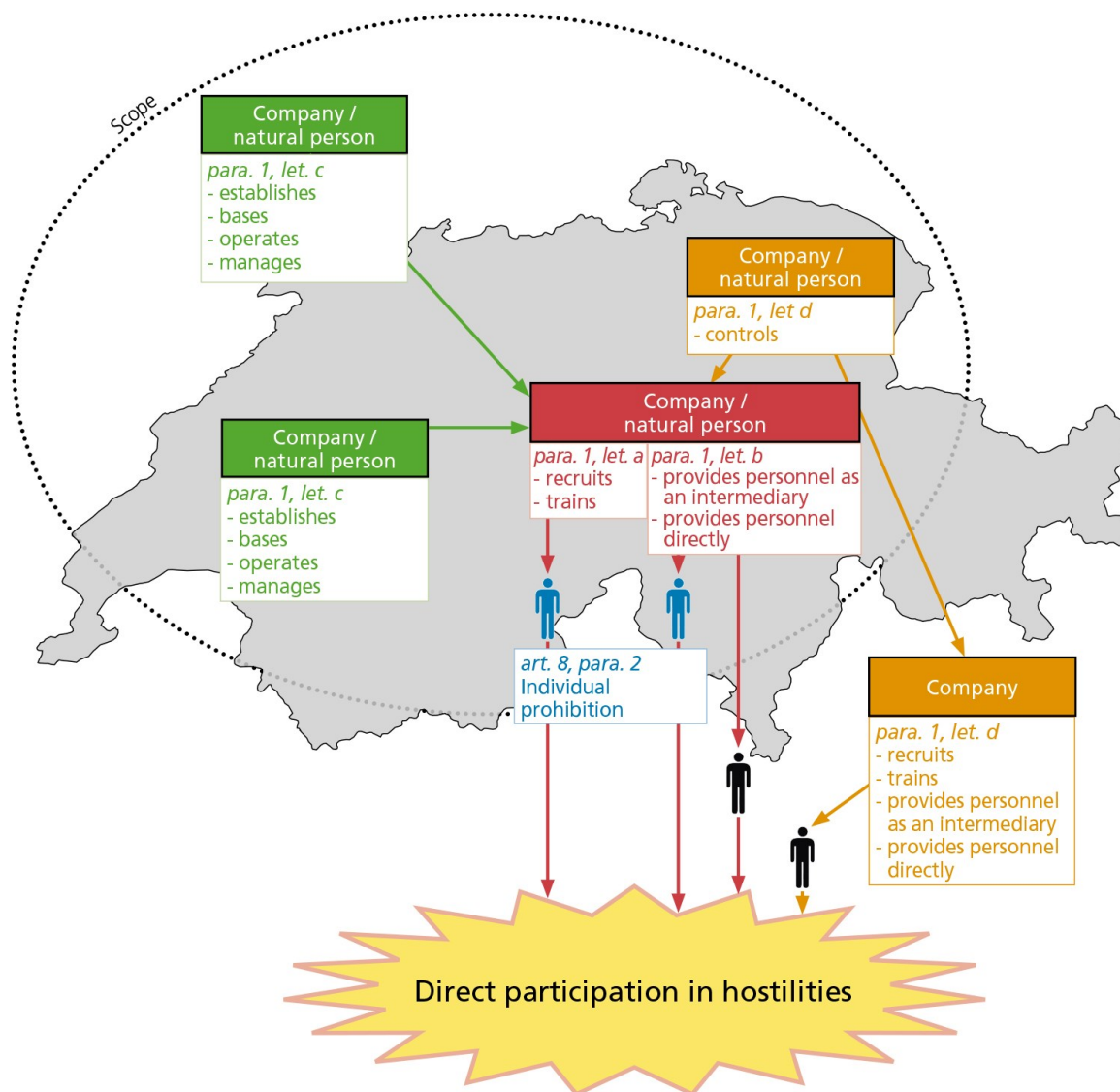
- a. to recruit or train personnel in Switzerland for the purpose of direct participation in hostilities abroad;
- b. to provide personnel, from Switzerland, directly or as an intermediary, for the purpose of direct participation in hostilities abroad;
- c. to establish, base, operate, or manage, in Switzerland, a company that recruits, trains, or provides personnel, directly or as an intermediary, for the purpose of direct participation in hostilities abroad;
- d. exercise control, from Switzerland, over a company that recruits, trains, or provides personnel, directly or as an intermediary, for the purpose of direct participation in hostilities abroad.

<sup>2</sup> Persons who are domiciled, or have their habitual place of residence, in Switzerland and are in the service of a company that is subject to this Act shall be prohibited from directly participating in hostilities abroad.

It should be noted that the provision – with the exception of Art. 8 para. 2 PSSA – does not prohibit participation in hostilities as such but instead focuses on **supporting activities in Switzerland**. Art. 8 para. 1 PSSA prohibits activities through which personnel are recruited, trained or provided, directly or as an intermediary, for the purposes of direct participation in hostilities abroad (→ II.7.a) **Error! Reference source not found.** What do ‘recruiting’ and ‘training’ mean?; II.7.b) **Error! Reference source not found.** What do ‘providing personnel as an intermediary’ and ‘providing personnel directly’ mean?).

The second section also prohibits persons who are domiciled in Switzerland and in the service of a private security service provider from directly participating in hostilities abroad.

Art. 8 PSSA can be graphically depicted as follows:



a) What are 'hostilities'?

Art. 8 PSSA prohibits the direct participation in combat actions pursuant to the Geneva Conventions and their Additional Protocols, and the provision and training of personnel for this purpose.

'Hostilities' are combat actions that take place between parties in an armed conflict pursuant to the Geneva Conventions.

'Armed conflict' pursuant to the Geneva Conventions essentially include any intentional and non-consensual use of violence between states and lasting or severe armed confrontations between states and organised armed groups or also solely between such groups. A state of war recognised under international law or recognised by the parties involved is not necessary for the existence of an armed conflict. What matters is the evidence base.

b) What is 'direct participation in hostilities'?

The term 'participation' in hostilities includes all individual or collective actions which are suitable and intended to support a conflict party to militarily impede or cause damage to an opposing party or kill and injure civilians on the side of the opposing party or destroy and damage civilian properties.

The 'directness' of the participation in hostilities only exists if an action (taken individually or as an integral part of a collective operation) directly causes the required civilian or military damage. Indirect support for combat actions is not sufficient. However, it is not necessary for an action to be essential for maintaining combat capacity or the implementation of operations.

Examples:

- The performance of a combat function for a conflict party always involves direct participation in hostilities. However, the performance of a purely medical or pastoral care function for the combat forces of a combat party does not constitute direct participation in hostilities. While the manufacture and supply of weapons and ammunition is essential for the combat actions, it does not constitute an integral part of these combat actions unless an active combat zone is directly supplied.
- The maintenance of weapons systems for a conflict party or the training of their armed forces in such systems constitutes neutrality-relevant indirect 'participation in hostilities' but does not entail the 'directness' to be prohibited by law. This would only be deemed otherwise if the maintenance or training in question takes place with regard to a specific combat action.
- The unarmed identification and marking of targets in a conflict zone for aerial attacks by a conflict party is an integral part of such attacks and therefore constitutes direct participation in hostilities.
- The guarding of military personnel, properties and infrastructure against criminal attacks does not constitute direct participation in hostilities per se. However, if such properties are also defended against any military attacks, this function is categorised as direct participation in hostilities.

With regard to the aims of the act set out in Art. 1 PSSA, in particular preserving Swiss neutrality and safeguarding internal and external security, the provision of services which support one party in an armed conflict against another is always problematic. While direct participation in hostilities is prohibited by the act, solely indirect participation, such as the maintenance of weapons systems or the training of the troops of a conflict party, must be reviewed with a greater degree of attention (see Art. 14 para. 1 let. c PSSA).

What is important is that the act prohibits individual persons whose place of residence or habitual place of residence is in Switzerland from participation in hostilities if they are in the service of a company subject to this act (Art. 8 para. 2 PSSA). Activities conducted from Switzerland through

which direct participation in hostilities is fostered, namely through the training or provision of personnel for this purpose, are also prohibited (Art. 8 para. 1 PSSA).

## 2. **Serious violations of human rights**

Activities which clearly foster serious violations of human rights are also prohibited (Art. 9 PSSA).

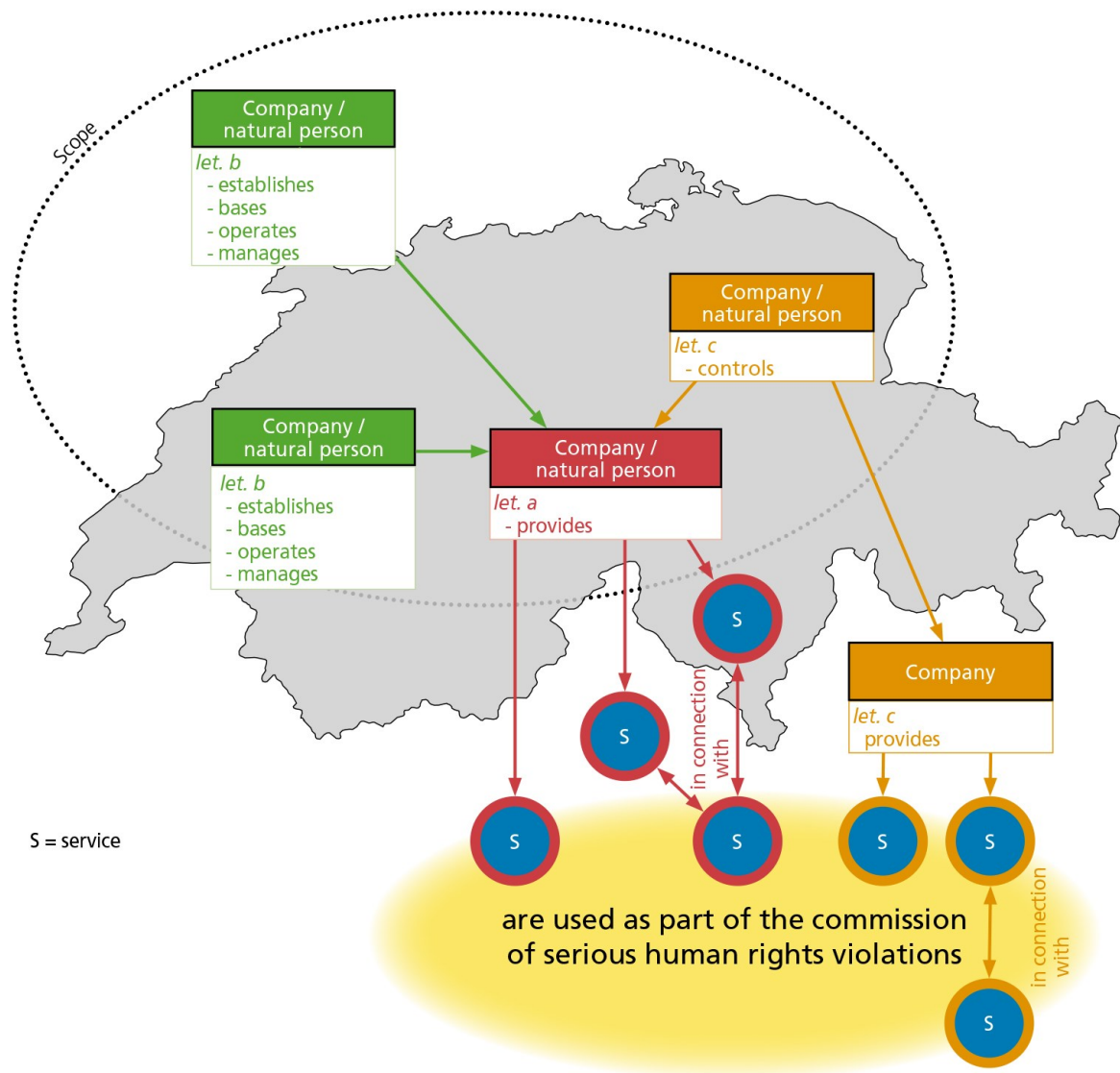
The provision states:

### **Art. 9 Serious violations of human rights**

It is prohibited:

- a. to provide, from Switzerland, private security services or services in connection therewith if it may be assumed that the recipients will use the services in connection with the commission of serious human rights violations;
- b. to establish, base, operate, or manage, in Switzerland, a company that provides private security services, or services in connection therewith, if it may be assumed that the recipients will use the services in connection with the commission of serious violations of human rights ;
- c. to exercise control, from Switzerland, over a company that provides private security services, or services in connection therewith, if it may be assumed that the recipients will use the services in connection with the commission of serious human rights violations.

The provision does not prohibit the violation of human rights as such but instead supporting activities that are performed in Switzerland or from Switzerland. The direct violation of human rights during an armed conflict can however be qualified as a war crime. Participation in such acts is punishable in accordance with the provisions of the SCC (in particular Art. 264 b seq. SCC), even if the acts are committed abroad. (→ **II.2 Error! Reference source not found.** What are 'private security services'?; **II.7 Error! Reference source not found.** When is a service in Switzerland deemed to be 'in connection' with a private security service provided abroad?) Art. 9 PSSA is directed against security services used by recipients as part of the commission of serious human rights violations. Art. 9 PSSA can be graphically depicted as follows:



a) What is a 'serious violation of human rights'?

Non-exhaustive examples of serious violations of human rights are arbitrary killing, torture and other cruel, inhuman or degrading treatment or punishment, abduction, arbitrary imprisonment, deprivation of liberty or the systematic suppression of the freedom of expression.

b) When does it have to be assumed that security services are being used for the commission of serious human rights violations?

This act does not refer to the direct commission of serious human rights violations by the private security companies abroad covered by this act but instead to security services provided by these companies about which it can be assumed that the recipient abroad uses them as part of the commission of serious violations of human rights. A causal relationship must exist between the security services provided by the company and the serious human rights violations committed by the service recipient. It must be recognisable to the service provider that in the ordinary course of events and based on general life experience the service is being used as part of the commission of

serious human rights violations. Sufficient recognisability exists if a **reasonable person** would realise that the security service plays a key role in the commission of serious human rights violations. However, it is not necessary for the company to have shown intent with regard to the human rights violations or that the service recipient is verifiably committing serious human rights violations, it is sufficient that this can be reasonably assumed based on the circumstances.

## VI. IMPLEMENTATION AND PENAL PROVISIONS

### 1. Measures for enforcing the act

As already set out in section III, this act is essentially based on the declaration requirement by the companies concerned. However, the PSSA also provides the competent authority with various means of ensuring the implementation of the act.

#### a) Oversight powers of the authority

Art. 19 PSSA empowers the authority to undertake oversight measures under certain circumstances. If the company attempts to influence the competent authority or fails to satisfy its duty of cooperation, and where all efforts on the part of the competent authority to obtain the necessary information and documents remain fruitless, the authority may undertake oversight measures. Three oversight measures are set out under Art. 19 para. 1 letters a–c PSSA. The authority is authorised to carry out unannounced on-site inspection of the company premises (let. a) to examine the relevant documents, i.e. the documents that it requires for the review of the activities subject to the act (let. b). It may also seize material (let. c). The authority may also involve other federal authorities and the police forces of the cantons and communes.

#### b) Threat of punishment / duty to report

Pursuant to Art. 27 para. 2 PSSA, the authority is obliged to report any infringements of which it obtains knowledge in the course of carrying out its official activities to the Office of the Attorney General of Switzerland. Infringements are set out in Art. 21-24 PSSA and include offences against statutory prohibitions (Art. 8 and 9 PSSA), offences against prohibitions issued by the competent authority, offences against the duty to declare or the duty to refrain from activities and offences against the duty of cooperation. (→ VI.3 **Error! Reference source not found.** Sanctions for offences) If the authority comes to the conclusion that the declaration requirement applies, it can notify the company of its obligation to comply with the declaration requirement under threat of criminal charges. The same applies in cases where the authority comes to the conclusion that further documents are required from the company to evaluate the activity.

### 2. Offences within a business undertaking (Art. 25 PSSA)

Where an offence is committed through the management of a business, regardless of whether or not that business has legal personality, or in any other manner in the performance of a business activity or service for a third person, the criminal provisions of the PSSA apply to the natural persons who have performed the act in question pursuant to Art. 25 PSSA in conjunction with Art. 6 Federal Act on Administrative Criminal Law (ACLA). In addition, the head of a business, an employer, a principal, or a party being represented, who, either intentionally or through negligence and in breach of a legal duty, fails to prevent an offence from being committed by a subordinate, an agent

or a representative, or fails to remedy the effects of the commission of such an offence, is subject to the criminal provisions applicable to an offender. Where the head of a business, employer, principal or party being represented is itself a business, with or without legal personality, paragraph 2 applies to the company's executive and management bodies and their members, to managing partners, actual managers, and liquidators guilty of wrongdoing.

Pursuant to Art. 25 para. 2 in conjunction with Art. 7 ACLA, a company can be punished with fines if a fine of not more than CHF 20,000 comes into consideration and if the investigation of the criminally liable persons necessitates investigative measures that would be disproportionate to the penalty incurred. Application of Art. 25 para. 2 PSSA is only considered in the case of minor offences, i.e. in cases of offences against the duty of cooperation (Art. 24 PSSA).

### 3. Sanctions for offences

The act provides for various sanctions for offences against the statutory duties set out in this act:

#### a) Offences against statutory prohibitions (Art. 21 PSSA)

The penal provision of Art. 21 PSSA implements the prohibitions pursuant to Art. 8 and 9 PSSA and contains a corresponding threat of punishment (→ **Error! Reference source not found.. Error! Reference source not found.****Error! Reference source not found.**). The elements of an offence are defined as a misdemeanour. The actions in question are liable to a custodial sentence from six months up to three years, where applicable, in combination with a fine of up to a maximum of 360 daily penalty units at CHF 3,000, therefore totalling CHF 1,080,000 (Art. 34 para. 1 and 2 SCC).

In the case of offences pursuant to Art. 21 para. 1 PSSA offenders may not only be persons who directly participate in hostilities themselves but also the head of a company and all line managers who perform the activities set out in Art. 8 para. 1 PSSA.

Paragraph 2 renders liable for punishment any person who conducts an activity where it may be assumed that it will be used by the recipient as part of the commission of serious human rights violations (→ V.2 **Error! Reference source not found.** Serious violations of human rights). The offence provided for in paragraph 2 is committed intentionally. Here again, the offender can be the head of a company or any person in a position of responsibility within a company that provides a security service where it can be assumed that the recipient will use it in the commission of serious human rights violations.

Offenders can also be punished according to the provisions of the SCC or the Military Criminal Code (MCC) if their actions fall under the scope of these offences and their degree of illegality is not covered by Art. 21 PSSA. For example, services which constitute involvement in serious violations of human rights or international humanitarian law may, under certain circumstances, not only be punishable pursuant to Art. 21 PSSA but may fall within the scope of other offences under the SCC, including the twelfth title of the SCC (genocide, crimes against humanity and war crimes).



b) Offences against prohibitions by the competent authority (Art. 22 PSSA)

The penal provision pursuant to Art. 22 PSSA threatens a custodial sentence or a fine in the event of an infringement of a prohibition of an activity issued by the competent authority pursuant to Art. 14 PSSA. (→ **Error! Reference source not found.** The declaration procedure is free of charge. Fees are levied for the review procedure, for prohibitions and any control measures (Art. 17 PSSA). The fees are calculated based on the time taken and an hourly rate of between CHF 150 and CHF 350 applies depending upon the function level (Art. 10 OPSA).

When does the authority issue a prohibition?) It is the task of the prosecution authority to examine whether offenders have violated the prohibition issued by the competent authority, i.e. whether they have fully or partially performed an activity prohibited by the competent authority. Accordingly, during the legal proceedings, the company can only claim not to have committed an activity. However, the prohibition of the activity by the authority has to be contested through administrative procedure. (→ **Error! Reference source not found. Error! Reference source not found.** Can a company oppose a prohibition?)

c) Offences against the duty to declare and the duty to refrain from activities (Art. 23 PSSA)

The penal provision pursuant to Art. 23 PSSA provides for a custodial sentence not exceeding one year or a fine in the event of violation of the declaration requirement of an activity, laid down in Art. 10 PSSA, or of the duty to refrain from an activity during the ongoing procedure, laid down in Art. 11 and 39 para. 2 PSSA. If the act is committed through negligence, a fine is imposed.

d) Offences against the duty of cooperation (Art. 24 PSSA)

Art. 24 PSSA provides for a penalty of a maximum amount of CHF 100,000 for any person who refuses to provide information, allow the inspection of documents, grant access to premises to the authority or who makes false statements to it. (→ **Error! Reference source not found. Error! Reference source not found. Error! Reference source not found.**) If the act has been committed through negligence, a fine not exceeding CHF 40,000 is imposed.

e) Dissolution and liquidation

In addition to the penalties set out above, the competent authority can, on the basis of Art. 26 PSSA in accordance with the Federal Act of 11 April 1889 on Debt Enforcement and Bankruptcy (DEBA), order the dissolution or liquidation of the legal entity or partnership concerned if its activity contravenes a statutory or official prohibition. The authority is not obliged to take this step. It must assess in each individual case whether the measure is justified and proportionate. The bankruptcy proceedings are based on DEBA. In such cases, the authority may also order the liquidation of business assets of an individual company and, as the case may be, the deletion of the entry in the commercial register.

## LIST OF LEGISLATIVE ACTS

ACLA	Federal Act on Administrative Criminal Law, 22 March 1974 (SR 313.0)
ANRA	Federal Act on the Acquisition of Immovable Property in Switzerland by Foreign Non-Residents, 16 December 1983 (SR 211.412.41)
APA	Federal Act on Administrative Procedure, 20 December 1968 (SR 172.021)
AP I	Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict, 8 June 1977 (SR 0.518.521)
AP II	Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflict, 8 June 1977 (SR 0.518.522)
CCCM	Regulation on the Control of Chemicals with Civil and Military Possible use (SR 946.202.21)
CO	Federal Act on the Amendment of the Swiss Civil Code (Part Five: The Code of Obligations), 30 March 1911 (SR 220)
DEBA	Federal Act on Debt Enforcement and Bankruptcy, 11 April 1889 (SR 281.1)
FC	Federal Constitution of the Swiss Confederation, 18 April 1999 (SR 101)
GC I	Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949 (SR 0.518.12)
GC II	Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949 (SR 0.518.23)
GC III	Geneva Convention relative to the Treatment of Prisoners of War, 12 August 1949 (SR 0.518.42)
GC IV	Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949 (SR 0.518.51)
GCA	Federal Act on the Control of Dual-Use Goods and of Specific Military Goods, 13 December 1996 (SR 946.202)
GCO	Ordinance on the Export, Import and Transit of Dual Use Goods, Specific Military Goods and Strategic Goods (SR 946.202.1)

MCC	Military Criminal Code, 13 June 1927 (SR 321.0)
PSSA	Federal Act on the Provision of Private Security Services Abroad, 27 September 2013 (SR 935.41)
OPSA	Ordinance on Private Security Services provided Abroad, 24 June 2015 (SR 935.411)
SCC	Swiss Criminal Code, 21 December 1937 (SR 311.0)
VIM	VIM Ordinance on the export and transfer of goods for internet and cellular monitoring (946.202.3)
WMA	Federal Act on War Material, 13 December 1996 (SR 514.51)
WMO	Ordinance on War Material, 25 February 1998 (SR 514.511)

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