



**UNODC**

United Nations Office on Drugs and Crime

# **Country Review Report of Switzerland**

Review by Algeria and Finland of the implementation by  
Switzerland of articles 15 – 42 of  
Chapter III. “Criminalization and law enforcement” and  
articles 44 – 50 of Chapter IV. “International cooperation” of  
the United Nations Convention against Corruption for  
the review cycle 2010 - 2015

## **I. Introduction**

1. The Conference of the States Parties to the United Nations Convention against Corruption was established pursuant to article 63 of the Convention to, inter alia, promote and review the implementation of the Convention.
2. In accordance with article 63, paragraph 7, of the Convention, the Conference established at its third session, held in Doha from 9 to 13 November 2009, the Mechanism for the Review of Implementation of the Convention. The Mechanism was established also pursuant to article 4, paragraph 1, of the Convention, which states that States parties shall carry out their obligations under the Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and of non-intervention in the domestic affairs of other States.
3. The Review Mechanism is an intergovernmental process whose overall goal is to assist States parties in implementing the Convention.
4. The review process is based on the terms of reference of the Review Mechanism.

## **II. Process**

5. The following review of the implementation by Switzerland of the Convention is based on the completed response to the comprehensive self-assessment checklist received from Switzerland, and any supplementary information provided in accordance with paragraph 27 of the terms of reference of the Review Mechanism and the outcome of the constructive dialogue between the governmental experts from Algeria and Finland, by means of telephone conferences and e-mail exchanges and involving Mr. Mokhtar Lakhdari, Judge of the Supreme Court, Director of Criminal Affairs and Procedures for Pardon, Ministry of Justice (Algeria); Mr. Tahar Abdellaoui, Judge of the Supreme Court, Director of Legal and Judicial Cooperation, Ministry of Justice (Algeria); Mr. Matti Joutsen, Director, European Institute for Crime Prevention and Control, affiliated with the United Nations (HEUNI) (representing the Ministry of Justice) (Finland); and Mr. Kaarle J. Lehmus Inspector General of the Police, Ministry of Interior/National Police Board (Finland). The staff members from the Secretariat were Mr. Panagiotis Papadimitriou and Ms. Maria Adomeit.

6. A country visit, agreed to by Switzerland, was conducted in Bern, Switzerland, from 27 February to 2 March 2012. During the on-site visit, meetings were held with the Federal Department of Foreign Affairs, Federal Department of Justice and Police, Swiss Federal Audit Office, Federal Department of Finance, Federal Department of Economic Affairs, Money-Laundering Reporting Office Switzerland, Swiss Financial Market Supervisory Authority, Federal Prosecution Service, as well as with representatives of the private sector, civil society and academia.

## **III. Executive summary**

### ***INTRODUCTION***

### The legal system of Switzerland

*The State of Switzerland is based on the principle of federalism and has 26 cantons. Each canton has its own constitution and legislation. Cantons exercise all rights and prerogatives that are not vested in the Confederation.*

*International treaties ratified by the Federal Council form an integral part of Swiss domestic law and are applicable from the time of their entry into force without need to be incorporated in the internal legal system through the adoption of a special law. The Federal Constitution requires the Confederation and the cantons to abide by international law, but supremacy of international law over domestic law is not guaranteed in all circumstances. The Federal Supreme Court of Switzerland and authors accept in principle the primacy of public international law over domestic law, but admit some exceptions.*

*Switzerland has signed the United Nations Convention against Corruption (the Convention) on 10 December 2003 and has ratified it on 24 September 2009. The Convention entered into force on 24 October 2009.*

*Executive power rests with the Federal Council, a collegial government composed of seven councillors elected by the Federal Parliament for four years. Legislative power is exercised by a bicameral parliament, composed of the Council of States and the National Council. The Federal Supreme Court is the country's highest judicial authority and guarantees uniform interpretation and application of federal law as well as respect of the Federal Constitution.*

*Major reforms in criminal matters have been introduced recently in Switzerland. A new Code of Criminal Procedure, in force since 1 January 2011, unified the procedural provisions in effect at the cantonal and federal level. The new code has, among others, abolished the function of the investigative judge. The prosecutor is now in sole charge of conducting investigations and preliminary proceedings until trial.*

### Overview of the anti-corruption legal and institutional framework

*Switzerland is a party to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business, and to the Criminal Law Convention on Corruption of the Council of Europe and the Additional Protocol to this Convention.*

*Internally, Switzerland has established an Interdepartmental (interministerial) Working Group on Combating Corruption (IDWG Corruption). The IDWG Corruption is primarily active in the area of prevention of corruption, and has no functions related to administrative or criminal investigation.*

*The Federal Prosecution Service (MPC) acts as the prosecutor's office for the Confederation. It is competent to prosecute and investigate specific offences directed against the federal government. It also performs tasks in the field of mutual legal assistance.*

*The Money Laundering Reporting Office Switzerland (MROS) plays a key role in the efforts of the Confederation to combat corruption. As a financial intelligence unit, it collects and analyzes suspicious facts reported by financial intermediaries and, in case of reasonable suspicion, forwards such information to prosecutorial authorities of the Confederation.*

## **IMPLEMENTATION OF CHAPTERS III AND IV**

### **Criminalization and Law Enforcement (Chapter III)**

### Main findings and observations

#### *Bribery offences; trading in influence (articles 15, 16, 18, 21)*

*The Swiss Criminal Code criminalizes the offences dealt with in articles 15 and 16 of the Convention in a manner which is very largely in compliance with the Convention. It was noted that provisions on bribery aiming at obtaining the performance of acts that would not be contrary to the duties of national public officials do not cover all instances of undue advantages for third parties.*

*Although indirect bribery is not expressly criminalized, it was noted that the interpretation and application of relevant domestic provisions permit to prosecute bribery committed through intermediaries. Moreover, Swiss legislation does not criminalize explicitly undue advantages granted to foreign public officials for conduct that does not constitute acts contrary to their duties; it should however be considered consistent with the requirements of the Convention to the extent that it fulfils the conditions of the interpretative notes on the scope of article 16, paragraph 1, of the Convention.*

*Bribery in the private sector is criminalized under Swiss law as an instance of unfair competition. Proceedings against alleged offenders may be initiated only following a complaint from those entitled to institute civil proceedings, including competitors and the State authorities. Switzerland is currently examining the advisability of eliminating the requirement of a prior complaint.*

*Switzerland has considered criminalizing trading in influence, but eventually decided against this option, and prefers to punish the acts covered by the Convention under the provisions on active and passive bribery, which seem not to cover all cases of trading in influence. Switzerland expressed its intention to reconsider the possibility of criminalizing trading in influence directly and should be encouraged to do so.*

#### *Laundering of proceeds of crime; concealment (articles 23, 24)*

*Swiss law criminalizes acts "aimed at obstructing the identification of the origin, the tracing or the confiscation of assets which [the alleged perpetrator] knows or ought to believe originate from a felony", i.e. from an offence punishable with imprisonment for more than three years. Although the four offences set out in Convention are not formally introduced in Swiss law, criminalization under Swiss law and its implementation by the courts adequately covers all cases of money laundering listed in the Convention. Under Swiss law, the perpetrator of the predicate offence may be convicted of laundering the proceeds of his or her offence, and money laundering is also prosecuted when the offence was committed abroad, provided that it is also punishable in the State where it was committed.*

*Swiss criminal law punishes concealment when the goods concealed were acquired by way of an offence against property and also, in some cases, under the provisions on money laundering.*

#### *Embezzlement; abuse of functions; illicit enrichment (articles 17, 19, 20,22)*

*Embezzlement, misappropriation in the public sector, abuse of functions and embezzlement of property in the private sector are established as offences in a manner consistent with the provisions of the Convention. The provision criminalizing embezzlement in the private sector has a wider scope than article 22 of the Convention, in that its scope is not limited to acts committed in the course of economic, financial or commercial activities.*

*Switzerland does not recognize the legal concept of illicit enrichment and does not criminalize solely an increase in wealth that the public official cannot justify.*

#### *Obstruction of justice (article 25)*

*Although it does not include specific provisions in the context of the fight against corruption, Swiss law contains a series of offences permitting prosecution of all punishable acts listed in article 25 paragraph (a) of the Convention. The possibility to prosecute, for instigation to perjury or for offences against physical integrity, persons that would resort to physical force, threats or intimidation meets the requirements of the Convention. Swiss criminal law criminalizes adequately the acts listed in paragraph (b) of article 25.*

#### *Liability of legal persons (article 26)*

*Swiss law provides for the criminal liability of legal persons as well as civil and administrative measures against legal persons involved in offences established in accordance with the Convention. The subsidiary criminal liability of a company for all felonies and misdemeanours is established when an offence can not be attributed to a particular individual due to lack of business organization. In addition, the primary criminal responsibility of a company is provided for in connection with certain serious offences, including bribery of domestic and foreign public official and money laundering, regardless of the criminal liability of natural persons, if the company failed to take all reasonable and necessary organizational measures to prevent the offence.*

#### *Participation and attempt (article 27)*

*Participation in the offences established in accordance with the Convention and attempt to commit the same is punishable under the general provisions of the Criminal Code. Preparatory acts of these offences are not punished under Swiss law.*

#### *Prosecution, adjudication and sanctions; cooperation with law enforcement authorities (articles 30, 37)*

*Sanctions under Swiss law for offences established in accordance with the Convention appear to take into account the gravity of such offences.*

*Parliamentarians, members of the Federal Council and judges elected by Parliament enjoy a relative immunity for acts in connection with their functions or activities, which may be waived by the Parliament. An authorization of the Federal Department of Justice and Police is required to prosecute federal employees for offences related to their activity or their office.*

*The exercise of criminal prosecution in Switzerland is governed by the principle of the mandatory nature of prosecution. Restrictive and limited application of the principle of*

*prosecutorial discretion is also possible but would depend solely on considerations of criminal law.*

*Non-custodial measures that could replace pre-trial detention under Swiss law are consistent with the Convention. Similarly, parole for persons convicted takes into account, among other considerations, the gravity of the offence.*

*Under the Law on the Personnel of the Confederation, public officials accused of corruption-related offences may be suspended with or without the withholding of salary. If the measures taken prove to be unjustified, the public official will be reinstated to all his or her rights. Public officials may also be fired in case of a serious breach of their professional duties and, if convicted for corruption in the exercise of their profession, they may be disqualified from practicing their profession for a period of from six months to five years.*

*Cooperation of the accused with the authorities is taken into account in Switzerland only as a mitigating circumstance at the stage of the determination of the sentence by criminal courts. Swiss law does not grant immunity from prosecution nor does it allow advance assurances of more favourable treatment.*

*Protection of witnesses and reporting persons (articles 32, 33)*

*Swiss legislation contains measures such as ensuring the anonymity of the protected person involved in criminal proceedings or the alteration of his or her voice when giving testimony. These measures may be ordered by the court or the prosecutor. In addition, the new law on extra-procedural protection of witnesses, which shall come into force on 1 January 2013, provides for protection measures outside the proceedings, such as personal protection, temporary accommodation in a safe place, or the provision of an assumed identity.*

*Measures to protect reporting persons employed in the public sector are satisfactory. Switzerland indicated that it considered adopting measures to reinforce protection against abusive treatment for private sector employees reporting information implicating their employers.*

*Freezing, seizing and confiscation; bank secrecy (articles 31, 40)*

*Swiss criminal law regulates the seizure, by ordinance of the prosecutor, and the confiscation, by court decision, of property and assets, in compliance with the provisions of Article 31 of the Convention. The judge may order the substitution of property to be confiscated by a compensatory claim of the State of an equivalent amount, which would include, where applicable, the yield of the assets to be confiscated. The system set up for the administration of seized property provides, among others, for investing the seized assets with the endorsement of the prosecutor, if necessary.*

*Specific provisions of the Criminal Code (Articles 72 and Article 260-third) provide that property and assets belonging to a person who has participated in or supported a criminal organization are presumed, until proven otherwise, as being at the disposal of the organization and therefore subject to confiscation. Moreover, the federal law on the restitution of assets of illicit origin (LRAI) of politically exposed persons, in force since 1 February 2011, allows the confiscation, under certain conditions and without a criminal conviction, of assets presumed to be of illicit origin belonging to the persons concerned.*

*Further, non-conviction based confiscation of a specific person is permitted, under certain conditions, under Swiss law.*

*The provisions of Swiss law on bank secrecy have been the subject of considerable discussion at the national and international level. The confidential relationship between the bank and the customer falls within the scope of article 13 of the Federal Constitution on respect for private and family life. However, bank secrecy can be lifted at the request of a judicial authority when information or evidence is needed in a criminal case.*

*Statute of limitations; criminal record (articles 29, 41)*

*The limitation period under Swiss legislation of fifteen years (for sentence of imprisonment of more than three years), and seven years (other sentences) for less serious offences, is considered sufficiently long. However, Swiss legislation does not contain provisions on the extension or suspension of the limitation period when the alleged offender has evaded justice; the rules on interruption and suspension of the statute of limitations were repealed because deemed too complex, while the periods of limitation were extended.*

*Jurisdiction (article 42)*

*In general, the jurisdiction of Swiss courts is established in compliance with the provisions of the Convention. Swiss law recognizes the active and passive personality principle of jurisdiction.*

*Consequences of acts of corruption; compensation for damage (articles 34, 35)*

*The consequences of corruption and compensation for damage are governed by the general rules of civil law on nullity of contracts as well as contract law in a manner consistent with the requirements of the Convention.*

*Specialized authorities and inter-agency coordination (articles 36, 38, 39)*

*In Switzerland, a number of members of the Prosecutor's Office are specialized in combating corruption. The Prosecutor's Office administers itself and has sufficient independence, reinforced by the appointment of the Federal Prosecutor by the Parliament, and its resources appear to be adequate. The Prosecutor's Office works closely with accountants and financial analysts.*

*Federal employees have an obligation to report to the prosecutorial authorities, their hierarchy or the Swiss Federal Audit Office, all offences prosecuted without the need of a prior complaint that they have been apprised of in the performance of their duties. Also, very close cooperation was noted between law enforcement authorities, the financial intelligence unit (MROS) and financial institutions.*

### **Successes and good practices**

*Wide scope of the criminalization of bribery of foreign public officials and officials of public international organizations. Swiss legislation goes beyond the requirements of the Convention by criminalizing the offence even when those implicated do not intend to obtain or retain business or other undue advantage in relation to the conduct of international business.*

*Mens rea of the offence of laundering of proceeds of crime and efficiency of legislation. The fact that the laundering of proceeds of crime is criminalized not only when the alleged offender knew but also when he or she ought to have known that the assets laundered resulted from a crime should be noted as good practice. Also, the large number of prosecutions and convictions for laundering of proceeds of crime reported (over 1,000 convictions from 2003 to 2009) demonstrates the effectiveness of the Swiss legislation on the matter. Similarly, the criminalization of self-laundering should also be noted as good practice.*

*Criminal liability of legal persons. Prosecutions and sanctions imposed on major companies for corruption demonstrates that the criminal liability of legal persons is implemented efficiently in Switzerland.*

*Measures to facilitate the confiscation and return of assets. Non-conviction based confiscation of a specific person is recognized in Swiss law. Moreover, the system set up by Switzerland for freezing assets diverted by politically exposed persons has resulted in considerable successes in terms of seizure, confiscation and return of proceeds of crime.*

*The law on extra-procedural protection of witnesses. The framework put in place by this law contains a wide range of measures that are expected to afford effective protection to the persons concerned.*

*The independence of the Prosecutor's Office and its close cooperation with professionals specialised in combating corruption.*

*The extent and quality of cooperation and coordination between public authorities and the private sector.*

*The effective and efficient mechanisms allowing the lifting of banking secrecy in an expedient manner.*

### **Challenges and recommendations**

*Switzerland is encouraged to criminalize all instances of granting, soliciting or accepting undue advantages in favour of third parties to obtain acts that are not contrary to the duties of national public officials or do not depend on their discretion. With regard to the criminalization of bribery of foreign public officials, although consistency of Swiss legislation with the requirements of the Convention is not questioned, Switzerland is encouraged to consider criminalizing explicitly advantages granted for acts that are not contrary to the duties of the foreign public official concerned.*

*The requirement of a prior complaint in order to prosecute bribery in the private sector might leave forms of corruption unpunished. Switzerland is encouraged to continue considering eliminating this requirement.*

*The criminalization of the laundering of proceeds of offences punishable by imprisonment for more than three years covers all acts that States are required by the Convention to establish as criminal offences, with the exception of some attenuated variants of bribery of national public officials. Switzerland is encouraged to criminalize the laundering of the proceeds of all offences established in accordance with the Convention and variants thereof.*



*Switzerland is also encouraged to consider enacting provisions on the extension or suspension of the limitation period when the alleged offender has evaded justice and encouraged to consider immunity from prosecution under paragraph (3) of article 37 for defendants who substantially cooperate with investigations.*

#### ***International cooperation (Chapter IV)***

##### ***Main findings and observations***

*Extradition; transfer of sentenced persons; transfer of criminal proceedings (articles 44, 45, 47)*

*The basic provisions on extradition and mutual legal assistance are to be found in the Federal Act on International Mutual Assistance in Criminal Matters of 20 March 1981 (IMAC). The Act is relatively comprehensive, and has been amended several times in order to respond to emerging needs. The principle of dual criminality applies to extradition (art. 35(1)(a) IMAC).*

*Switzerland may extradite even without the existence of a treaty or convention. Switzerland is a party to several multilateral conventions that deal with extradition, in particular the European Extradition Treaty of 13 December 1957 and its two additional protocols. Switzerland is also a party to several bilateral extradition treaties.*

*Articles 32 through 38 IMAC set out the conditions for extradition. These are in line with the provisions of UNCAC.*

*Swiss law contains several provisions that expedite extradition procedures. Among these is article 12(2) IMAC, which curtails the possibility of suspension of extradition procedures. Article 17a establishes a general obligation to execute requests promptly and rule without delay. The Federal Office may intervene if unjustified delays are encountered.*

*Articles 85 to 87 of IMAC set out the principle of “aut dedere, aut judicare”; if extradition is not granted, Switzerland may exercise its jurisdiction instead of the requesting State. Parallel provisions govern extradition for the purpose of enforcement of a sentence.*

*IMAC also governs the procedure to be followed in transferring the punishment for an offence, and in transferring the enforcement of a foreign criminal judgment. Article 8(a) IMAC provides that the Federal Council may conclude bilateral agreements with foreign States regarding the transfer of convicted persons. Switzerland has entered into a number of bilateral and multilateral agreements that provide for the possibility of transfer of persons sentenced to imprisonment. Among these are the Convention on the Transfer of Sentenced Persons (1983) and its Additional Protocol (1997), and bilateral agreements with Barbados, Cuba, Morocco, Paraguay and Thailand.*

*Pursuant to the general principle contained in article 85 IMAC, criminal proceedings may be transferred to Switzerland. The transfer of criminal proceedings is regulated in detail in articles 86 – 93 IMAC. Bilateral treaties with Austria, Germany and Italy allow direct transfer of criminal prosecution, which according to the Swiss authorities has resulted in rapid proceedings.*

### *Mutual legal assistance (article 46)*

*IMAC provides for a wide range of mutual legal assistance. In addition, Switzerland has entered into a large number of bilateral and multilateral agreements or arrangements on mutual legal assistance, including the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959 and its Second Additional Protocol, the Criminal Law Convention on Corruption of 27 January 1999, and bilateral agreements with Algeria, Australia, Brazil, Canada, Ecuador, Egypt, India, Japan, Mexico, Peru, the Philippines and the United States of America. The Federal Office of Justice has been designated as the Swiss central authority for purposes of extradition and mutual legal assistance. Switzerland does not require that requests be submitted through diplomatic channels. The average time for responding to a request is estimated to be between six and twelve months.*

*Switzerland follows the international practice of granting requests requiring coercive measures only on condition of dual criminality. However, even in the absence of dual criminality, a request for assistance involving coercive measures (which according to Switzerland include search, seizure, production orders, handing over of records and documents) may be granted for the exoneration of a suspect or defendant. Requests for assistance that does not involve coercion will be executed even in absence of dual criminality as long as the grounds for refusal set out in articles 2 or 3 of IMAC do not apply.*

*The issue of fiscal offences has been an issue of interest in the context of Swiss international cooperation. Article 3(3) IMAC establishes the basic limit of cooperation in this regard: "A request shall not be granted if the subject of the proceeding is an offence which appears to be aimed at reducing fiscal duties or taxes or which violates regulations concerning currency, trade or economic policy." If the facts of the case are considered by the Swiss authorities as acts of corruption under the Convention, assistance may be given even if the case involves fiscal matters. This is also valid for extradition. The use of means of evidence, however, is subject to the principle of specialty.*

*The obligation for financial institutions to make documents available upon request of the prosecutor when evidence or information is needed in a criminal case applies equally in international cooperation, subject to the condition of dual criminality.*

*According to the basic provision in Swiss law (art. 80a IMAC), mutual legal assistance is to be executed in accordance with Swiss procedural law. However, art. 65 IMAC allows for the taking of testimony in accordance with the law of the requesting State, if the latter requests so, as long as this law is not incompatible with Swiss law or does not cause serious prejudice to the participants in the proceedings.*

### *Law enforcement cooperation; joint investigations; special investigative techniques (articles 48, 49, 50)*

*The legal basis for international law enforcement cooperation by Swiss authorities is the Federal Law on the Central Criminal Police Bureaux of the Confederation. The Swiss Criminal Code governs collaboration with INTERPOL as well as collaboration with Europol and the Schengen states.*

*The Swiss authorities engage in international law enforcement cooperation on several levels, including global (through Interpol), European (on the basis of the Schengen Agreement) and on the basis of the many bilateral and multilateral treaties. The centres for police and customs cooperation in Geneva and Chiasso contribute to facilitating the exchange of information. In addition, Swiss police officers stationed abroad and foreign liaison officers seconded to Switzerland contribute to the coordination between the authorities of the States parties concerned.*

*Switzerland has concluded bilateral agreements on police cooperation with Albania, Austria, Bosnia-Herzegovina, the Czech Republic, France, Germany, Hungary, Italy, Latvia, Liechtenstein, Romania, Serbia, Slovenia, the former Yugoslav Republic of Macedonia and the United States of America.*

*Further measures undertaken by the Swiss authorities to facilitate effective coordination include the expansion of the network of liaison officers and the possibility of forming working groups on analysis of offences based on bilateral agreements. In addition, bilateral agreements, including with Germany, allow for joint police training.*

*Some agreements on international cooperation in law enforcement allow for the formation of joint investigation teams. The agreement with the United States, for example, allows for the formation of joint investigation teams to counter terrorism and its financing.*

*With regard to special investigative techniques, the monitoring of post deliveries and telecommunications may, under certain conditions, be ordered in the investigation of certain offences, including corruption-related offences. Moreover, under certain conditions, the prosecution may use other technical means of surveillance, observation, and the monitoring of banking relationships. In the context of mutual legal assistance, the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, to which Switzerland is a party, includes provisions on cross-border observation, controlled delivery and joint investigative teams.*

#### *Successes and good practices*

*The principle of favourable treatment in international cooperation. Swiss jurisprudence has adapted the principle of favourable treatment to international cooperation (this principle is more widely known in connection with labour law and human rights law). In line with the principle, which has been developed on the basis of case law, Switzerland will interpret the provisions of international conventions such as UNCAC in a manner that is most favourable to international cooperation in judicial matters. This is an example of how policy and jurisprudence can promote international cooperation.*

*Simplified extradition on the basis of consent. Following the provisions of the European Extradition Treaty, article 54 IMAC provides for a simplified extradition procedure, within only a few days or even a few hours of the receipt of the request, in cases where the person whose extradition is requested consents to the extradition. According to the Swiss authorities, this simplified procedure is applied in somewhat over one half of the cases of extradition.*

*Return of assets. The statistics provided on assets seized in Switzerland and returned within the context of judicial assistance demonstrate the successes achieved in the matter. In recent years alone, several hundred million US dollars have been returned. Among the largest*

amounts returned recently were USD 40 million to Nigeria in 2006, and USD 74 million to Mexico in 2008.

*The reversal of burden of proof and the use of legal presumptions in the context of mutual legal assistance in connection with requests for the return of assets. On the basis of the provisions of the Criminal Code on the partial reversal of the burden of proof in connection with assets belonging to a person who has participated in or supported a criminal organization, the Swiss authorities have returned considerable sums to countries of origin. The Federal Law of 1 October 2010 on the restitution of assets of illicit origin of politically exposed persons makes possible, without a criminal conviction of the politically exposed person or his or her associates, to confiscate assets of illicit origin. Under certain conditions, the illicit origin of assets is assumed.*

*Provision of technical assistance in law enforcement. Switzerland has made experts available for the provision of technical assistance abroad. Switzerland has sent experts to assist developing countries in improving investigations and in better formulating requests for mutual legal assistance.*

### **Challenges and recommendations**

*It is noted that Switzerland has become a party to several treaties that include provisions on international cooperation in criminal matters. Switzerland is encouraged to continue to expand this network of treaties.*

*Given that the Swiss legislation appears to allow the Swiss authorities to charge the requesting State with the costs involved in the execution of a mutual legal assistance request, Switzerland is encouraged to ensure consent or prior consultation with the requesting State in all circumstances.*

### **TECHNICAL ASSISTANCE NEEDS**

*Switzerland has not reported technical assistance needs in the area of the fight against corruption and implementation of the Convention, and has noted that it frequently supports efforts aiming at facilitating the implementation of the Convention by other countries.*

## **IV. Implementation of the Convention**

### **A. Ratification of the Convention**

7. Switzerland signed the United Nations Convention against Corruption on 10 December 2003. The Convention was approved by the Federal Assembly on 20 March 2009, allowing Switzerland to deposit its instrument of ratification with the Secretary-General on 24 September 2009. The Convention entered into force in Switzerland on 24 October 2009.
8. In Switzerland, the ratification of the Convention was preceded by the ratification of the Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions in 2000, and accession to the Council of Europe Criminal Law Convention on Corruption

and the additional protocol thereto in 2006. Subsequent to the ratification of these instruments, Switzerland reported having had completely reformed the standards of the Criminal Code relating to corruption of domestic and foreign public officials as well as corruption in the private sector. Consequently, Switzerland reported that no further legislative changes to the Criminal Code were necessary in view of the ratification of the United Nations Convention against Corruption.

## **B. Legal system of Switzerland**

### **1. Incorporation of international instruments into domestic law**

9. The Swiss legal system is based on a monist conception of law, according to which public international law and domestic law form a sole legal system. Consequently, international treaties ratified by the Federal Council form part of Swiss domestic law and are applicable from the time of its entry into force without need for it to be incorporated in the internal legal system through the adoption of a special law. .
10. Article 5, paragraph 4 of the Federal Constitution requires the Confederation and the cantons to abide by international law. However, this does not imply that the supremacy of international law over domestic law is guaranteed in all circumstances. This provision does not resolve the potential conflict between a norm of international law and a norm of Swiss law. In such a case, the Federal Supreme Court of Switzerland and the majority of the authors accept in principle the primacy of international law, but admit some exceptions.

### **2. Federalism**

11. The State of Switzerland is based on the principle of federalism. The main feature of Swiss federalism is the recognition of the sovereignty of the cantons. According to article 3 of the Federal Constitution of the Swiss Confederation, the cantons are sovereign except to the extent that their sovereignty is limited by the Federal Constitution. They shall exercise all rights that are not vested in the Confederation.
12. In Switzerland, some fields of government activity fall within the general competence of the Confederation. Among them are foreign affairs, customs, monetary policy, postal and telecommunication services, the armed forces and legislation relating to nuclear energy. Other sectors, such as public education, religious worship, and social welfare, are exclusively within the competence of the cantons.
13. In other areas, the division of powers between the Confederation and the cantons is less clear-cut. In many cases, the Confederation legislates and the cantons implement the legislation. This is true for civil law, criminal law, social insurance and road traffic. In yet other areas, such as taxes and subsidies , legislative power is shared.
14. Switzerland has 26 cantons. Each canton has its own constitution and legislation. Legislative power in the cantons is exercised in principle by a unicameral parliament usually elected by proportional representation. Executive and administrative power is vested in a State council or executive council elected by the people for a specific period of time.

15. The cantons are sovereign with regard to organization of the courts. Cantons' judicial systems are usually headed by a supreme court, known as the Cantonal Court. According to article 86, paragraph 2, of the Federal Court Act of 17 June 2005, each canton must establish an "administrative court" for matters relating to the Confederation's public law.
16. Switzerland has about 2,500 communes ("municipalities"), which are the smallest political entity of the State. According to article 50 of the Federal Constitution, the autonomy of the communes shall be guaranteed in accordance with cantonal law.

### **3. Organization of federal institutions**

#### *(a) The Federal Council*

17. The Federal Council is a collegial government composed of seven members (councillors) who have equal powers. Each member is elected independently by the Federal Parliament for four years. He or she may be re-elected indefinitely. In practice, re-election is the rule, thus ensuring the continuity and stability of Swiss policy, particularly as neither the Federal Council nor any of its members may be deposed by Parliament. This principle is reflected in the saying, "the Federal Council yields, but is not deposed".
18. Each year, the Federal Assembly chooses one of the seven Federal Councillors as President of the Confederation. The President does not have any special powers. His or her main role is to chair meetings of the Government and to discharge representation duties.
19. Each Federal Councillor is the head of a department (ministry), whose interests he or she represents in the Government. As a collegial body, the Federal Council takes its decisions only by consensus or by a simple majority, and each member assumes responsibility for joint decisions.
20. The composition of the Federal Council represents a subtle linguistic, religious, regional and political balance. Since 1959, a political compromise known as the "magic formula" has ensured the country's four largest political parties a permanent place in the Federal Council.
21. The Federal Council exercises traditional executive functions. It performs several duties of governmental, administrative, but also legislative, nature. For example, it defines the goals of federal policy, enacts provisions to implement federal legislation, develops financial guidelines as well as the draft budget. The Federal Council is responsible for foreign affairs (subject to the prerogatives of the Federal Assembly), represents Switzerland in international relations, and is the guardian of external security, independence and neutrality of Switzerland. It also represents the Confederation vis-à-vis the Cantons. The Federal Council also ratifies the international treaties adopted by the Federal Chambers.

#### *(b) The Federal Assembly*

22. Switzerland has a bicameral parliamentary system. The Council of States and the National Council compose the Federal Assembly. The Council of States is composed of 46 deputies, two per canton, while six cantons, formerly referred to as "half-cantons", having

only one seat each. The National Council is composed of 200 deputies divided among the cantons in proportion to the size of their populations. Although the way the councillors are elected to the Council of States is decided by each canton, the members of the National Council are uniformly elected by proportional representation.

23. A parliamentary term of office lasts four years. The chambers hold four regular sessions each year. They hold separate sessions and deliberations, with some exceptions. Both chambers have the same prerogatives and no draft statute or ordinance is adopted unless approved in identically worded form by each of them. As the supreme body of the Confederation, and subject to the rights of the people and the cantons, the chambers enact legislation, establish the budget and adopt expenses. They also have the power to authorize the Federal Council to ratify international treaties.
24. The Federal Assembly, meeting in joint session, elects the Federal Councillors, the President and the Chancellor of the Confederation, the federal judges and, in time of war, the commander-in-chief of the armed forces. Moreover, it rules on jurisdictional disputes between the highest federal authorities and on petitions for pardon.
25. Since 1874, the Swiss Federal Constitution has provided for the right of optional referendum. Thus, if, within 100 days of the adoption of an act by the Federal Assembly, 50,000 valid signatures are collected from citizens who would like it to be submitted to popular approval, the act has to be voted on by the people and cannot enter into force unless a majority of the persons voting so decide. Such a vote must also be held if requested by at least eight cantons. Consequently, a federal law (with the exception of urgent federal laws) can only enter into force after the 100-day referendum period. The optional referendum procedure is applicable to international treaties which are not subject to denunciation and are concluded *sine die*, which provide for membership of an international organization, which contain important provisions that establish rules requiring the adoption of federal laws for their implementation or which entail multilateral unification of law. Constitutional amendments and membership of collective security organizations or supranational communities are subject in all cases to the dual consent of the people and the cantons, as is urgent federal legislation which has no constitutional basis and whose validity exceeds one year (mandatory referendum according to art. 140 par. 1 of the Constitution). The latter legislation must be put to the vote within one year after its adoption by the Federal Assembly.
26. Since 1891, the Constitution has also recognized the right of proposal by popular initiative of total or partial amendment of the Constitution. For this purpose, 100,000 citizens' signatures must be collected within a period of 18 months. The Parliament cannot prevent the submission of a popular initiative to the vote, but may declare an initiative to amend totally or partially the Constitution inadmissible or null and void if it does not meet the requirements of unity of form and of subject matter or breaches peremptory norms of international law. Since such an initiative can only relate to constitutional amendments, it must be approved both by the people and by the cantons to be adopted.

*(c) The Federal Supreme Court*

27. The Federal Supreme Court is the country's highest judicial authority. It guarantees respect for federal law not only in criminal, civil and administrative matters, but also in constitutional matters, to the extent that a remedy is available for violations of

constitutional rights. In ruling in last instance on the decisions of the cantonal courts referred to it, the Federal Supreme Court ensures uniform application and interpretation of federal legislation and guarantees respect of the Federal Constitution.

#### **4. Procedure, appeals and division of jurisdiction in criminal matters**

##### *(a) General Principles*

28. Reforms aimed at significantly altering criminal procedure and appeals recently came into force. The new Swiss Criminal Procedure Code (CPC) adopted on the basis of Article 123 paragraph 1 of the Constitution entered into force on 1 January 2011, replacing the 26 cantonal codes of criminal procedure and the federal law on criminal procedure by replacing the 26 cantonal codes of criminal procedure as well as existing federal law on criminal procedure. Subsequent to this reform, the cantons only have regulatory jurisdiction in limited areas of criminal procedure, including in offences committed in violation of cantonal criminal law.
29. Also, the CPC no longer provides for the sharing of the preliminary proceedings between the prosecutor and the investigative magistrate: The prosecutor alone conducts and directs investigations, indicts the accused and supports the charges before the courts. The significant prerogatives of the prosecutor are offset by the establishment of a court of coercive measures as well as by strengthening the rights of the defence. This concentration of powers is designed to make criminal prosecutions more effective and faster.
30. The new Criminal Procedure Code was preceded by a reform of the judiciary at the federal level. The Federal Court Law, adopted on 17 June 2005 and in force since 1 January 2007, simplifies appeals in civil, criminal and public law matters, providing for a sole legal remedy, the so-called “unified appeal”, for assessing all complaints, including those of a constitutional nature. According to article 78 of the Federal Court Law, such appeal in criminal matters is possible against any decision based on criminal law or procedure, with the exception of Swiss military penal law, as well as against rulings on civil claims considered simultaneously with the criminal case and rulings on the execution of punishments and measures. The appeal is directed against decisions taken by the cantonal authorities of last resort and the Federal Criminal Court.
31. In parallel with this legislative reform, a constitutional amendment led to the creation of a new Federal Criminal Court. Prior to this, criminal jurisdiction of the courts within the Confederation was shared among several sections of the Federal Court through the Federal Assizes, the Criminal Division, the Federal Criminal Court, the Court of Criminal Cassation and the Special Court of Criminal Cassation. The Federal Criminal Court (first instance) is independent of the Federal Court (Constitution 191a.). The constitutional amendment allowed the establishment of a federal criminal court (first instance) independent of the Federal Court. The Federal Criminal Court is the ordinary criminal court of the Confederation in cases under federal jurisdiction.

##### *(b) Principles of criminal procedure under Swiss law*



32. The Swiss criminal procedure is divided into two phases: the investigation phase and the trial phase. The investigation phase is inquisitorial. The trial stage is dominated by the adversarial principle. The new Code of Criminal Procedure and the Federal Law on the organization of criminal authorities have significantly modified the operating principles of the investigation phase, introducing a new role for the public prosecutor, assigning him with the entirety of criminal prosecution, from the initiation of proceedings to laying of charges before the court. The long process of investigation shared between the prosecution and the investigative judge has disappeared..The new legislation abolishes the function of investigative magistrate and assigns the conduct of the investigation, to the prosecutor alone.
33. In parallel with these changes, the adaptation of the organization of the federal criminal authorities to the new Code of Criminal Procedure which entered into force on 1 January 2011 has gradually been implemented. Parliament has opted for a strengthening of the guarantees of independence for the Federal Prosecution Service (MPC). Thus, oversight of the MPC has been entrusted to a newly created independent supervisory authority. This authority, elected by the Parliament, is composed of a representative of the Federal Supreme Court, a representative of the Federal Criminal Court, two lawyers practicing law by way of representing clients before courts and three experts.

*(c) Division of jurisdiction in criminal matters*

34. According to the new division of powers between the Confederation and the cantons for prosecuting criminal offences (Article 22 ff of the Criminal Procedure Code), prosecution is in principle the responsibility of the cantons. The Confederation has an exclusive jurisdiction over offences related to economic and financial crime, when acts of organized crime, financing of terrorism, corruption or money laundering are committed by officials of the federal government or against the Confederation, when the acts were to the larger extent committed abroad, or when the acts were committed in several cantons without the predominance of one of them. In cases of particularly complex economic crime, concurrent jurisdiction between the Confederation and the cantons is provided.

**5. Institutional framework of the fight against corruption**

35. Based on the recommendations of the Council of Europe as a result of the evaluation of Switzerland in the fight against corruption, the Federal Council, on 19 December 2008, mandated the Federal Department of Foreign Affairs to create an interdepartmental working group on combating corruption (Corruption IDWG). This is run by a committee composed of representatives of the Federal Department of Foreign Affairs (Division for Sectoral External Policies, Economic Affairs) the Federal Department of Economic Affairs (Secretariat of State for Economy, SECO), the Federal Department of Justice and Police (Federal Office for Justice, OFJ), the Federal Audit Office and the Federal Department of Finance (Federal Office of Personnel, OFPER), as well as the Federal Prosecution Service. To fulfill the mandate given to it by the Federal Council, the interdepartmental group actively involves in its work the cantons, municipalities, representatives of the economy and civil society, including both NGOs and the business community.
36. Law enforcement tasks for the Confederation are concentrated within The Federal Office of Police (Fedpol), established in 2000. The recent reorganization brought together in one

office all units performing police duties at the federal level, including the relevant offices for international police cooperation, judicial inquiry or reports relating to money laundering, such as the Money Laundering Reporting Office Switzerland (MLRO). The latter plays a key role in the efforts of the Confederation to combat corruption. As a liaison office, it collects and analyzes suspicious facts reported by financial intermediaries and, in case of reasonable suspicion, forwards such information to law enforcement authorities of the Confederation. The Federal Office of Justice (FOJ) plays a key role in international cooperation through its units for extradition, mutual legal assistance and international treaties. These three units provide cooperation with foreign law enforcement or investigation authorities. The Federal Prosecution Service (MPC) acts as the prosecutor's office for the Confederation. It is competent to prosecute and investigate certain offences directed against the federal government (see above). It also performs tasks in the field of mutual legal assistance.

## **6. Earlier assessments of the Swiss anti-corruption measures**

37. The effectiveness of anti-corruption measures taken by Switzerland has been the subject of several assessments at the international level, following the ratification of international anti-corruption conventions, as well as at the national level.
38. Switzerland ratified the Council of Europe Criminal Law Convention on Corruption in 2006, thus becoming automatically a member of the Group of States against Corruption (GRECO). In this context, Switzerland was subject to an assessment process that resulted in a report adopted in 2008 with thirteen recommendations to Switzerland. In 2010, GRECO examined the information provided by Switzerland on the implementation of its recommendations and considered that Switzerland had satisfactorily implemented twelve of the thirteen recommendations. Action taken by Switzerland in response to the GRECO recommendations include the establishment of an independent supervisory authority for the Federal Prosecution Service, the setting of rules in the Ordinance on Swiss Federal Personnel for accepting gifts and ancillary activities, and the establishment of an Interdepartmental Working Group against corruption. During the third phase of the evaluation cycle, GRECO addressed eleven recommendations to Switzerland and invited the Swiss authorities to present a report on the implementation of such recommendations by April 2013.
39. In 2000, Switzerland ratified the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. In 2004, Switzerland underwent Phase 2 of the peer review process. The review focused on the practical arrangements for implementation of the Convention. The report with recommendations was adopted and published in 2004. Phase 3 of the review process focused on prosecutions and criminal penalties related to the bribery of foreign officials. The final evaluation of the Swiss report took place in December 2011 during the session of the Working Group on Corruption.
40. The Inter-departmental Working Group on the Fight against Corruption (IDWG) follows the implementation of legislation adopted in accordance with Swiss international obligations. Its first report entitled "Current status of activities against corruption in Switzerland and abroad" was published in April 2011.

## **7. Technical Assistance**

41. Switzerland reported that it does not require technical assistance in the context of the implementation of the provisions of the Convention against corruption under review. Switzerland regularly offers technical assistance and is involved in many partnerships aimed at facilitating the implementation of the Convention. Such technical assistance is provided in the areas of economic governance, and governance. The first component aims both to improve the functioning of economic policy and the development of rules of conduct for the private sector. The second component is broader, taking into account all aspects of governance and involving, in particular, non-state actors. Switzerland also provides bilateral assistance in connection to concrete case

## **C. Implementation of selected articles**

### **Chapter III. Criminalization and law enforcement**

#### **Article 15 Bribery of national public officials**

##### **Subparagraph (a)**

*Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:*

*(a) The promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties;*

##### **(a) Summary of information relevant to reviewing the implementation of the provision**

42. With regard to the concepts of public official, domestic or foreign, and official of a public international organization as defined in article 2 of the Convention, Switzerland stated that they find their equivalents at articles 110 paragraph 3 and 322-eighth paragraph 3 of the Criminal Code, which stipulate as follows:

Criminal Code  
Art. 110

3. Public officials are the officials and employees of a public administrative authority or of an authority for the administration of justice as well as persons who hold office temporarily or are employed temporarily by a public administrative authority or by an authority for the administration of justice or who carry out official functions temporarily.

Art. 322-eighth

3. Private individuals who fulfil official duties are subject to the same provisions as public officials.

43. Moreover, Switzerland indicated that the criminal laws on corruption mention - in addition to officials - members of a judicial or other authority, as being the objects of an act of corruption. This formulation includes all persons holding an executive or legislative

mandate. In addition, the Swiss Criminal Code covers institutional officials as people who hold the position of public official. Article 322-eighth paragraph 3 of the Criminal Code treats individuals who perform public duties as public officials. It is immaterial as to under which legal status a person performs tasks in the service of the community. What is decisive is that he or she accomplishes the tasks of the state, regardless of the nature of the contractual relation between the public sector and the individual concerned.

44. Switzerland cited the jurisprudence of the Swiss Federal Tribunal in order to better explain the concept of public official under Swiss law: ““The category of public officials under art. 110, para. 3 of the Criminal Code includes both public officials in the formal sense and public officials in the substantive sense. The former are public officials under public law and employees of a public authority, while in the case of the latter the legal form in which the individuals perform their activities within the public domain is irrelevant. The employee relationship may be governed by public or private law. What is critical is the purpose of the activities. When these are carried out for public purposes, their function is public and under criminal law the persons carrying them out are considered to be public officials [...].” Judgment of the Federal Court (ATF) 135 IV 198 (21.8.2009), consid. 3.3, p. 201, and ATF 6B\_921/2008 (21.8.2009), consid. 4.3 (translation).
45. The legislative provisions criminalizing bribery of national public officials are the following:.

#### Criminal Code

##### Article 322-third

###### 1. Bribery of Swiss public officials:

Active bribery: Any person who offers, promises or bestows to a member of a judicial or other authority, a public official, an officially-appointed expert, translator or interpreter, an arbitrator, or a member of the armed forces an undue advantage, for the benefit of one of them or of a third party, in order to cause that public official to carry out or to fail to carry out an act in connection with his official activity which is contrary to his duty or dependent on his discretion, shall be liable to a custodial sentence not exceeding five years or to a monetary penalty.

##### Article 322-fifth

Bestowing an advantage: Any person who offers, promises or bestows a member of a judicial or other authority, a public official, an officially-appointed expert, translator or interpreter, an arbitrator or a member of the armed forces an undue advantage in order that he carries out his official duties, shall be liable to a custodial sentence not exceeding three years or to a monetary penalty.

46. According to article 322-eighth paragraph 2 of the Criminal Code, advantages that are permitted under the regulations on the conduct of official duties as well as negligible advantages that are common social practice are not regarded as undue advantages. Switzerland explained that the advantages referred to in article 322-eighth of the Criminal Code are negligible advantages that present no danger of encouraging a public official to act in breach of his or her duties. They do not constitute a risk of dependence or unacceptable influence on the public official concerned. Switzerland gave the example of Christmas gifts, such as personal organizers or pens, and provided additional examples,

based on cases previously before the courts, to show that the “tolerance threshold” in Swiss law is low:

- An invitation to go to the circus is acceptable;
- Five invitations to a meal and the offer of several drinks are considered advantages that are not socially acceptable;
- The offering by a driver of around 10 francs to a police officer so that the latter will refrain from recording a traffic offence committed by the driver is unacceptable because such an act is intended to encourage the public official to engage in conduct that is in breach of his or her duties.

47. Switzerland has provided the following statistical data with regard to cases of active bribery of national public officials:

Number of convictions per year:

	2003	2004	2005	2006	2007	2008	2009	2010	2011	Total
322 <sup>-third</sup> PC	4	6	12	9	11	8	5	3	4	62
322 <sup>-fifth</sup> PC	1	--	--	--	--	--	--	--	--	1

Source: court record as at 16 August 2011

Number of criminal investigations underway:

322 <sup>-third</sup> PC	21
322 <sup>-fifth</sup> PC	2

Source: court record as at 16 August 2011

**(b) Observations on the implementation of the provision**

48. During the country visit, Switzerland explained that the interpretation of “public official” in Swiss legislation and in jurisprudence is made not only in terms of the employment relationship between the official and the public sector, but also in terms of the acts he or she is performing concretely: If these acts are normally carried out by the public authority, the person performing them is considered a public official in the material sense, even though his or her work relationship is governed by private law. Therefore, he or she is subject to the provisions of criminal law governing bribery of civil servants. Under this interpretation, the acts of employees of public companies that are active in the economic and business field will be covered if those employees have duties of public nature. This solution covers all public officials covered by the Convention.

49. It is observed that Swiss law does not mention expressly that offering, promising or giving an undue advantage to a public official will be punished whether committed directly or indirectly. However, the Message of the Federal Council of 21 September 2007 on the United Nations Convention against Corruption, which contains comments on the implementation of the Convention and the interpretation of relevant legislative provisions,

as well as the jurisprudence, confirm that active – and passive – bribery through intermediaries can be prosecuted.

50. Switzerland criminalizes by a separate provision (Art. 322-fifth of the Criminal Code) the offering, promising or giving of an undue advantage to perform acts that would not be contrary to the duties of the public official. It is observed that article 322-fifth does not cover expressly undue advantages given in favour of third parties, which are expressly mentioned in Article 322-third covering bribery of the public official in order to accomplish acts in breach of his/her duties or the law. In response to this observation, the Swiss authorities have noted that article 322-fifth covers undue advantages in favour of third parties, when the undue advantage benefits indirectly the public official, for example where the third party is the spouse or the child of the public official
51. Switzerland is very largely compliant with article 15 paragraph a of the Convention. In order to achieve full compliance, Switzerland is encouraged to adopt measures criminalizing all instances of promising, offering or giving of undue advantages in favour of third parties when the public officials perform acts that are not contrary to their duties or depend on their power of appreciation.

## **Article 15 Bribery of national public officials**

### **Subparagraph (b)**

*Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:*

*(b) The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.*

### **(a) Summary of information relevant to reviewing the implementation of the provision**

52. Switzerland referred to articles 322-fourth and 322-sixth of the Criminal Code that provide for passive bribery and acceptance of an undue advantage. With regard to the definition of public official in Swiss law, Switzerland referred to the analysis above under article 15 para. a.

53. The applicable legal provisions are:

#### **Article 322-fourth**

Passive bribery: Any person who as a member of a judicial or other authority, as a public official, officially-appointed expert, translator or interpreter, or as an arbitrator demands, secures the promise of or accepts an undue advantage for himself or for a third party in order that he or she carries out or fails to carry out an act in connection with his official activity which is contrary to his duty or dependent on his discretion, shall be liable to a custodial sentence not exceeding five years or to a monetary penalty.

Article 322-sixth

Acceptance of an advantage: Any person who as a member of a judicial or other authority, as a public official, officially-appointed expert, translator or interpreter, or as an arbitrator, demands, secures the promise of, or accepts an undue advantage in order that he or she carries out his official duties, shall be liable to a custodial sentence not exceeding three years or to a monetary penalty.

54. Switzerland clarified that although “military personnel” is not mentioned in articles 322 fourth and 322sixth, they are nevertheless subject to the Military Criminal Code which contains provisions similar to those of the Criminal Code. Passive bribery committed by military personnel is therefore punishable under Swiss criminal law. The military courts apply the Military Criminal Code and the Military Criminal Procedure Code, as well as the provisions of ordinary criminal law for matters not expressly regulated in the Military Criminal Code.

55. Swiss Military Criminal Code, art. 142:

Any person who solicits, invites a promise of, or accepts an undue advantage, in his favour or in favour of a third party, for the performance or omission of an act related to his service that is contrary to his duties or depends on his/her discretion shall be punished with imprisonment of five years or a fine.

56. Swiss Military Criminal Code, art. 143:

1. Any person who solicits, invites a promise of, or accepts an undue advantage to fulfil his duties shall be punished with imprisonment of three years or a fine.  
2. The offence will be subject to disciplinary sanctions if it is not serious.

57. Switzerland provided the following example of a case of bribery relating to articles 322-third, -fourth and -sixth of the Criminal Code:

A, a federal official, decided to take advantage of his position which included the purchasing powers in a polytechnic school (school L), a public institution, to promote businesses belonging to his family and to obtain from them in exchange financial benefits in the form of cash benefits (commissions) or in kind (materials, equipment, labour). Taking advantage of such conduct, A obtained, from 1985 to 2002, benefits which, during the police investigation, he estimated at a total of SF 270,000.

In 1985, A suggested to B that he would give work to his company (sanitation), on behalf of the school L, on condition that B paid a percentage of the price of its services. B accepted the offer and paid A regularly, until his company went bankrupt, commissions up to 10% of invoices paid by the school. B estimated the sums he paid to A at SF 140,000.

H had a company selling industrial bakery equipment, and H assumed responsibility as its representative in French-speaking Switzerland. H met A in 1988 as part of his business—he had contacts with school L where he had obtained various machine orders. In 1996, A gave him to understand that if he wished to obtain new contracts for his company, he must “make a gesture.” Fearing that if he did not comply, he would not be able to sell new equipment to school L, H gave in to this threat and, on three occasions in 1996, he asked his management to write checks to people as requested by A, named CC and DD. Thus H caused to be paid SF 3,850 in August 1996, SF 4,500 in January 1997 and SF 1,000 (or

2,000) in November 2002. H claims to have been unaware that A was the real recipient of these benefits and believed that they were for O, an association. In fact, it was A who cashed these amounts via the above-named intermediaries.

A was found guilty by the Federal Criminal Court of repeated passive bribery (article 322-fourth of the Criminal Code), accepting a benefit (article 322-sixth of the Criminal Code), repeated mismanagement of public interests (article 314 of the Criminal Code) and incitement to forgery (article 251 of the Criminal Code). This decision was upheld by the Federal Supreme Court. B was convicted of repeated active bribery (article 322-third of the Criminal Code). H was acquitted of the granting of a benefit (article 322-fifth of the Criminal Code), in the absence of proof that he knew he was favouring a public official (benefit granted to a third party).

*Judgment of the Federal Supreme Criminal Court SK.2005.10 of 20 February 2006 and Federal Supreme Court decision 6S.180/2006 of 14 July 2006.*

58. Switzerland provided the following statistical data on cases of passive bribery of national public officials:

Number of convictions per year:

	2003	2004	2005	2006	2007	2008	2009	2010	2011	Total
322 <sup>fourth</sup> PC	--	1	1	2	4	2	5	1	--	16
322 <sup>sixth</sup> PC	1	1	--	1	1	--	1	1	--	6

Source: court record as at 16 August 2011-11-14

Number of criminal investigations underway:

322 <sup>fourth</sup> PC	9
322 <sup>sixth</sup> PC	--

Source: court record as at 16 August 2011-11-14

**(b) Observations on the implementation of the provision**

59. It is noted that also in the provisions criminalizing passive bribery, Swiss law does not expressly mention that the solicitation or acceptance of an undue advantage by a public official or a military should be punished whether committed directly or indirectly. However, as noted above, the Message of 21 September 2007 and jurisprudence confirm that passive bribery committed through intermediaries can be prosecuted.

60. Switzerland criminalizes by separate provisions the acceptance or solicitation of an undue advantage to perform acts that would not be contrary to the duties of the public official (art. 322sixth of the Criminal Code) or the military (art. 143 of the Military Criminal Code). It is noted that these provisions do not cover undue advantages given in favour of third parties, which are expressly mentioned in articles 322-fourth of the Criminal Code



and 142 of the Military Criminal Code criminalizing passive bribery in order to accomplish acts in breach of the law or the duties of the persons concerned. The Swiss authorities noted that articles 322 sixth of the Criminal Code and article 143 of the Military Criminal Code only cover the situation where an undue advantage benefits indirectly the public official, for example where the third party is the spouse or the child of the public official.

61. Switzerland is very largely compliant with article 15 paragraph b of the Convention. Switzerland is encouraged to adopt measures to criminalize all instances of solicitation or acceptance of undue advantages in favour of third parties when the public officials perform acts that are not contrary to their duties or depend on their power of appreciation.

### **Article 16 Bribery of foreign public officials and officials of public international organizations**

*1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the promise, offering or giving to a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business.*

*2. Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the solicitation or acceptance by a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

62. Switzerland cited article 322-seventh paragraph 1 of the Criminal Code which covers bribery of foreign public officials. Article 322-seventh par. 1 provides as follows:

Article 322-seventh

#### **2. Corruption of foreign public officials:**

Any person who offers, promises or bestows to a person acting for a foreign state or international organization as a member of a judicial or other authority, a public official, an officially-appointed expert, translator or interpreter, an arbitrator, or a member of the armed forces with an undue advantage for the benefit of one of them or of a third party, in order that the person carries out or fails to carry out an act in connection with his official activities and which is contrary to his duties or dependent on his discretion,

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

63. Switzerland also mentioned the following court cases regarding bribery of foreign public officials:
64. By conviction order issued by the Prosecutor General of the Republic and Canton of Geneva of 2 December 2010, X, a Swiss national, was convicted for paying intermediaries cash commissions totalling CHF 109 100 (approximately EUR 90 000) so that foreign diplomatic representations would choose to stay in his establishments. When questioned by the Geneva law enforcement authorities, the defendant acknowledged having paid commissions to attract customers, while contending that the customers brought in by the commissions had not, in his opinion, been members of official representations. The prosecutor in the case rejected the defendant's contentions. X was sentenced by summary punishment order to a suspended fine of CHF 49 500 (approximately EUR 41 000), three years' probation and a fine of CHF 12 000 (approximately EUR 10 000). (cited in the OECD report)
65. In a summary punishment order issued by the Federal Prosecution Service on 22 November 2011, a subsidiary company (B) incorporated in Switzerland, acting for its parent company, A, was found guilty of not having taken all reasonable and necessary organisational measures to prevent the payment of bribes to foreign public officials in Latvia, Malaysia and Tunisia, in relation to conduct that took place following the entry into force of article 102 of the Swiss Criminal Code in October 2003. The company was sentenced to a fine of 2.5 million Swiss francs (CHF) and a compensatory penalty of CHF36.4 million, calculated on the basis of the profits earned by the entire group through the contracts involving bribery. The company was also ordered to pay procedural costs amounting to some CHF95,000.
66. In a decision issued the same day, the OAG considered that a conviction of the parent company, A, in addition to that of its subsidiary, B, was not justified, having noted that the investigation showed that A had made considerable efforts to develop the necessary regulations with a view to preventing the payment of illegal amounts, in particular bribes, in the context of its operations (A was nonetheless criticized for not having enforced these regulations with the requisite vigour); The decisions handed down on 22 November 2011 did not conclude the OAG's proceedings against B, as proceedings are still underway against both individuals suspected of passive bribery, and consultants. (cited in the OECD report)
67. A third case cited by Switzerland involved the payment of a bribe to a German police officer posted at the Basel border post for the purpose of obtaining a stamp on a form declaring departure from Switzerland. The person was sentenced by a summary punishment of 8 August 2008 issued by the Canton of Basel-city to a fine of an amount of 450 Swiss francs with suspension of execution,

68. Switzerland provided statistical data on the number of convictions related to article 322-seventh of the Criminal Code per year and the number of criminal investigations underway.

Number of convictions per year:

	2003	2004	2005	2006	2007	2008	2009	2010	2011	Total
322 <sup>-seventh</sup> PC	--	--	--	--	--	--	1	1	1	3

Number of criminal investigations underway: 30

Sources: convictions: court record as at 16 August 2011; criminal investigations underway: Federal Prosecution Service

69. Switzerland informed that the convictions for felonies and misdemeanours as well as for pending criminal proceedings are recorded in Swiss criminal records. Sentences are counted once they enter into force.

**(b) Observations on the implementation of the article**

70. Under Swiss law, bribery of foreign public officials and officials of public international organizations is punishable even when the acts of the public official do not seek to obtain or retain business or other undue advantage in relation to the conduct of with international business. In this sense, the Swiss legislation goes beyond the requirements of the Convention, which should be noted as good practice.

71. Similarly, it is noted that Switzerland decided to criminalize passive bribery of foreign public officials and officials of public international organizations, although this is not a mandatory requirement under Article 16 paragraph 2 of the Convention.

72. Also, it is noted that unlike the provisions relating to bribery of national public officials, specifically the granting and acceptance of an advantage (article 322-fifth and 322-sixth), article 322seventh of the Criminal Code does not expressly cover facilitation payments, that is undue advantages granted in view of acts that are not contrary to the law or the duties of the officer concerned. During the country visit, the representatives of Switzerland explained that the concept of “act depending on the discretion of the foreign official” covers most cases of facilitation payments. However, it is noted that the provisions on bribery of national public officials cover not only acts contrary to the law or their duties and depending on the discretion of the official, but also acts not contrary to their duties (granting and accepting an advantage, art. 322-fifth and 322-sixth), which confirms that there is a difference in the incrimination of bribery of foreign public officials and officials of public international organizations. In this regard, Switzerland stressed that an interpretative note to article 16, paragraph 1 of the Convention (A/58/422/Add.1, para. 24) stipulates that “a statute that defined the offence in terms of payments ‘to induce a breach of the official’s duty’ could meet the standard set forth in each of these paragraphs, provided that it was understood that every public official had a duty to exercise judgement or discretion impartially and that this was an “autonomous”

definition not requiring proof of the law or regulations of the particular official's country or international organization".

73. To the extent that article 322seventh of the Criminal Code and its interpretation by the Courts meets the conditions set forth in this interpretative note, Switzerland can be considered in compliance with article 16 paragraph 1 of the Convention. Switzerland is encouraged to consider expanding the scope of the incrimination of bribery of foreign public officials in order to expressly criminalize granting undue advantages to obtain acts that are not contrary to their duties or depend on their power of appreciation.

**(c) Successes and good practices**

74. The fact that Swiss legislation law criminalizes bribery of foreign public officials and officials of public international organizations even when they do not seek to obtain or retain business or other undue advantage in relation to the conduct of with international business, thus going beyond the requirements of the Convention, should be noted as a good practice.

**Article 17 Embezzlement, misappropriation or other diversion of property by a public official**

*Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally, the embezzlement, misappropriation or other diversion by a public official for his or her benefit or for the benefit of another person or entity, of any property, public or private funds or securities or any other thing of value entrusted to the public official by virtue of his or her position.*

**(a) Summary of information relevant to reviewing the implementation of the article**

75. In Swiss criminal law, there are several offences that might correspond to the criminal acts as defined in the Convention. Article 138 paragraph 1 of the Criminal Code on misappropriation punishes those who appropriate for themselves a moveable item for the purpose of illicit enrichment or who use for their own benefit assets with which they have been entrusted. When such a person acts as a member of an authority or an official the penalty is increased as per article 138 paragraph 2 of the Criminal Code. Article 314 of the Criminal Code on mismanagement of the public interest may also be taken into consideration when a public official damages by a legal transaction the public interests he or she had the task to protect, in order to obtain an improper advantage. Alternatively, article 158 of the Criminal Code on mismanagement can be applied.

76. The applicable legal provisions are:

Criminal Code

Art. 138 - Misappropriation

1. Any person who for his own or another's illicit gain appropriates moveable property belonging to another but entrusted to him, any person who makes unlawful use of financial assets entrusted to him for his own or another's benefit, shall be liable to a custodial sentence not exceeding five years or to a monetary penalty.

Misappropriation to the detriment of a relative or family member is prosecuted only on complaint.

2. Any person who commits the foregoing offence in his capacity as a member of a public authority, or as a public official, guardian, adviser, professional asset manager, or in the practice of a profession or a trade or the execution of a commercial transaction for which he has been authorised by a public authority, shall be liable to a custodial sentence not exceeding ten years or to a monetary penalty.

#### Art. 158 - Mismanagement

1. Any person who by law, an official order, a legal act or authorisation granted to him, has been entrusted with the management of the property of another or the supervision of such management, and in the course of and in breach of his duties causes or permits that other person to sustain financial loss shall be liable to a custodial sentence not exceeding three years or to a monetary penalty.

Any person who acts in the same manner in his capacity as the manager of a business but without specific instructions shall be liable to the same penalty.

If the offender acts with a view to securing an unlawful financial gain for himself or another, a custodial sentence of from one to five years may be imposed.

2. Any person who, with a view to securing an unlawful gain for himself or another, abuses the authority granted to him by statute, an official order or a legal transaction to act on behalf of another and as a result causes that other person to sustain financial loss shall be liable to a custodial sentence not exceeding five years or to a monetary penalty.

3. Criminal mismanagement to the detriment of a relative or family member is prosecuted only on complaint.

#### Art. 314 - Misconduct in public office

Any member of an authority or public official who, in the course of a legal transaction and with a view to obtaining an unlawful advantage for himself or another, damages the public interests that he has a duty to safeguard shall be liable to a custodial sentence not exceeding five years or to a monetary penalty. A custodial sentence must be combined with a monetary penalty.

77. Switzerland provided examples of cases relating to articles 314 and 138 point 2 of the Criminal Code:

In the case cited at paragraph 58 above, A was also convicted, according to article 314 of the Criminal Code, of mismanagement of public interest for having exercised his power in law or fact and his influence in order to get Y (contractor) paid by the school L the amount of SF 1,950, where this amount did not match the price of the work but was intended to give him an unfair advantage.

X, employed by the City of Zurich was responsible for the maintenance and renovation of buildings in the city. He had a particular task to verify invoices from suppliers and contractors for payment by the municipality. Between November 1989 and May 1995, X acquired goods on behalf of the city he used for personal purposes. The Federal Supreme Court upheld the cantonal decision that X was guilty of, inter alia, repeated and aggravated misappropriation within the meaning of article 138 point 2 of the Criminal Code (act committed by an official). Federal Court decision of 19 October 2003, 6S.262/2003 is available at

**(b) Observations on the implementation of the article**

78. Switzerland is in compliance with Article 17 of the Convention. Misappropriation by a member of a public authority or a public official (section 138 para 2 of the Criminal Code) and the mismanagement of public interests meet satisfactorily the requirements of the article under consideration.

**Article 18 Trading in influence**

*Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:*

*(a) The promise, offering or giving to a public official or any other person, directly or indirectly, of an undue advantage in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party an undue advantage for the original instigator of the act or for any other person;*

*(b) The solicitation or acceptance by a public official or any other person, directly or indirectly, of an undue advantage for himself or herself or for another person in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party an undue advantage.*

**(a) Summary of information relevant to reviewing the implementation of the article**

79. Switzerland reported that it was in partial compliance with article 18, subparagraph (a) of the Convention. Switzerland noted that the Criminal Code covers part of the conduct covered by article 12 of the Convention of the Council of Europe and article 18 of the Convention under review. Switzerland added that the legislator wanted to focus on the most dangerous acts, especially those that undermine public confidence in public administration, justice and the authorities in general. Therefore, Swiss law in force focuses on the behaviour of the last link in the chain, namely the public official, by expanding the scope of the Criminal Code (bribery in the narrow sense of articles 322-third and 322-fourth of the Criminal Code) to cases of acceptance or granting of benefits (articles 322-fourth and 322-sixth of the Criminal Code).

80. Switzerland further clarified that although, formally, the Criminal Code does not provide for an offence entitled "Trading in Influence", some severe cases of trading in influence are punishable under Art. 322-third to 322-seventh of the Criminal Code.

81. According to the information provided by Switzerland, when the intermediary is a public official, if he or she accepts an advantage of some kind in return for exerting influence on a third party who is also in public office, he or she is guilty of “passive bribery” or bribe-taking (art. 322-fourth of the Criminal Code), or even acceptance of an undue advantage (art. 322-sixth of the Criminal Code). The person offering the advantage is punishable under art. 322-third (active bribery or bribe-giving) or art. 322-fifth (granting of an undue advantage) of the Criminal Code. However, the advantage accorded or offered must be related to the public office of the intermediary. In other words, an offence is constituted whenever a public official solicits or is granted an undue advantage by an individual with the aim of inciting the official to abuse his or her influence over another public official or member of a public authority, provided that such influence derives from his or her public functions.
82. If the intermediary is not a public official, the offence of bribery is only applicable in certain cases. In particular, where the public official to be influenced takes part in and accepts the “deal”, the offence of bribery will in most cases be applicable. For instance, depending on the content of the agreement among the various parties, the third party will be guilty of active bribery (or instigating active bribery), the public official of passive bribery and the intermediary of active bribery (or incitement or complicity). Where the person promising the advantage agrees with the intermediary that the latter will bribe an official directly, but the intermediary does not do so, this would constitute attempted instigation of active bribery, which is punishable under article 24, al. 2 of the Criminal Code.
83. Switzerland has repeatedly considered criminalizing trading in influence but did not do so, preferring the path of prevention and establishing rules of professional ethics. During the country visit, Swiss officials stated that specifically criminalizing trading in influence will be again considered in the future.

**(b) Observations on the implementation of the article**

84. It is noted that Swiss law does not provide for the offence of trading in influence as described in the Convention. Switzerland stated that although criminalizing trading in influence has been considered, this path was not followed. During the country visit, the Swiss officials reported that one of the considerations taken into account in rejecting the criminalization of the offence was the difficulty of distinguishing trading in influence from socially acceptable forms of pressure, such as lobbying. They added that the issue will be revisited in the future. Having considered the criminalization of the offence, Switzerland must be deemed in compliance with the article under review.
85. Although the solutions adopted by Swiss law appear to allow, in some cases, the prosecution of perpetrators of trading in influence as envisaged by the Convention, in other cases, such as where, at the same time, the intermediary is not a public official and does not engage in bribery but instead in other forms of undue influence, it doesn't seem possible to initiate a prosecution. It is therefore believed that the Swiss penal system would benefit from being supplemented by criminalizing trading in influence directly. Switzerland is therefore encouraged to continue considering criminalization of trading in influence, directly and expressly, to avoid gray areas and to be able to provide the widest measure of mutual legal assistance at the request of countries requesting it in the context of investigations and prosecution for trading in influence as covered in the Convention. In this regard, Switzerland underlined that it only faced a very small number of challenges in

the area of international cooperation, as the conduct that could constitute trading in influence is very often accompanied by other punishable acts, which permit providing legal assistance. Indeed, in order to grant legal assistance, it is sufficient that one offence is committed in accordance with Swiss law.

## **Article 19 Abuse of Functions**

*Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the abuse of functions or position, that is, the performance of or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself or for another person or entity.*

### **(a) Summary of information relevant to reviewing the implementation of the article**

86. Switzerland cited article 312 of the Criminal Code.

Criminal Code

Art. 312 - Abuse of public office

Any member of an authority or a public official who abuses his official powers in order to secure an unlawful advantage for himself or another or to cause prejudice to another shall be liable to a custodial sentence not exceeding five years or to a monetary penalty.

### **(b) Observations on the implementation of the article**

87. The cited provision (article 312 of the Criminal Code) does not expressly refer to the situation where abuse of functions is committed by failure to perform an act (omission). However, Switzerland clarified that abuse of functions by omission may also be covered by article 312 of the Criminal Code if a public official's failure to act breaches a duty to act. Moreover, according to the general rule of Swiss criminal law, a felony or a misdemeanour may also be committed through passive behaviour contrary to a duty to act (art. 11 of the Criminal Code). Switzerland is therefore in compliance with the article under review.

## **Article 20 Illicit Enrichment**

*Subject to its constitution and the fundamental principles of its legal system, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income.*

### **(a) Summary of information relevant to reviewing the implementation of the article**



88. Switzerland reported that, like other European countries, it does not have the legal concept of illicit enrichment and does not criminalize the sole increase in wealth that a public official cannot justify, which would require the reversal of the burden of proof.
89. However, article 260-third of the Swiss Criminal Code establishes the partial reversal of the burden of proof in the context of assets belonging to a person who has participated in or supported a criminal organization. As per article 72 of the Criminal Code, these assets are presumed, until proven otherwise, as being at the disposal of the organization and are therefore subject to confiscation. The prosecuting authority must still prove that the defendant's prior conduct is punishable (membership in or support for the criminal organization).
90. The Federal law of 1<sup>st</sup> October 2010 on the restitution of assets of illicit origin of politically exposed persons (Law on the restitution of assets of illicit origin, LRAI) also recognizes a similar principle. This law allows, without a criminal conviction of the politically exposed person or his associates, the confiscation of assets of illicit origin. Under certain conditions, the illicit origin of assets is assumed.
91. The cited legal provisions are:

#### Criminal Code

##### Art. 72 - Forfeiture of the assets of a criminal organization

The court shall order the forfeiture of all assets that are subject to the power of disposal of a criminal organisation. In the case of the assets of a person who participates in or supports a criminal organisation (Art. 260-third), it is presumed that the assets are subject to the power of disposal of the organisation until the contrary is proven.

##### Art. 260-third - Criminal organization:

1. Any person who participates in an organisation, the structure and personal composition of which is kept secret and which pursues the objective of committing crimes of violence or securing a financial gain by criminal means, or any person who supports such an organisation in its criminal activities, shall be liable to a custodial sentence not exceeding five years or to a monetary penalty.
2. The court shall have the discretion to mitigate the penalty imposed (Art. 48a) if the offender makes an effort to foil the criminal activities of the organisation.
3. The foregoing penalties also apply to any person who commits the offence outside Switzerland provided the organisation carries out or intends to carry out its criminal activities wholly or partly in Switzerland. article 3 paragraph 2 applies.

#### Law of Recovery of Illicit Assets

##### Art. 6 - Presumption of illegality

- 1 The assets of illicit origin is presumed if the following conditions are met:
  - a. the wealth of the person who has disposal over the assets has been subject to an excessive increase in relation to the exercise of the public service of the politically exposed person;
  - b. the degree of corruption of the State of origin of the politically exposed person in question was known to be high during his time in public office.
- 2 The presumption is rebutted if the legality of the acquisition of the assets is demonstrated on the balance of probabilities.

**(b) Observations on the implementation of the article**

92. Switzerland does not criminalize illicit enrichment, which is not a mandatory provision of the Convention. This notwithstanding, Swiss law contains provisions allowing the reversal of the burden of proof regarding the lawful origin of goods acquired by a criminal organization, which can lead to confiscation.
93. Moreover, the law on restitution of illicit assets allows the confiscation of assets based on a presumption of illicit origin similar to the provision of Article 20 of the Convention. However, this law only applies to foreign politically exposed persons, and only if the degree of corruption of the State of origin or the person in question is notoriously high. The scope of the law seems therefore limited.
94. Given the non-mandatory nature of this provision and the measures taken by Switzerland, Switzerland shall be considered in compliance with article 20 of the Convention.

**Article 21 Bribery in the private sector**

*Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally in the course of economic, financial or commercial activities:*

*(a) The promise, offering or giving, directly or indirectly, of an undue advantage to any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting;*

*(b) The solicitation or acceptance, directly or indirectly, of an undue advantage by any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting.*

**(a) Summary of information relevant to reviewing the implementation of the article**

95. Switzerland cited articles 4a paragraph 1 let. a. and 23 of the Federal Law against Unfair Competition (LCD).
96. The cited legal provisions are the following:

Federal Law against Unfair Competition

Art. 4a - Active and passive bribery:

1. A person acts unfairly when:

- a) he offers, promises or gives an unfair advantage to an employee, partner, agent or other officer of a private-sector third parties, in favour of that person or to a third party, for the performance or the omission of an act in relation to his professional or commercial activity that is contrary to his duties or depends upon his discretion;
- b) as an employee, partner, agent or other auxiliary of a private-sector third party seeks, seeks the promise of or accepts in his favour or in favour of another, an undue advantage for the performance or omission of an act in relation to his professional or commercial

activity that is contrary to his duties or depends on his discretion.  
2 Advantages agreed by contract as well as those of minor importance that are consistent with social norms are not undue.

**Art 23 - Unfair competition:**

1. Whoever intentionally makes himself liable for unfair competition within the meaning of Sections 3, 4, 4a, 5 or 6 shall be liable, on complaint, to imprisonment of a maximum of three years or a fine.

2. A complaint may be lodged by anyone entitled to institute civil proceedings under Sections 9 and 10.

97. Switzerland reported that there have been no convictions related to the above mentioned articles.

**(b) Observations on the implementation of the article**

98. The elements of the offence provided for in Article 4a of the Federal Law against Unfair Competition match those of the offence under section 21 of the Convention, except the indirect commission of the act which, although not specifically mentioned in the relevant article of the law, is covered by it just like in the case of bribery of public officials. Moreover, although it is commendable to see unfair competition equated with corruption in the private sector, the requirement of a prior complaint appears to narrow the scope of the offence.

99. During the country visit, the reviewers were informed that the scope of potential plaintiffs is relatively broad, including competitors of the alleged offender and the State. The reviewers were also informed that in surveys conducted at the cantonal level, the prosecutors reported that there have been no cases where proceedings have not been initiated or charges dropped for lack of complaint. However, the lack of convictions for corruption in the private sector might lead to think that the requirement of a prior complaint may leave forms of corruption unpunished. The reviewers note that during the country visit, Swiss officials expressed the intention of Switzerland to consider withdrawing this requirement.

100. Given the non-mandatory nature of this provision, Switzerland shall be considered in compliance with the Convention. This notwithstanding, the reviewers welcome the fact that Switzerland is currently considering the possible elimination of the requirement of prior complaint, as they believe that this would secure punishment of more cases of bribery in the private sector.

**Article 22 Embezzlement of property in the private sector**

*Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally in the course of economic, financial or commercial activities, embezzlement by a person who directs or works, in any capacity, in a private sector entity of any property, private funds or securities or any other thing of value entrusted to him or her by virtue of his or her position*

**(a) Summary of information relevant to reviewing the implementation of the article**

101. Switzerland referred to article 138 of the Criminal Code, cited above in connection to the review of article 17 of the Convention, and to the cases illustrating implementation of this provision.

**(b) Observations on the implementation of the article**

102. Article 138 of the Criminal Code is broader than article 22 of the Convention because it is not confined to economic, financial and commercial activities. In this sense, its scope is broader than that of the Convention. Hence Switzerland is in compliance with the article under review, which is not a mandatory provision.

**Article 23 Laundering of proceeds of crime**

**Subparagraph 1 (a) (i)**

*1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:*

- (a) (i) The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;*
- (ii) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime;*
- (b) Subject to the basic concepts of its legal system:*
  - (i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime;*
  - (ii) Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.*

**(a) Summary of information relevant to reviewing the implementation of the provisions**

103. Switzerland reported that it was one of the first countries to introduce the offence of money laundering into its criminal law in the sense of an offence of obstructing the administration of justice. The nature of the offence does not include all behaviours formally covered by the Convention, but the concept of obstruction covers the various acts under the Convention.

104. The relevant legal provision is article 305-second of the Criminal Code.

Art. 305-second - Money laundering:

1. Any person who carries out an act that is aimed at obstructing the identification of the origin, the tracing or the confiscation of assets which he knows or ought to believe originate from a felony, shall be liable to a custodial sentence not exceeding three years or to a monetary penalty.

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

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

a. acts as a member of a criminal organisation;

b. acts as a member of a group that has been formed for the purpose of the continued conduct of money laundering activities

c. achieves a large turnover or substantial profit through commercial money laundering.

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

105. Switzerland explained that the concept of obstruction of article 305-second of the Criminal Code covers all acts listed in section 23 subsection 1 paragraph a and paragraph b, subparagraph i, that is the conversion and transfer (Article 23 paragraph a, subparagraph i), concealment and disguise (Article 23, paragraph a, subparagraph ii) and the acquisition, possession or use of property (Article 23, paragraph b, subparagraph i).

106. Switzerland also reported that there have been several court cases related to laundering of proceeds of crime. Article 305-second par. 2 let. a refers to the concept of criminal organisation within the meaning of art. 260-third of the Criminal Code, cited above (paragraph 92), where the notion is defined..

107. With regard to the acts referred to in letter ii of subparagraph b of paragraph 1, Switzerland stated that these are punishable under the general provisions of Swiss law on participation, attempt (Art. 22 and 23 of the Criminal Code), instigation (article 24 of the Criminal Code) and complicity (Article 25 of the Criminal Code), which apply without exception to money laundering offences. These provisions are listed below in the section devoted to the review of article 27 of the Convention.

108. Statistical data on the overall number of cases under article 305-second of the Criminal Code was provided:

Number of convictions (enforceable judgments) for money-laundering (art. 305 bis of the Criminal Code) per year:

2003	2004	2005	2006	2007	2008	2009	Total
149	142	139	148	159	191	184	1112

Source: Swiss Federal Statistical Office, taken from the website of the Office on 30 January 2012

109. It is noted that the system that Switzerland uses for data collection produces statistics by article of the law. Therefore, it is not possible to provide statistics by paragraph or element of the law or predicate offence.

**(b) Observations on the implementation of the provisions**

110. Although the Convention against Corruption provides for four offences of laundering of proceeds of crime, the notion of obstruction to the identification of the origin, the tracing or the confiscation of assets adopted in Switzerland and its application by the courts covers satisfactorily all cases. During the country visit, the examples given by Swiss officials convinced the reviewers that the Swiss approach adequately punishes money laundering. The only reservation concerns the criminalization of possession of property by a holder who knows, when he or she receives them, that it results from an offence, but this seems rather hypothetical, as acts of concealment would occur sooner or later.
111. It is noted that Swiss law criminalizes the acts covered not only when the perpetrator knows that the assets in question are the proceeds of crimes, but also when he or she ought to have known the same, thus going beyond the requirements of the Convention concerning the mens rea.
112. It is also noted that Swiss tribunals have rendered a significant number of convictions in cases of laundering proceeds of crime. This important jurisprudence allowed not only to define the concept of obstruction, but also shows the efficiency of the provisions in force. Switzerland is in compliance with this provision.

**Article 23 Laundering of proceeds of crime**

**Paragraph 2**

*2. For purposes of implementing or applying paragraph 1 of this article:*

*(a) Each State Party shall seek to apply paragraph 1 of this article to the widest range of predicate offences;*

*(b) Each State Party shall include as predicate offences at a minimum a comprehensive range of criminal offences established in accordance with this Convention;*

*(c) For the purposes of subparagraph (b) above, predicate offences shall include offences committed both within and outside the jurisdiction of the State Party in question. However, offences committed outside the jurisdiction of a State Party shall constitute predicate offences only when the relevant conduct is a criminal offence under the domestic law of the State where it is committed and would be a criminal offence under the domestic law of the State Party implementing or applying this article had it been committed there;*

*(d) Each State Party shall furnish copies of its laws that give effect to this article and of any subsequent changes to such laws or a description thereof to the Secretary-General of the United Nations;*

*(e) If required by fundamental principles of the domestic law of a State Party, it may be provided that the offences set forth in paragraph 1 of this article do not apply to the persons who committed the predicate offence.*

**(a) Summary of information relevant to reviewing the implementation of the provision**

113. With regard to the implementation of subparagraphs a and b of paragraph 2, Switzerland stated that in line with article 305-second of the Criminal Code, an act may only be punishable under the provisions on money laundering if the assets in question are the proceeds of a felony, i.e. an offence punishable by imprisonment for more than 3 years (article 10 par. 2 of the Criminal Code distinguishes felonies and misdemeanours depending on the severity of the sanction for the offence provided for in the law). Switzerland noted that in Swiss law, there are hundreds of offences falling within that definition. Switzerland added that, all acts that the Convention requires States Parties to criminalize, and which form the core of the Convention, are punished as felonies under Swiss law and may therefore constitute a predicate offence to money laundering. These include article 15 on bribery of national public officials; article 16 on bribery of foreign public officials and officials of public international organizations; article 17 on embezzlement, misappropriation and other diversion of property by a public official; and article 25 on obstruction of justice).
114. With regard to subparagraph c, Switzerland noted that under article 305-second of the Criminal Code, the offender is also punishable where the predicate offence was committed abroad, if the offence is also punishable in the State where it was committed.
115. With respect to article 23 par. 2 (d) Switzerland expressed its intention to furnish through the official channel to the Secretary-General of the United Nations a copy of its laws that give effect to article 23 of the Convention.
116. In addition, Switzerland stated that its domestic system does not contain fundamental principles such as those referred to in paragraph e of subsection 2. Under Swiss law, the perpetrator of the offence may be also convicted for money laundering.

**(b) Observations on the implementation of the article**

117. Swiss law punishes the laundering of proceeds of crime only where the predicate offence is considered a felony under Swiss law, i.e. if it is liable to imprisonment of more than 3 years. Although the majority of the offences established in accordance with the Convention are felonies, there are some exceptions, in particular some attenuated variants of bribery of national public officials, established by articles 322-fifth and 322-sixth of the Criminal Code, which criminalize the acceptance or granting of an undue advantage in view of acts which are not contrary to the duties of the official concerned. These offences are punishable with imprisonment for up to three years, and thus are not considered “felonies”. Accordingly, the laundering of proceeds of these offences does not seem to be criminalized in Swiss law. In this regard, Switzerland stated that all the acts that the Convention obliges States to establish as a criminal offence (and which constitute the core of the Convention, i.e. articles 15, 16, 17 et 25) are felonies under Swiss law, and may constitute a predicate offence to money-laundering (in particular articles 15 and 16), and that consequently Switzerland is fully in line with the spirit of the relevant provisions of the Convention that recommend to States to apply paragraph 1 of article 23 to the widest range of predicate offences.

118. It is observed that the solution adopted in Swiss law to criminalize self-laundering seems appropriate, since money laundering is a criminal conduct which is often complex and distinct from the predicate offence.

**(c) Successes and good practices**

119. The fact that Swiss law criminalizes laundering of proceeds of crime also when the perpetrator ought to have known that the assets in question are the proceeds of crimes, thus going beyond the requirements of the Convention concerning the mens rea, must be noted as a good practice,

120. The significant number of prosecutions and convictions in Switzerland in cases of laundering proceeds of crime (over 1000 convictions from 2003 through 2009), demonstrates the efficiency of Swiss legislation on the matter and should be regarded as a success.

121. The criminalization of self-laundering shall also be noted as a good practice.

**Article 24 Concealment**

*Without prejudice to the provisions of article 23 of this Convention, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally after the commission of any of the offences established in accordance with this Convention without having participated in such offences, the concealment or continued retention of property when the person involved knows that such property is the result of any of the offences established in accordance with this Convention.*

**(a) Summary of information relevant to reviewing the implementation of the provision**

122. Switzerland cited article 305-second of the Criminal Code, cited above in connection to the review of article 23 of the Convention, and article 160 of the Criminal Code on concealment, which punishes with imprisonment not exceeding five years or a fine “Any person who takes possession of, accepts as a gift or as the subject of a pledge, conceals, or assists in the disposal of goods which he knows or must believe to have been acquired by way of an offence against property”

123. Switzerland stated that the offence described in article 24 of the Convention has, in the light of Swiss law, the elements of the offence of money laundering (article 305-second of the Criminal Code) as well as the elements of the offence of the handling of stolen goods (article 160 of the Criminal Code). According to Switzerland, Swiss law largely covers the concept of handling within the meaning of article 24 of the Convention although some conduct may not be punishable under Swiss law. These include cases where the predicate offence does not constitute a crime within the meaning of article 305-second of the Criminal Code or an offence against property under article 160 of the Criminal Code.



124. Switzerland reported that the Swiss Parliament had considered an amendment to the Criminal Code to cover these cases but ultimately did not consider it necessary. Indeed, article 24 of the Convention is on the one hand, largely covered by Swiss law and on the other hand, it is formulated in a positive form.

**(b) Observations on the implementation of the provision**

125. Although a limited number of cases covered by the Convention do not seem to be covered by the criminalization of concealment under Swiss law, Switzerland is in compliance with its obligations under this provision, since it has considered an amendment of the Swiss Criminal Code in order to cover all situations that may arise.

**Article 25 Obstruction of Justice**

**Subparagraph (a)**

*Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:*

*(a) The use of physical force, threats or intimidation or the promise, offering or giving of an undue advantage to induce false testimony or to interfere in the giving of testimony or the production of evidence in a proceeding in relation to the commission of offences established in accordance with this Convention;*

**(a) Summary of information relevant to reviewing the implementation of the provision**

126. Switzerland reported that there are several offences in its criminal law that fall within the definition of obstruction of justice given in the Convention. Acts as defined in subparagraph (a) of article 25 fall within the provisions relating to serious crimes and offences against the administration of justice and in particular article 307 of the Criminal Code on perjury, perjury by an expert witness and false translation. According to the means used, it can also include serious crimes or offences against life and bodily integrity, as well as against freedom,. Acts as defined in subparagraph (b) of article 25 are themselves governed by article 285 of the Criminal Code on violence or menace against the authorities and officials.

127. The relevant legal provision is:

Criminal Code

Art. 307 - Perjury. Perjury by an expert witness. False translation

1 Any person who appears in judicial proceedings as a witness, expert witness, translator or interpreter and gives false evidence or provides a false report, a false expert opinion or a false translation in relation to the case shall be liable to a custodial sentence not exceeding five years or to a monetary penalty.

2 If the statement, report, expert opinion or translation is made on oath or affirmation, the penalty shall be a custodial sentence not exceeding five years or a monetary penalty of not less than 180 daily penalty units.

3 If the false statement relates to matters that are irrelevant to the judicial decision, the penalty shall be a monetary penalty not exceeding 180 daily penalty units.

**(b) Observations on the implementation of the provision**

128. It has been noted that the provisions of paragraph a of article 25 of the Convention do not seem to be taken into consideration by the Swiss legislation, which in Article 307 CP punishes intentional perjury and not the use physical force, threats or intimidation to induce false testimony. In response to this observation, Switzerland noted that depending on the means used, felonies and misdemeanours against life, physical integrity and freedom may also apply concurrently. Switzerland also noted that the person who uses physical force, threats or intimidation to obtain false testimony can be prosecuted as instigator. Lastly, Switzerland indicated that the Swiss legislation permits to prosecute every conduct envisaged by the provision under review.

129. Switzerland is in compliance with this provision.

**Article 25 Obstruction of Justice**

**Subparagraph (b)**

*Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:*

*(b) The use of physical force, threats or intimidation to interfere with the exercise of official duties by a justice or law enforcement official in relation to the commission of offences established in accordance with this Convention. Nothing in this subparagraph shall prejudice the right of States Parties to have legislation that protects other categories of public official.*

**(a) Summary of information relevant to reviewing the implementation of the provision**

130. Switzerland cited article 285 of the Criminal Code.

Art. 285 - Violence and threats against public authorities and public officials

1. Any person who by the use of violence or threats prevents an authority, one of its members or a public official from carrying out an official act, or coerces them to carry out such an act, or assaults them while they are carrying out such an act shall be liable to a custodial sentence not exceeding three years or to a monetary penalty.

Public officials also include employees of undertakings in terms of the Railways Act of 20 December 1957, the Passenger Transport Act of 20 March 2009, the Goods Transport Act of 19 December 2008 and the Federal Act of 18 February 1878 on the Administration of the Railway Police.

2. If the offence is committed by a mob, anyone who participates in the mob shall be liable to a custodial sentence not exceeding three years or to a monetary penalty.

Any participant who uses violence against persons or property shall be liable to a custodial sentence not exceeding three years or to a monetary penalty of not less than 30 daily penalty units.

**(b) Observations on the implementation of the provision**

131. It has been observed that the offence provided for in article 285 of the Criminal Code is generic and does not seem to provide specific protection to the public officials exposed to the risk of violence and intimidation because of their engagement in the fight against corruption. In response to this observation, Switzerland reported that the Swiss law does not provide for the protection of specific categories of public officials. Switzerland considered that article 285 of the Criminal Code is sufficiently severe (imprisonment of up to three years) and broad enough to cover all the possibilities set forth in the Convention
132. Switzerland is in compliance with this provision of the Convention, since article 285 of the Criminal Code, although general, appears to cover the possibilities listed in the provision under consideration, that is acts of physical force , threat or intimidation against justice or law enforcement officials in charge of corruption cases.

**Article 26 Liability of legal persons**

*1. Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in the offences established in accordance with this Convention.*

*2. Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative.*

*3. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences.*

*4. Each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.*

**(a) Summary of information relevant to reviewing the implementation of the article**

133. Switzerland cited article 102 paragraph 1 of the Swiss Criminal Code which establishes a general subsidiary criminal liability to an enterprise when an offence cannot be attributed to any particular individual determined due to lack of business organization. Switzerland noted that all offences under the Convention are covered by the subsidiary liability of the enterprise, since it applies to all crimes and offences. The enterprise may incur a fine of up to SF 5 million.
134. Switzerland also explained that article 102 of the Criminal Code is an attribution provision, based on a specific form of fault, namely inadequate organization. What is at stake is a form of negligence attributable to an enterprise. In the same way that intention and negligence are subjective conditions for attributing fault to a physical person, it can be said that “the culpable conduct” of an enterprise is constituted by inadequate organization.

135. As in the case of physical persons, once the fault (inadequate organization) has been established, the penalty imposed will depend on the gravity of the organizational inadequacy. For example, it should be possible to charge an enterprise with failure to put in place internal controls that might have prevented or detected sooner the culpable conduct of an employee in offering bribes to a public official in return for contracts.
136. Moreover, Switzerland reported that article 102 paragraph 2 of the Criminal Code provides for the primary criminal responsibility of an enterprise, regardless of the criminal liability of individuals, for certain categories of serious offences if it can be criticized for failing to take all reasonable and necessary organizational measures to prevent such an offence. The catalogue of offences includes active bribery of domestic public officials (article 322-third of the Criminal Code), active bribery of foreign public officials (article 322-seventh paragraph. 1 of the Criminal Code), the granting of a benefit (article 322-fifth of the Criminal Code), active bribery in the private sector (article 4a of the Law on Unfair Competition), participation in a criminal organization (article 260-third of the Criminal Code), the financing of terrorism (article 260-fifth of the Criminal Code) and money laundering (article 305-second of the Criminal Code). Switzerland noted that, by establishing the primary responsibility of companies involved in serious criminal offences as set out in the list of crimes under article 102 paragraph 2 of the Criminal Code, Swiss law meets the main requirements of the Convention since it punishes the legal person who has committed acts constituting the core of the convention, which are acts of corruption - in private or public - and acts of money laundering.
137. Switzerland added that in addition to the criminal liability of the enterprise, responsibility under administrative law provides for sanctions to prevent future damage, for example by withdrawing a licence or refusing to allow a company to do business in a particular field. Swiss law recognizes several mechanisms of this nature, which cannot, however, be applied indiscriminately to all companies and only extend to certain sectors of the market and the economy. Thus, it is possible to impose administrative sanctions on companies subject to supervision by the state. The federal oversight of financial markets may, for example, withdraw a licence from banks which no longer meet the conditions or have seriously violated their legal obligations. Companies and institutions that have an illegal or immoral purpose cannot acquire legal personality. They must be dissolved and their wealth accrues to the public purse. If the organization of a society has shortcomings and its legal situation is not resolved in a timely manner, the court may order its dissolution. Finally, there are civil law means and instruments for the liability of enterprises on whose account crimes were committed by a person who has a leading position in them or who has neglected his or her duties of supervision for an offence committed by a subordinate.

138. The applicable legal provision is:

Criminal Code

Art. 102 - Liability under the criminal law

1. If a felony or misdemeanour is committed in an undertaking in the exercise of commercial activities in accordance with the objects of the undertaking and if it is not possible to attribute this act to any specific natural person due to the inadequate organisation of the undertaking, then the felony or misdemeanour shall be attributed to the undertaking. In such cases, the undertaking shall be liable to a fine not exceeding 5 million francs.

2. If the offence committed falls under articles 260-third, 260-fifth, 305A, 322-third, 322-fifth or 322-seventh paragraph 1 or is an offence under article 4a paragraph 1 letter a of the Federal Law of 19 December 1986 on Unfair Competition, the undertaking shall be penalised irrespective of the criminal liability of any natural persons, provided the undertaking is responsible for failing to take all the reasonable organisational measures that were required in order to prevent such an offence.

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

4. Undertakings within the meaning of this title are:

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

**(b) Observations on the implementation of the article**

139. Switzerland was asked what would be the consequence in Swiss criminal law if the legal person had an active role in a criminal endeavour, and in particular if the legal person was created specifically to perform criminal activity such as money laundering. The Swiss officials replied that in such a case, it would be all the easier to hold the legal person criminally liable as its structure would have not only allowed but also promoted criminal acts. Switzerland has also noted that in this case the company would probably be dissolved.

140. During the country visit, the Swiss officials also indicated that sanctions applicable to legal persons specifically include administrative and civil law sanctions cited above (withdrawal of licence, dissolution of the company), as well as confiscation of assets or the publication of the judgment.

141. It is noted that although establishing criminal liability of legal persons is not mandatory under the Convention, Switzerland has done so and has even prosecuted and convicted large corporations. Switzerland made reference to two cases of jurisprudence, namely the conviction of a corporate body B, cited above (paragraph 66), and the conviction of a company owning a vehicle involved in excessive speeding. Other cases involving criminal proceedings against legal persons brought to the attention of examiners include the conviction of the Post for violation of the law against money laundering.

142. Corporate criminal liability is supplemented in Switzerland by administrative and civil sanctions. Switzerland is in compliance with this article.

**(c) Successes and good practices**

143. The establishment and, more importantly, the successful implementation of criminal liability of legal persons should be identified as good practice.

## **Article 27 Participation and attempt**

*1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, participation in any capacity such as an accomplice, assistant or instigator in an offence established in accordance with this Convention.*

*2. Each State Party may adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, any attempt to commit an offence established in accordance with this Convention.*

*3. Each State Party may adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, the preparation for an offence established in accordance with this Convention.*

### **(a) Summary of information relevant to reviewing the implementation of the article**

144. With regard to paragraph 1, Switzerland cited articles 24 to 26 of the Criminal Code, which govern participation. With regard to criminalization of attempt, Switzerland cited articles 22 and 23 of the Criminal Code.

145. As far as paragraph 3 of article 27 is concerned, Switzerland noted that Swiss law criminalizes the characteristic preparatory steps for certain serious crimes such as murder, the taking of hostages or genocide. However, the list under article 260-second of the Criminal Code does not include offences under the Convention. Even so, Swiss law punishes the attempt without exception for any serious crime or offence.

### **(b) Observations on the implementation of the article**

146. Participation and attempt are criminalized under the general provision of Swiss criminal law. The provisions cited apply to all offences, including offences established in accordance with the Convention. Switzerland is in compliance with the provisions of paragraphs 1 and 2 of Article 27.

147. Switzerland has not taken steps to criminalize the preparation of offences established in accordance with the Convention, and therefore does not apply the optional provision (article 27 paragraph 3) of the Convention.

## **Article 28 Knowledge, intent and purpose as elements of an offence**

*Knowledge, intent or purpose required as an element of an offence established in accordance with this Convention may be inferred from objective factual circumstances.*

### **(a) Summary of information relevant to reviewing the implementation of the article**

148. Article 12 paragraph 2 of the Criminal Code expressly provides for recklessness as a form of intention, not only for corruption but for the whole category of offences. According to case law on the offence of money laundering, what the defendant knows, or should have assumed, can be inferred from objective factual circumstances and is the basis for determining the state of mind of the defendant. This case law also applies more generally to establish the intention of the defendant for any offence. Moreover, since the Swiss legal system recognises the principle of free evaluation of evidence, the court is able to infer from objective factual circumstances the mens rea of the defendant as defined by the convention.

**(b) Observations on the implementation of the article**

149. Switzerland is in compliance with this article.

**Article 29 Statute of limitations**

*Each State Party shall, where appropriate, establish under its domestic law a long statute of limitations period in which to commence proceedings for any offence established in accordance with this Convention and establish a longer statute of limitations period or provide for the suspension of the statute of limitations where the alleged offender has evaded the administration of justice.*

**(a) Summary of information relevant to reviewing the implementation of the article**

150. Switzerland indicated that, as per article 97 of the Criminal Code, criminal proceedings shall be time-barred after fifteen years if the offence is punishable by imprisonment for more than three years, which is the case for offences that constitute the core of the Convention, and after seven years if it is punishable with a shorter term of imprisonment.

151. According to paragraph 3 of article 97, if a judgment is issued by a court of first instance before expiry of the limitation period, the time limit no longer applies.

**Observations on the implementation of the article**

152. It is noted that the majority of the offences established by Switzerland in accordance to the Convention are punishable by imprisonment for more than three years, and therefore criminal proceedings would be time-barred after fifteen years. The offences provided for in articles 322-fifth and 322-sixth are however punishable with imprisonment of three years, and therefore the limitation period is seven years.

153. The statute of limitation periods provided for in the Swiss legislation are considered sufficiently long. It is noticed that Swiss does not contain rules on the extension or suspension of the limitation period when the alleged offender has evaded the administration of justice prior to his or her hearing. In this regard, Switzerland indicated that it had eliminated the interruption and suspension of statute of limitation period, as this

system was deemed too complex, while in the same time it had extended the limitation periods.

## **Article 30 Prosecution, adjudication and sanctions**

### **Paragraph 1**

*1. Each State Party shall make the commission of an offence established in accordance with this Convention liable to sanctions that take into account the gravity of that offence.*

#### **(a) Summary of information relevant to reviewing the implementation of the provision**

154. In order to give an account of the sanctions linked to the offences established in accordance with the Convention, Switzerland referred to articles 322-third to 322-seventh, as well as 305-second and 102 of the Criminal Code and article 23 of the Federal Law against Unfair Competition, cited above.

155. According to Switzerland, active and passive bribery of Swiss and foreign public officials may lead to imprisonment not exceeding five years or a fine. The granting and acceptance of an advantage and private corruption are offences that can lead to a custodial sentence of three years or a fine. Money laundering is punishable by a custodial sentence of up to three years or by a fine and in severe cases (especially a criminal organization) by a custodial sentence of five years or a fine. In case of imprisonment, a fine may also be imposed. Similarly, the other offences covered by the Convention are, overwhelmingly, punishable by prison sentences of up to five years. Enterprises face a fine of up to five million francs.

156. The applicable legal provisions are cited in paragraphs 46, 54, 56, 57, 63, 77, 87, 97, 105 and 131 above.

#### **(b) Observations on the implementation of the provision**

157. It was initially observed that the sanctions provided by Swiss law did not seem dissuasive enough, given the short duration of custodial sentences and the possibility to replace them with a fine, thus excluding imprisonment. During the country visit, the Swiss officials noted that in general, in case of concurrent offences, prison sentences of five years can be raised to seven and a half years. They also noted that prohibitions to perform specific professional activities, imposed by bodies overseeing sectors of economic activities against white-collar offenders, are often more dissuasive than prison sentences, given their extremely negative impact on the reputation and careers of those implicated. Given the context and the European legal culture prevailing in Switzerland, sanctions under Swiss law appear to take into account the gravity of offences established in accordance to the Convention.



## **Article 30 Prosecution, adjudication and sanctions**

### **Paragraph 2**

*2. Each State Party shall take such measures as may be necessary to establish or maintain, in accordance with its legal system and constitutional principles, an appropriate balance between any immunities or jurisdictional privileges accorded to its public officials for the performance of their functions and the possibility, when necessary, of effectively investigating, prosecuting and adjudicating offences established in accordance with this Convention.*

#### **(a) Summary of information relevant to reviewing the implementation of the provision**

158. According to Swiss law, members of parliament, as well as government officials and judges elected by Parliament enjoy limited immunity for offences related to their duties or their parliamentary activities. The cantons may adopt rules along the same lines. This immunity is called qualified because there can still be a prosecution, but with the leave of two parliamentary committees appointed by the two Councils of Parliament. Between 2006 et 2011, three requests for lifting the immunity of parliamentarians were refused, whereas in a fourth case it was considered that the acts were not covered by immunity. None of the cited cases was connected to acts of corruption.

159. As for federal employees, authorization from the Federal Department of Justice and Police is required to open a criminal prosecution against them for offences related to their activity or their office. However, when there appears to be an offence and the legal requirements for criminal prosecution are met, authorization may only be refused in less serious cases and if, given all the circumstances, disciplinary action against the offender appears to be sufficient. During the country visit, the Swiss officials noted that no request for lifting the immunity for high-level officials have ever been denied by the Federal Department of Justice and Police. Similarly, the prosecutor has the power of judicial appeal against any refusal of permission to prosecute.

160. With regard to public officials (employees of the Confederation), the applicable provision is article 15 of the Federal Law on the responsibility of the Confederation for members of its entities and officials.

#### **(b) Observations on the implementation of the provision**

161. It is observed that the immunity granted to public officials does not hinder prosecuting and adjudicating offences established in accordance with the Convention. Switzerland is in compliance with this provision.

## **Article 30 Prosecution, adjudication and sanctions**

### **Paragraph 3**

*3. Each State Party shall endeavour to ensure that any discretionary legal powers under its domestic law relating to the prosecution of persons for offences*

*established in accordance with this Convention are exercised to maximize the effectiveness of law enforcement measures in respect of those offences and with due regard to the need to deter the commission of such offences.*

**(a) Summary of information relevant to reviewing the implementation of the provision**

162. As per articles 6 to 8 of the Swiss Code of Criminal Procedure, the exercise of criminal prosecution is governed by the principle of investigation and the mandatory nature of the prosecution. Swiss law does not provide a means of defence and exception to this, and the principle of prosecutorial discretion is limited and conditioned by the circumstances and specific and restrictive conditions. The exercise of discretion depends on criminal considerations not those of a political nature. Moreover, according to the Supreme Federal Court, legal safety and equality before the law call for the respect of the principle of legality, so that it can only be "shelved" exceptionally and in strictly defined cases.

163. More specifically, article 8 of the Code of Criminal Procedure provides for the following cases of waiver of criminal prosecution:

Code of Criminal Procedure

Art. 8 - Waiver of criminal prosecution

1 The prosecution service and the courts shall waive criminal prosecution where federal law provides, especially when the conditions referred to in art. 52, 53 and 54 of the Criminal Code are met.

2 They shall also waive undertaking a criminal prosecution if no overriding interest of the complainant opposes this and:

a. the offence is not likely to significantly influence the sentencing or the measure incurred by the defendant because of other offences imposed upon him;

b. the sentence which should be imposed in addition to a sentence under execution would likely be insignificant;

c. a penalty of equivalent duration imposed abroad should be imposed in addition to the penalty for the offence.

3 The prosecution and the courts may decide not to initiate criminal prosecution if no overriding interest of the complainant opposes this and the offence is already the subject of a prosecution by a foreign authority or the prosecution is transferred to such an authority.

4 In these cases, they issue an order of non-consideration or filing.

164. With regard to the possibility to waive prosecution for corruption offences under article 8 of the Code of Criminal Procedure, Switzerland stressed that this article provides for a measured application of the principle of discretionary prosecution and is strictly defined in the law. This principle is applicable under very specific and strict conditions, and depends on considerations of penal nature rather than political factors, thus not constituting a defence.

165. Switzerland provided an example of a case to illustrate how the legal provisions in force are applied to corruption cases. This example describes how it was decided not to impose a penalty (under article 322-eighth of the Criminal Code) in a case where the offence committed was deemed to be of negligible gravity:

A 79-year old man gave a Christmas present of around 10 Swiss francs to a police officer to induce him not to report some minor material damage resulting from a traffic accident. The Court found that the act was aimed at inciting the police officer to refrain from carrying out an act that belonged to his public duties and that the omission of the act was therefore in breach of his duties. The Court nevertheless considered that this was in all truth a trivial matter, since the legally protected good, i.e. the objective official activity, was not seriously compromised and the material damage caused by the accident was minor. The culpable activity of the offender was considered to be negligible, considering his age and clean record up to that point. Thus, despite the guilty verdict, the Court did not impose a penalty under article 52 of the Criminal Code. In this case, the offender was prosecuted, but the considerations that led the court not to impose a penalty under article 52 of the Criminal Code could apply, *mutatis mutandis*, in the context of article 8 of the Code of Criminal Procedure.

**(b) Observations on the implementation of the provision**

166. The information provided by Switzerland, in particular article 7 paragraph 1 of the Code of Criminal Procedure, show that in Switzerland there is no discretion of the public prosecutor with regard to prosecution. The explanations regarding the application of Article 8 of Code of Criminal Procedure are satisfactory. Switzerland is in compliance with the provision under review.

**Article 30 Prosecution, adjudication and sanctions**

**Paragraph 4**

*4. In the case of offences established in accordance with this Convention, each State Party shall take appropriate measures, in accordance with its domestic law and with due regard to the rights of the defence, to seek to ensure that conditions imposed in connection with decisions on release pending trial or appeal take into consideration the need to ensure the presence of the defendant at subsequent criminal proceedings.*

**(a) Summary of information relevant to reviewing the implementation of the provision**

167. Switzerland cited articles 237ff of the Code of Criminal Procedure, which provides for non-custodial measures that can replace pre-trial detention and take into account the need to ensure the defendant's presence in the pending criminal proceedings, such as the provision of collateral or the obligation to report regularly to an administrative service.

**(b) Observations on the implementation of the provision**

168. Switzerland is in compliance with the provision under review.

## **Article 30 Prosecution, adjudication and sanctions**

### **Paragraph 5**

*5. Each State Party shall take into account the gravity of the offences concerned when considering the eventuality of early release or parole of persons convicted of such offences.*

#### **(a) Summary of information relevant to reviewing the implementation of the provision**

169. Switzerland cited articles 86 to 89 of the Criminal Code and noted that these provisions permit the granting of early release or parole only in case the inmate has served at least two thirds of his or her sentence, his or her behaviour during the execution of the sentence does not indicate that early release should not be granted, and there is no reason to fear that he or she will commit new felonies or misdemeanours. These conditions take into account indirectly the gravity of the offence.

#### **(b) Observations on the implementation of the provision**

170. The provisions regulating early release and parole take into account the gravity of the sentence imposed and, thus, the gravity of the offence. Switzerland is in compliance with this provision.

## **Article 30 Prosecution, adjudication and sanctions**

### **Paragraph 6**

*6. Each State Party, to the extent consistent with the fundamental principles of its legal system, shall consider establishing procedures through which a public official accused of an offence established in accordance with this Convention may, where appropriate, be removed, suspended or reassigned by the appropriate authority, bearing in mind respect for the principle of the presumption of innocence.*

#### **(a) Summary of information relevant to reviewing the implementation of the provision**

171. Switzerland cited articles 12, 25 and 26 of the Law on the Personnel of the Confederation (LPers) and stated that, public officials of the Confederation may have their employment terminated at any time for breach of their obligations, either with respect for notice periods or immediately depending on the seriousness of the breach.

172. When breaches of professional obligations do not justify dismissal, Federal or Cantonal employers may take disciplinary action. Measures such as warning, reprimand or a change of work area might be considered for a negligent breach of duty; measures such as a reduction in salary, fines or a change in hours or place of work might be

considered in a violation as a result of serious or wilful negligence of duty. Disciplinary measures may only be imposed after an investigation.

173. It is also possible to suspend an employee when the proper execution of tasks is compromised. This is together with reduction or non-payment of salary. This measure is a provisional remedy taken before a final measure is imposed on that employee, e.g. termination of the employment relationship.

174. Moreover, article 67 of the Criminal Code provides that if the perpetrator has committed an offence in the exercise of a profession, trade or business and was sentenced for the offence to a prison sentence of more than six months or a fine that consists of more than 180 day-fines, the court may prohibit all or part of such activity or similar activities for a period of six months to five years if there are grounds to fear further abuse. This new regulatory regime can prohibit any professional activity, including, for example, that of director or officer of a legal person.

**(b) Observations on the implementation of the provision**

175. In addition to disciplinary sanctions imposed on public officials of the Confederation for breach of duties and obligations which are substantiated following an investigation, the Personnel Act of the Confederation provides in article 26 for the possibility of adopting provisional measures against public officials, in case the proper performance of their tasks is compromised. Charges for corruption could be interpreted as affecting the proper performance of public duties. Available provisional measures are not exhaustively listed, but the suspension of the employment relationship and the reduction or withholding of pay is specifically mentioned in the law as examples. The procedure put in place provides for the reinstatement of the public official within his or her position and rights if the provisional measure turns out to be unjustified. Switzerland is in compliance with this provision.

**Article 30 Prosecution, adjudication and sanctions**

**Paragraph 7**

*7. Where warranted by the gravity of the offence, each State Party, to the extent consistent with the fundamental principles of its legal system, shall consider establishing procedures for the disqualification, by court order or any other appropriate means, for a period of time determined by its domestic law, of persons convicted of offences established in accordance with this Convention from:*

*(a) Holding public office; and*

*b) Holding office in an enterprise owned in whole or in part by the State.*

**(a) Summary of information relevant to reviewing the implementation of the provision**

176. Switzerland referred to the information provided with regard to article 30 paragraph 6 above.

**(b) Observations on the implementation of the provision**

177. The procedure established by Article 67 of the Criminal Code, cited above, is in compliance with the provisions of paragraph 7 of Article 30, which is a non-mandatory provision.

**Article 30 Prosecution, adjudication and sanctions**

**Paragraph 8**

*8. Paragraph 1 of this article shall be without prejudice to the exercise of disciplinary powers by the competent authorities against civil servants.*

**(a) Summary of information relevant to reviewing the implementation of the provision**

178. Switzerland referred to the information provided with regard to article 30 paragraph 6 above.

**(b) Observations on the implementation of the provision**

179. Switzerland is in compliance with this provision

**Article 30 Prosecution, adjudication and sanctions**

**Paragraph 10**

*10. States Parties shall endeavour to promote the reintegration into society of persons convicted of offences established in accordance with this Convention.*

**(a) Summary of information relevant to reviewing the implementation of the provision**

180. Switzerland noted that the principle stipulated in the provision under review is one of the foundations of crime policy in Switzerland. Switzerland cited article 75 of the Criminal Code, which provides that “the execution of custodial sentences must encourage an improvement in the social behaviour of the prison inmates, and in particular their ability to live their lives without offending again” and establishes the general framework of measures aiming at promoting the reintegration of detainees.

**(b) Observations on the implementation of the provision**

181. Article 75 of the Criminal Code cited by Switzerland has a general scope and refers social reintegration of all convicted persons, including persons found guilty of offences established in accordance with the Convention. Switzerland is in compliance with this provision.

## **Article 31 Freezing, seizure and confiscation**

### **Paragraph 1**

*1. Each State Party shall take, to the greatest extent possible within its domestic legal system, such measures as may be necessary to enable confiscation of:*

*(a) Proceeds of crime derived from offences established in accordance with this Convention or property the value of which corresponds to that of such proceeds;*

*(b) Property, equipment or other instrumentalities used in or destined for use in offences established in accordance with this Convention.*

### **(a) Summary of information relevant to reviewing the implementation of the provision**

182. With regard to the implementation of the provisions of article 31 of the Convention, Switzerland referred to articles 69 to 72 of the Swiss Criminal Code, articles 263ff, 376ff and 173 paragraph 2 of the Code of Criminal Procedure, article 47 paragraph 5 of the Federal Law on banks and savings banks, and articles 1ff of the Ordinance on placing seized assets.

183. More specifically, articles 263ff of the Code of Criminal Procedure permit, with a view to subsequent confiscation, the seizure of items (article 69 of the Criminal Code) and the seizure of assets that are the result of an offence or which were intended to persuade or reward the offender (article 70 paragraph 1 of the Criminal Code). Moreover, the possibilities for confiscation and seizure are particularly extensive when assets are in the hands of criminal organizations. In this case, the court may, under article 72 of the Criminal Code, order the confiscation of all the assets over which a criminal organization has power of disposal. Assets belonging to a person who has participated in or supported a criminal organization are presumed, until proven otherwise, to be controlled by the organization. As per articles 376ff of the Code of Criminal Procedure, the court may also under certain conditions order confiscation independent of criminal proceedings.

184. Switzerland also reported that in Swiss law the court may also under certain conditions order confiscation independent of criminal proceedings, and referred to article 376 of the Code of Criminal Procedure, which provides that “independent confiscation proceedings are introduced when the confiscation of objects or assets of a particular person has to be decided independently of criminal proceedings”. Moreover, article 377 of the Code of Criminal Procedure provides that “the objects or assets that are likely to be confiscated in independent proceedings are sequestered”. The legal basis for confiscation,

where no specific person is punishable, lies in articles 69 and 70 of the Criminal Code. Such confiscation can also take place pursuant to articles 376 ff of the Criminal Procedure Code.

185. Moreover, Switzerland provided the following information on the amount confiscated of proceeds of crime derived from offences established in accordance with the Convention: Between 2008 and June 2011, the amounts of SF 108,261,312 and USD 32,000,000 were confiscated in connection with international corruption offences, in particular money laundering arising from a predicate corruption offence, whereas SF 50,000 were confiscated in connection with domestic corruption. In addition, Switzerland confiscated SF 18,800,000 in 2007 and 2008 in the context of the "Oil for Food" affair.

186. Switzerland noted that it was very active in the restitution of the illicit assets of politically exposed persons (PEPs). Switzerland stressed that if, despite all caution, illicit assets diverted by politically exposed persons to the prejudice of their State arrive in Switzerland, these must be identified and returned to their home country. This restitution mechanism is an important pillar of Swiss policy to combat funds of criminal origin. Switzerland reported that it had returned some SF 1.7 billion over the last 15 years, which is more than any other financial centre of comparable size. Some of these cases have generated enormous media interest because of the reputation of the persons concerned and the significant amounts involved, which was in the millions. Examples include:

- the Montesinos case, Peru, 2002
- the Marcos case, Philippines, 2003
- the Abacha case, Nigeria, 2005
- the Angola funds case, 2005
- the Kazakhstan funds case, 2007
- the Salinas case, Mexico, 2008

187. Switzerland noted that some cases were particularly complex to resolve. Among these are those of Mobutu's assets (Democratic Republic of Congo / DRC) and Duvalier's assets (Haiti). In Mobutu's case, Switzerland reported having worked for 12 years to return frozen money to the DRC. This effort has not been successful partly due to lack of cooperation by the State in question. It is in these circumstances that the Federal Criminal Court decided on 14 July 2009 to not respond to a complaint. Pursuant to the Federal Council decision of 30 April 2009, the measure taken to freeze the assets was discontinued.

188. In the second case, the funds of the former dictator Jean-Claude Duvalier, amounting to some SF 6 million, were once again frozen by a Federal Council decision of 03 February 2010. This freezing has prevented the return to the funds to the Duvalier family following the decision of 12 January 2010 of the Federal Court that ended mutual assistance in criminal matters between Haiti and Switzerland. Freezing continued until the entry into force of the law on the restitution of assets of illicit origin (LRAI). This law, approved by Parliament during its autumn session in 2010, came into force on 1 February 2011. Since the coming into force of this law, the Duvalier funds have been automatically blocked on the basis of article 14 LRAI. Confiscation proceedings were opened by the Confederation before the Federal Administrative Court in April 2011, following the Federal Council's decision to mandate the Federal Department of Finance (FDF) to open confiscation proceedings over Duvalier's assets frozen in Switzerland. Once confiscated,



the funds can be returned to Haiti in order to improve the lives of the people of the State in question. The LRAI is an illustration of the policy that had led Switzerland for over 20 years to avoid serving as a refuge for the money stolen by PEPs.

**(b) Observations on the implementation of the provision**

189. Articles 69 and 70 of the Swiss Criminal Code contain general measures for confiscation, ordered by a tribunal, of proceeds of crime or instrumentalities that were used or were intended to be used to commit an offence, in a manner which is in line with the provisions of the Convention. Switzerland is in compliance with the provision under review.

**Article 31 Freezing, seizure and confiscation**

**Paragraph 2**

*2. Each State Party shall take such measures as may be necessary to enable the identification, tracing, freezing or seizure of any item referred to in paragraph 1 of this article for the purpose of eventual confiscation.*

**(a) Summary of information relevant to reviewing the implementation of the provision**

190. Article 263 of the Code of Criminal Procedure permit the seizure by way of ordinance of objects and assets where it is likely that they will be confiscated and regulate the procedure pertaining to the seizure. .

191. During the country visit, the reviewers were informed that Swiss financial institutions detecting a suspicious transaction and reporting it to the FIU (Money Laundering Reporting Office – MLRO) have to freeze the funds involved on their own initiative for a maximum of five days. The criminal authorities, and not the MLRO, decide on the extension of the freezing.

**(b) Observations on the implementation of the provision**

192. Switzerland is in compliance with this provision.

**(c) Successes and good practices**

193. The system set up by Switzerland for seizure of funds misappropriated by politically exposed persons has achieved considerable success in terms of seizure, confiscation and return of proceeds of crime. The restitution of very large amounts during the last 15 years must be identified both as a success and as a good practice in the implementation of the provisions of article 31, but also in the area of mutual legal assistance in view of asset recovery (see the section on the implementation of article 46 para. 3 (j)-(k)). The adoption of the law on the restitution of illicit assets also deserves to be noted as a positive step, although it seems that it would apply to rather limited cases due to the restrictive conditions for its implementation.

## **Article 31 Freezing, seizure and confiscation**

### **Paragraph 3**

*3. Each State Party shall adopt, in accordance with its domestic law, such legislative and other measures as may be necessary to regulate the administration by the competent authorities of frozen, seized or confiscated property covered in paragraphs 1 and 2 of this article.*

#### **(a) Summary of information relevant to reviewing the implementation of the provision**

194. Article 266 of the Code of Criminal Procedure contains provisions on the administration of seized assets, allowing, among other things, the immediate disposal of objects subject to rapid devaluation or expensive maintenance. Moreover, article 1 of the Ordinance on the investment of sequestered assets provides that to the fullest extent possible, sequestered assets are to be invested so that the investment is safe, does not depreciate and produces a return. During the country visit, the reviewers were informed that Switzerland did not consider it necessary to set up a special agency for the management of seized assets. Responsibility for the administration of seized assets rests with the Federal Prosecution Service, which leads the criminal proceedings. The Federal Prosecution Service allows the bank to pursue its investment policy, in agreement with the account holder, provided that administration is conservative and, if possible, yields a return. The Federal Prosecution Services will endorse the placement proposed by the bank whenever doubts arise about the safety of such investments. The interest yielded by the seized amounts must also be seized and that the return of seized assets that are the proceeds of a crime will be part of the amount to be eventually confiscated, if confiscation occurs,

#### **(b) Observations on the implementation of the provision**

195. Switzerland is in compliance with this provision as far as administration of frozen or seized property is concerned. Moreover, Switzerland noted that article 266 of the Criminal Procedure Code and the Ordinance on the investment of seized assets provide rules for the administration of seized assets. As these latter are subject to a freezing order which depends on the outcome of the main proceedings and is, therefore, of temporary nature, it is necessary to establish rules on the administration of seized assets. Once assets are confiscated, the issue of asset administration does not arise, as they become property of the State.

## **Article 31 Freezing, seizure and confiscation**

### **Paragraph 4**

*4. If such proceeds of crime have been transformed or converted, in part or in full, into other property, such property shall be liable to the measures referred to in this article instead of the proceeds.*

**(a) Summary of information relevant to reviewing the implementation of the provision**

196. In Switzerland, according to authority and case law, the confiscation may cover both the direct product of the offence or items purchased with this product. If the substituted goods are still available, they will also be confiscated. If this is not the case, the claim of the state should be realized in the form of a compensatory claim. Indeed, according to article 71 of the Criminal Code, the court may, when the assets to be confiscated are not available, order their substitution by a compensatory debt to the State of an equivalent amount. The compensatory debt includes, where applicable, the returns produced by assets to be confiscated or substituted property from the time that the property was obtained until the confiscation order or the decision to replace it with a compensatory debt (equivalent claim).

**(b) Observations on the implementation of the provision**

197. The legal provisions cited by Switzerland allow the freezing, seizure or confiscation of property to which the proceeds of crime have been transformed or converted. Moreover, the institution of the compensatory claim also permits to replace assets which would no longer be available. Switzerland is in compliance with the provision under review.

**Article 31 Freezing, seizure and confiscation**

**Paragraph 5**

*5. If such proceeds of crime have been intermingled with property acquired from legitimate sources, such property shall, without prejudice to any powers relating to freezing or seizure, be liable to confiscation up to the assessed value of the intermingled proceeds.*

**(a) Summary of information relevant to reviewing the implementation of the provision**

198. In Switzerland, if the proceeds of crime have been mixed with assets of legal origin and the movement of assets can still be identified, the court may proceed with partial confiscation. Otherwise, the claim of the state will be realized in the form of a compensatory claim.

**(b) Observations on the implementation of the provision**

199. The legal framework put in place by Switzerland, including the institution of the compensatory claim, is in compliance with this optional provision of the Convention.

**Article 31 Freezing, seizure and confiscation**

**Paragraph 6**

*6. Income or other benefits derived from such proceeds of crime, from property into which such proceeds of crime have been transformed or converted or from property with which such proceeds of crime have been intermingled shall also be liable to the measures referred to in this article, in the same manner and to the same extent as proceeds of crime.*

**(a) Summary of information relevant to reviewing the implementation of the provision**

200. As mentioned above, the compensatory debt includes, where applicable, the returns produced by assets to be confiscated or substituted property from the time that the property was obtained until the confiscation order or the decision to replace it with a compensatory debt (equivalent claim). Return of seized assets constitutes as well an illicit proceed and is therefore subject to confiscation

**(b) Observations on the implementation of the provision**

201. Switzerland states that the compensatory claim includes, where applicable, the benefits generated by the assets subject to confiscation, as well as other assets replacing the latter. Switzerland therefore seems to have taken measures along the lines of this non-mandatory provision of the Convention.

**Article 31 Freezing, seizure and confiscation**

**Paragraph 7**

*7. For the purpose of this article and article 55 of this Convention, each State Party shall empower its courts or other competent authorities to order that bank, financial or commercial records be made available or seized. A State Party shall not decline to act under the provisions of this paragraph on the ground of bank secrecy.*

**(a) Summary of information relevant to reviewing the implementation of the provision**

202. As far as production or seizure of bank, financial or commercial records is concerned, Switzerland noted that article 47 paragraph 5 of the Federal Law on Banks and Savings Banks, which criminalizes the breach of bank secrecy, frees the banks of the obligation to maintain banking secrecy in cases where they are obliged to inform the authorities and testify in court. Moreover, according to article 173 paragraph 2, Swiss courts are enabled to order that bank, financial or commercial records be made available, in line with the requirements of Article 31 paragraph 7 of the Convention. The obligation for subjects of professional secrecy to testify shall be waived only where the court considers that the interest in maintaining secrecy outweighs the interest of the truth. It is noted that none of the possibilities of refusal to testify listed in article 173 para. 1 of the Code of Criminal Procedure are related to bank secrecy.

203. As for the possibilities for the authority to order the production of documents, these are extensively regulated by the procedural rules applicable in this area (articles 263ff of the Code of Criminal Procedure). More specifically, article 263 of the Code of Criminal

Procedure provides that objects and assets belonging to the defendant or third parties may be sequestered when it is likely that they will be used as evidence.

204. In response to the question whether a specific procedure to lift bank secrecy is in place (in terms of receivability of the request, prior clearance etc), Switzerland stated that there is no specific procedure for lifting bank secrecy. In connection with a criminal investigation, the prosecutor is authorized to send a request for the production of documents to any financial institution governed by the obligation set out in article 47, paragraph 5, of the aforementioned Law on Banks.

**(b) Observations on the implementation of the provision**

205. Following the information and clarifications provided by Swiss officials on the obligation of banking institution to provide information upon request of the prosecutor, it appears that, contrary to widespread belief, lifting of bank secrecy is not an issue in Switzerland. Switzerland is in compliance with this provision.

**Article 31 Freezing, seizure and confiscation**

**Paragraph 8**

*8. States Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of such alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the fundamental principles of their domestic law and with the nature of judicial and other proceedings.*

**(a) Summary of information relevant to reviewing the implementation of the provision**

206. Switzerland cited article 72 of the Criminal Code which provides for a specific case where the burden of proof can be shifted. This provision stipulates that property and assets belonging to a person involved with or having supported a criminal organization shall be presumed, unless otherwise proven, to be at the disposal of the organization, and therefore liable to forfeiture. Apart from this particular case, Swiss law contains no other provisions requiring the owner to establish the lawful origin of property subject to confiscation.

**(b) Observations on the implementation of the provision**

207. It is noted that Switzerland has taken some steps in line with this optional provision of the Convention.

**Article 31 Freezing, seizure and confiscation**

**Paragraph 9**

9. *The provisions of this article shall not be so construed as to prejudice the rights of bona fide third parties.*

**(a) Summary of information relevant to reviewing the implementation of the provision**

208. Switzerland stated that under article 70, paragraphs 2 and 4 of the Criminal Code, the rights of bona fide third parties may, under certain conditions, be preserved. According to these provisions, Confiscation is not permitted if a third party has acquired the assets in ignorance of the grounds for confiscation, provided he has paid a consideration of equal value therefor or confiscation would cause him to endure disproportionate hardship. Claims by persons harmed or third parties expire five years after the date on which official notice of confiscation is given.

**(b) Observations on the implementation of the provision**

209. Article 70 paragraph 2 and 4 cited by Switzerland takes adequately into account the rights of bona fide third parties. Switzerland is in compliance with the provision under review.

**Article 32 Protection of witnesses, experts and victims**

**Paragraphs 1 and 2**

*1. Each State Party shall take appropriate measures in accordance with its domestic legal system and within its means to provide effective protection from potential retaliation or intimidation for witnesses and experts who give testimony concerning offences established in accordance with this Convention and, as appropriate, for their relatives and other persons close to them.*

*2. The measures envisaged in paragraph 1 of this article may include, inter alia, without prejudice to the rights of the defendant, including the right to due process:*

*(a) Establishing procedures for the physical protection of such persons, such as, to the extent necessary and feasible, relocating them and permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons;*

*(b) Providing evidentiary rules to permit witnesses and experts to give testimony in a manner that ensures the safety of such persons, such as permitting testimony to be given through the use of communications technology such as video or other adequate means.*

**(a) Summary of information relevant to reviewing the implementation of the provision**

210. Switzerland stated that protection measures are provided in articles 149 and 150 of the Code of Criminal Procedure. Prior to the entry into force of the new Code of Criminal Procedure in 2011, Swiss cantonal codes of procedure contained provisions on the protection of witnesses.

211. For protective measures to be ordered, it is necessary that the person directly concerned or his or her relatives are at risk of serious danger to life or limb or another serious disadvantage. Accordingly, putting assets at risk may also justify protective measures when it should be considered a "serious disadvantage". Jurisdiction to order protective measures falls to the "direction of the proceedings", namely the direction of the proceedings of the court which rules on the merits, the court of coercive measures or the prosecution. The police, however, are not empowered to take such measures. If, during the process of police investigation, it appears necessary to adopt measures of protection, it shall request the prosecution to order them. If the prosecution guarantees the anonymity of a person to be protected, it will submit this measure for approval to the court of coercive measures.
212. Article 149 of the Code of Criminal Procedure enumerates, without being exhaustive, the protective measures that may be ordered individually or in combination. These measures include: ensuring the anonymity of the person to be protected; conduct hearings in the absence of the parties or in private; changing the appearance and the voice of the person to be protected or hiding them from the view of others. As these measures have the effect of limiting procedural rights, the prosecuting authorities are required by article 5 to otherwise guarantee the right to be heard, including that of the defence. Thus, the accused shall have the opportunity to ask additional questions to a witness, despite the protective measures. In this case, the principle of proportionality requires that in certain circumstances, only the defendant's right to be heard is limited, and not his or her defence.
213. An example of implementation of the cited protective measures is the ability to testify anonymously as provided for in article 150 of the Criminal Procedure. Article 149 paragraph 2 letter. (d) also allows for changes in appearance (e.g. with a wig) and changes in the voice of the person to be protected (e.g. by acoustic alterations).
214. Switzerland reported that, currently, extra-procedural protection of witnesses is not institutionalized in Switzerland. But the legislative process in order to remedy this is about to conclude. The new Federal law on the extra-procedural protection of witnesses will come into force on 1 January 2013.
215. Extra-procedural measures for witness protection provided for in the new law deal with the protection of witnesses under threat outside the criminal proceedings, even after the completion of the criminal trial if necessary. The bill provides for the establishment of a Witness Protection Authority attached to the Confederation, which will ensure a uniform implementation of protection programmes. This service would also provide support and advice to cantons when witnesses can not be admitted to a protection programme, but still require specifically determined protective measures.
216. The bill provides for a special measure, namely the possibility of giving a person assumed identity documents. To create a safe new identity and to prevent the identification of the old identity, it is also necessary to block access to several data registers. In addition, genuine documents must be generated, and genuine entries in registries must be made under the new name. The bill contains the legal basis for the participation of relevant bodies of the Confederation, cantons and communes, as well as for the participation of individuals. The message to Parliament concerning the new law is available online at the address <http://www.admin.ch/ch/f/ff/2011/1.pdf>.

217. According to projections made in the course of drafting the bill, the new legislation will deal with from 10 to 15 cases per year.
218. Switzerland further informed that the costs of procedural safeguards are not subject to any statistics.
219. The estimated costs of future measures to protect witnesses are highly variable depending on the case, and are between 5,000 and 150,000 Swiss francs. These costs go down as a rule, as the protection program continues over time and the protected person becomes more and more independent.

**(b) Observations on the implementation of the provision**

220. Swiss legislation in force contains measures to protect witnesses and experts involved in the criminal proceedings as well as their relatives. These measures appear to meet the requirements of the provisions under review. It is important to note that the protection framework will be strengthened and supplemented by the new law on extra-procedural protection of witnesses, which will come into force on 1 January 2013. This law provides for protection measures outside the actual proceedings, especially during and after the trial, which were previously not in place in Switzerland, such as personal protection, short-term accommodation in a secure venue, or specific measures such as the granting of assumed identity, moving to a new residence, finding a new employment, or covering for subsistence expenses. Switzerland is in compliance with the provision under consideration.

**Article 32 Protection of witnesses, experts and victims**

**Paragraph 3**

*3. States Parties shall consider entering into agreements or arrangements with other States for the relocation of persons referred to in paragraph 1 of this article.*

**(a) Summary of information relevant to reviewing the implementation of the provision**

221. Switzerland stated that the new federal law on extra-procedural protection of witnesses, which provides the implementation of specific programs by a federal jurisdiction, will come into force on 1 January 2013. If necessary, persons to be protected will be transferred abroad or received in Switzerland. In such a case, an agreement will be concluded with the relevant foreign authority.

**(b) Observations on the implementation of the provision**

222. Agreements or arrangements as provided for in this non-mandatory provision of the Convention have not been concluded to date by Switzerland, which stated that it did not apply the provision under review. However, the possibility of concluding such agreements



is envisaged in the new Law on the extra-procedural protection of witnesses which will come into force on 1 January 2013. Switzerland is in compliance with this provision.

## **Article 32 Protection of witnesses, experts and victims**

### **Paragraph 4**

*4. The provisions of this article shall also apply to victims insofar as they are witnesses.*

#### **(a) Summary of information relevant to reviewing the implementation of the provision**

223. Switzerland stated that the procedural protection measures of articles 149ff of the Code of Criminal Procedure also apply to victims of crime if they are involved in the proceedings as witnesses. Additional measures to protect victims are stipulated in articles 152ff of the Code of Criminal Procedure. Thus, according to article 152 paragraph 2, the victim may be accompanied by a support person in addition to his legal counsel for all procedural acts. Also, paragraph 3 provides that the criminal authorities shall prevent the victim from being confronted with the accused if the victim so requires. Pursuant to article 116 of the Code of Criminal Procedure, a victim is any injured person who, as the result of an offence, suffered direct damage to his or her physical, mental or sexual well-being.

#### **(b) Observations on the implementation of the provision**

224. Swiss law does not preclude the victims testifying in court from benefiting from the protection afforded to witnesses. Switzerland is in compliance with this provision.

## **Article 32 Protection of witnesses, experts and victims**

### **Paragraph 5**

*5. Each State Party shall, subject to its domestic law, enable the views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings against offenders in a manner not prejudicial to the rights of the defence.*

#### **(a) Summary of information relevant to reviewing the implementation of the provision**

225. Switzerland stated that the special rights of victims of crime are listed in a non-exhaustive manner in article 117 of the Code of Criminal Procedure. Each of them refers to an article of the same Code. The term “victim” is defined in article 116 of the Code of Criminal Procedure.

226. When the victim is under the age of 18 years, special provisions apply to further protect his or her personality. They are listed in article 117 paragraph 2 of the Code of Criminal Procedure.

**(b) Observations on the implementation of the provision**

227. The provisions cited by Switzerland award a number of rights to victims of criminal offences. Furthermore, it is observed that Swiss law provides for the opportunity for any person aggrieved by an offence to become a complaining party (“partie plaignante”), that is to participate in criminal proceedings as a plaintiff for criminal or civil matters. The plaintiff may either request that the person criminally liable for the offence be prosecuted and convicted, or, by joining the criminal proceedings, request that the court considers his or her views on civil matters that arise from the offence. If the aggrieved person has not taken spontaneously such a position, the prosecutor shall draw his or her attention to this prerogative as soon as the preliminary procedure is initiated. Switzerland is in compliance with this provision.

**Article 33 Protection of reporting persons**

*Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention.*

**(a) Summary of information relevant to reviewing the implementation of the article**

228. Switzerland indicated that Swiss law on public service and employment law (private sector) grants, under certain conditions, protection to the person who has disclosed a criminal act. Article 14 of the Federal Personnel Law has a component to strengthen the protection of persons who report suspected violations or irregularities. On the one hand, an employer is obliged to propose to an employee dismissed as a result of whistle-blowing his or her reinstatement to the position he or she held previously, or if this is not possible, to offer him or her another job that he or she can reasonably perform. On the other hand, the Federal Personnel Law, which contains an obligation to report felonies and misdemeanours prosecuted without requiring prior complaint from the victim (article 22a of the Federal Personnel law) also provides that no person should suffer professional disadvantage for having, in good faith, informed about a reported violation or irregularity or for having given evidence as a witness. Based on this provision, the person concerned may appeal or file a complaint regarding any damage, retaliation, discrimination, etc.

229. Switzerland also noted that the public sector employee has the choice of reporting to the Swiss Federal Audit Office (CDF), which guarantees the anonymity of the whistle-blower. The Swiss Federal Audit Office is the supreme oversight authority of the Confederation in financial matters.

230. Switzerland reported that, regarding the private sector, an amendment that is being made to the Code of Obligations will provide that a worker should be able to report in

good faith to his or her employer anything wrong while not violating his or her duty of loyalty. Under certain conditions, he or she may also turn to the authorities and the media. The worker's dismissal will be considered unfair and the employer must pay compensation of up to twelve months' salary. It is also envisaged that social partners during the negotiation of collective agreements, will provide as a safeguard for whistleblowers a sanction going beyond twelve months' salary or even reinstatement.

231. Switzerland also noted that the legislation in force already recognizes an exception, applicable in instances of legitimate reporting, to the obligation of confidentiality. Thus, any dismissal action taken in such cases on the grounds of violation of the obligation of confidentiality is deemed to be unjustified and gives rise to a claim for compensation. The jurisprudence of the Federal Tribunal admits one exception to the obligation of confidentiality where the disclosure meets an overriding interest and the employee first of all reports the facts to the employer, then to the authorities and only in the last resort to the media. Direct disclosure to the authorities is admissible where justified. The precedents in case law do not yet point to specific conditions to be fulfilled. The amendment of the legislation currently under way builds on this jurisprudence and addresses outstanding issues. It also considers dismissal on the grounds of whistle-blowing to be wrongful.

**(b) Observations on the implementation of the article**

232. Measures to protect persons reporting information employed in the public sector seem to be satisfactory. However, it appears that the obligation of confidentiality and loyalty of employees in the private sector remains an obstacle, exposing workers reporting facts involving their employers to unjustified treatment. Switzerland underlined that legislation in force punishes such treatment, in particular dismissal subsequent to justified report, since such dismissal would be abusive and subject to a sanction up to six months of salary. Switzerland also stated that it intended to take measures to strengthen the system of protection in force against unfair treatment, and should be encouraged to take measures towards that direction. Given that the provision under review is not mandatory, Switzerland can be considered as being in compliance with article 33.

**Article 34 Consequences of acts of corruption**

*With due regard to the rights of third parties acquired in good faith, each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to address consequences of corruption. In this context, States Parties may consider corruption a relevant factor in legal proceedings to annul or rescind a contract, withdraw a concession or other similar instrument or take any other remedial action.*

**(a) Summary of information relevant to reviewing the implementation of the article**

233. Switzerland reported that under Swiss law, a contract is void if its object is impossible, illegal or immoral. A contract made following an act of corruption will be void under this provision if the act of corruption has influenced the content of the contract. If the act of corruption led to the conclusion of a contract with lawful content, the contract is voidable

for fraud or essential error in its basis. In administrative law, general principles apply, in particular the rules on revocation.

234. In a recent case, the Federal Tribunal (Supreme Court of the Confederation) examined whether the profit made by the corrupt party, on the basis of a corrupt contract, could be considered as "assets deriving from a crime" under article 305-second paragraph 1 of the Criminal Code and open to confiscation. The court replied in the affirmative, provided that the indirect benefit could be considered as deriving from a crime that has a natural and proper causal connection with the act of corruption, without necessarily being its direct and immediate result.

**(b) Observations on the implementation of the article**

235. It is noted that the legislation and jurisprudence cited is general, and draws on principles of Contract Law. The provision of the Convention on annulling or rescinding a contract is optional and the provisions cited by Switzerland allow rescission of contracts tainted by corruption under certain conditions.

**Article 35 Compensation for damage**

*Each State Party shall take such measures as may be necessary, in accordance with principles of its domestic law, to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation.*

**(a) Summary of information relevant to reviewing the implementation of the article**

236. In Switzerland, the victim of an act of corruption may seek redress of his or her injury under the law of obligations, liability for unlawful acts (Code of Obligations, article 41). As part of a contractual relationship, this can also be based on liability for *culpa in contrahendo* [fault in the process of concluding a contract].

**(b) Observations on the implementation of the article**

237. Compensation for damage suffered from an act related to corruption appears to be adequately ensured pursuant to general provisions of the Code of Obligations. Switzerland is in compliance with the article under review.

**Article 36 Specialized authorities**

*Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies or persons specialized in combating corruption through law enforcement. Such body or bodies or persons shall be granted the necessary independence, in accordance with the fundamental principles of the legal system of the State Party, to be able to carry out their*

*functions effectively and without any undue influence. Such persons or staff of such body or bodies should have the appropriate training and resources to carry out their tasks.*

**(a) Summary of information relevant to reviewing the implementation of the article**

238. According to article 24 paragraph 1 of the Code of Criminal Procedure, cases of international corruption are mainly handled by the Federal Prosecution Service (MPC), which also has jurisdiction when federal officials are involved. Investigations of domestic corruption, especially when a cantonal public official is under suspicion, are the responsibility of the cantons.

239. On 1 January 2007, the MPC created a new centre of expertise on economic crime and corruption (white-collar crime) in order to create specialists and more effective prosecutors in the fight against this type of crime. Composed of 12 lawyers, namely a lead prosecutor, seven prosecutors, two deputy prosecutors and two assistant prosecutors, as well as five clerks, the centre of expertise works closely with accountants and financial analysts, whose number has steadily increase since centralization of new skills to more than twenty today. A specialized centre of expertise (RIZ), composed of a lead prosecutor, five prosecutors, one deputy prosecutor, a lawyer and five clerks, handles letters rogatory from abroad (passive applications) including numerous requests on cases of international corruption (to date 18) and criminal proceedings related to such assistance. For complex cases, larger groups of prosecutors from the centres of expertise on economic crime and mutual legal assistance are formed.

240. At the cantonal level, it is important to note the establishment by the major cantons of specialized units in the fight against economic crime.

241. The applicable legal provisions on independence are the following:

Code of Criminal Procedure

Art. 4 - Independence

1 The criminal authorities are independent in the application of the law and are governed solely by rules of law.

2 The competence to give instructions (art. 14) under the law in respect of law enforcement is reserved.

Federal Law on the organization of the federal criminal authorities

Art. 16 - Administration

1 The Federal Prosecution service administers itself.

2 It forms its services and engages the necessary staff.

3 It holds its own accounts.

242. The independence of the cantonal authorities is guaranteed at the procedural level by article 4 of the Code of Criminal Procedure. With regard to federal authorities, the MPC has, since 1 January 2011, been an independent administrative level pursuant to article 16 of the Federal Law on the organization of the federal criminal authorities. Indeed, the guarantees of independence for the MPC were strengthened, as oversight of the MPC has been entrusted to a newly created independent supervisory authority. This authority, elected by the Parliament, is composed of a representative of the Federal Supreme Court,

a representative of the Federal Criminal Court, two lawyers practicing law by way of representing clients before courts and three experts.

243. To illustrate efficiency of its law enforcement bodies, Switzerland stressed progress made in prosecuting corruption cases by referring to the conviction, in 2011, of a natural person as well as of a legal person in two cases of transnational corruption falling within the scope of the Convention. Switzerland also underscored its proactive policy on confiscation: between 2008 and June 2011, 108.2 million Swiss francs and \$32 million US dollars were confiscated by the Office of the Attorney General in connection with the bribery of public officials of foreign countries. That figure does not include the 18.8 million Swiss francs confiscated in connection with the United Nations "oil-for-food" programme, nor the sums confiscated by the cantons, nor the sums confiscated in connection with the case of a corporate offender referred to in para 66 above.

**(b) Observations on the implementation of the article**

244. Making the choice to have "persons specialized in fight against corruption" within the prosecutor's office, which itself is independent, is a good initiative. This independence seems reinforced by the fact that the Federal Prosecutor is appointed directly by Parliament. It is further observed that the resources made available to the Department seem sufficient and that the specialization of prosecutors assigned to cases of corruption seems adequate. Switzerland is in compliance with this provision..

**Article 37 Cooperation with law enforcement authorities**

*1. Each State Party shall take appropriate measures to encourage persons who participate or who have participated in the commission of an offence established in accordance with this Convention to supply information useful to competent authorities for investigative and evidentiary purposes and to provide factual, specific help to competent authorities that may contribute to depriving offenders of the proceeds of crime and to recovering such proceeds.*

*2. Each State Party shall consider providing for the possibility, in appropriate cases, of mitigating punishment of an accused person who provides substantial cooperation in the investigation or prosecution of an offence established in accordance with this Convention.*

*3. Each State Party shall consider providing for the possibility, in accordance with fundamental principles of its domestic law, of granting immunity from prosecution to a person who provides substantial cooperation in the investigation or prosecution of an offence established in accordance with this Convention.*

*4. Protection of such persons shall be, mutatis mutandis, as provided for in article 32 of this Convention*

5. *Where a person referred to in paragraph 1 of this article located in one State Party can provide substantial cooperation to the competent authorities of another State Party, the States Parties concerned may consider entering into agreements or arrangements, in accordance with their domestic law, concerning the potential provision by the other State Party of the treatment set forth in paragraphs 2 and 3 of this article.*

**(a) Summary of information relevant to reviewing the implementation of the article**

245. Switzerland stated that in general, the jurisprudence of the Federal Tribunal accepts that the cooperation of a defendant can lead to significant mitigation of sentence. Furthermore, article 260-third of the Criminal Code, cited above in connection to the review of implementation of article 20 of the Convention, provides at paragraph 2 that "the judge may freely mitigate the sentence with respect to one who has sought to prevent further criminal activity of the organization". However, it should be noted that the consideration of the cooperation of the accused only has tangible effects during deliberations and cannot provide assurances to the accused in advance. The person who cooperates can only qualify for mitigation of sentence. He or she cannot escape all punishment. Switzerland also noted that it has not applied the measures contained in paragraphs 3 and 5 of article 37, since immunity from prosecution to a person who provides substantial cooperation can not be granted under Swiss law. Indeed, Switzerland came to the conclusion that such a practice would be inconsistent with the legal tradition of continental Europe. Of course, some countries are familiar with the practice in one form or another, while others have abandoned it because they consider it to be inconclusive. Moreover, Switzerland indicated that the increased weight given to assistance provided by defendants in shedding light on the facts of the case, i.e., the possibility for such persons to benefit from a reduced penalty, is already provided for in Swiss law by means of the determination by the judge of the severity of the penalty.

246. Article 358ff of the Code of Criminal Procedure provides in turn a simplified procedure by which the accused who has admitted the facts decisive for the legal assessment and accepts in principle the civil claims may request a simplified procedure from the prosecution. This simplified procedure allows shortening the public hearing in court, and concluding it without examining the facts of the case or the evidence. During the country visit, representatives of the Prosecutors' office informed the reviewers that the limitation of the public debates to a formal hearing of the accused and other parties, if any, (article 361 of the Criminal Procedure Code) as well as the reduction of sentence that can result from admitting the facts is an incentive for white collar offenders, eager to avoid negative impact on their reputation, and thus ready to cooperate with the authorities by admitting the charges against them..

247. Switzerland added that in the course of work relating to the unification of legislation on Criminal procedure, Swiss lawmakers considered whether it would be appropriate to introduce the use of "Crown witnesses", a form of administration of evidence derived from common law. They eventually came to the conclusion that such a practice would be inconsistent with the legal tradition of continental Europe. Moreover, the increased weight given to assistance provided by defendants in shedding light on the facts of the case, i.e., the possibility for such persons to benefit from a reduced penalty, is already provided for in Swiss law by means of the determination by the judge of the severity of the penalty.

**(b) Observations on the implementation of the article**

248. The explanations provided and the related texts are consistent with the mandatory requirements of article 37 para. 1, which refers to the situation where a State encourages perpetrators of offences to cooperate with Justice. The Swiss legislation encourages offenders through the mitigation of the sentence they may receive. Swiss law is therefore fully consistent with the optional requirements of paragraph 2 (mitigated punishment).

249. Moreover, Switzerland is encouraged to consider immunity of prosecution in line with paragraph 3 of article 37 for those persons who provide substantial cooperation in the investigation or prosecution of corruption-related offences.

**Article 38 Cooperation between national authorities**

*Each State Party shall take such measures as may be necessary to encourage, in accordance with its domestic law, cooperation between, on the one hand, its public authorities, as well as its public officials, and, on the other hand, its authorities responsible for investigating and prosecuting criminal offences. Such cooperation may include:*

*(a) Informing the latter authorities, on their own initiative, where there are reasonable grounds to believe that any of the offences established in accordance with articles 15, 21 and 23 of this Convention has been committed; or*

*(b) Providing, upon request, to the latter authorities all necessary information.*

**(a) Summary of information relevant to reviewing the implementation of the article**

250. According to article 22a of the Federal Personnel Law, with respect to all federal employees, there exists an obligation to report to the law enforcement authorities, their superiors or the Federal Audit Office, all serious crimes and offences prosecuted ex officio (including the offence of corruption) which they knew about or which were indicated to them in the performance of their duties (Law on the Personnel of the Confederation, article 22). The duty of disclosure arises upon the existence of reasonable suspicion. The choice of who to inform depends on the circumstances, the facts found and how they were discovered. Employees have the explicit right to notify the Federal Audit Office of any other irregularities they knew about or which were indicated to them in the performance of their duties. In addition, federal employees are required to testify in court, once released from their official secrecy by their superiors.

**(b) Observations on the implementation of the article**

251. Switzerland is in compliance with this article.



## Article 39 Cooperation between national authorities and the private sector

### Paragraph 1

*1. Each State Party shall take such measures as may be necessary to encourage, in accordance with its domestic law, cooperation between national investigating and prosecuting authorities and entities of the private sector, in particular financial institutions, relating to matters involving the commission of offences established in accordance with this Convention.*

#### **(a) Summary of information relevant to reviewing the implementation of the provision**

252. Switzerland stressed that, in recent years, corruption - seen as predicate offences for money laundering - and the dirty money linked to corruption have become important topics of public debate in the country, in the media as in the political arena. In addition to its legal arsenal which seeks both deterrence and effective law enforcement, Switzerland has made considerable efforts, especially in the development of effective central structures and closer cooperation with private organizations, including financial intermediaries. In the financial sector, a system of cooperation, which has its legal basis in the Law Against Money Laundering (LBA), exists between law enforcement and financial intermediaries. Thus article 9 LBA makes it mandatory for the financial intermediary who knows or presumes, on the basis of reasonable suspicion, that assets involved in a transaction or business relationship derive from a money laundering operation or another crime such as corruption, to immediately inform the Money Laundering Reporting Office (MLRO). In addition to the requirement to report his or her suspicions, the intermediary must immediately block the funds entrusted to it pursuant to article 10 LBA. The obligation to report complements the right of financial intermediaries to report to MLRO concerning assets of suspicious origin (article 305-third paragraph 2 of the Criminal Code).
253. When the Money Laundering Reporting Office receives a report of suspicions, it analyzes the report and decides whether to refer it to law enforcement authorities in accordance with article 23 paragraph 4 of the LBA. During this analysis, MLRO is in close contact with the financial intermediary that made the report. The latter is also formally informed of the decisions taken by the MLRO regarding the matter in question. During the country visit, the representatives of the MLRO informed the reviewing experts that the rate of reports of suspicions that are eventually transmitted from the MLRO to the criminal authorities ranges from 85% to 95%, which demonstrates the quality of the reports submitted to the MLRO. It was also noted that the MLRO has access to a database of press articles from around the world which it consults, among other sources of information, when analyzing the reports of suspicion.
254. The criminal authority appraised will then take charge of the file it has been consigned and will inform, according to the rules of procedure governing its activity, the financial intermediary of the outcome of the report. Financial intermediaries maintain not only an indirect relationship, but also a direct relationship with law enforcement.

255. If the offence of corruption was seen as a predicate offence to money laundering, MLRO will then be notified pursuant to article 29a paragraphs 1 and 2 of the LBA which provide for the transmission of any criminal decision made pursuant to articles. 260-third paragraph 1, 260-fifth paragraph 1, 305-second and 305-third paragraph 1 of the Criminal Code.
256. According to article 8 of the LBA, financial intermediaries are required to ensure that their staff receives adequate training to enable them to detect any violation of the LBA in the broadest sense. Thus, in order to raise awareness of financial intermediaries on the issue of corruption, MLRO is actively involved in organizing training courses for financial intermediaries, during which the issue of corruption is discussed.
257. Similarly, MLRO draws up annual statistics on the development of the fight against money laundering, which includes an analysis (typology) of predicate offences, including corruption.
258. In addition, the frequent media reports in recent years of cases of international corruption have also contributed to a significant extent to private sector awareness of the prohibition on corruption abroad. This aspect was also noted in the MLRO annual report of 2010 which stated the importance of the media as a trigger for suspicious activity reports. In 2010, 378 cases of reporting were triggered on the basis of information published by the media, against 219 in 2009, representing an increase of 159 cases.
259. The applicable legal provisions are the Federal law on combating money laundering and terrorist financing in the financial sector, the Ordinance of the Federal Financial Market Supervisory Authority on the prevention of money laundering and terrorist financing and the Swiss Criminal Code.
260. During the events of the Arab spring (early 2011), the Swiss Federal Council adopted emergency orders on the basis of article 184 paragraph 3 of the Federal Constitution, which provides for the adoption of orders for a limited period of time where this is required to safeguard the interest of the country. To assist banks in implementing these measures, the MLRO issued a memorandum explaining its practice in this area. This approach has been welcomed by financial intermediaries.
261. Switzerland has also organized various seminars and conferences in this area. MLRO is always open to collaboration with financial intermediaries and other partners of the private sector.
262. The latter include the following (private) entities:
- Annual Bankers Forum (in Zurich and Geneva - in collaboration with the Swiss Bankers Association)
  - Academic studies and conferences on the phenomenon and combating of money laundering in Switzerland
  - Annual Conferences of Swiss self-regulatory organizations
  - Conferences organized by the associations of Compliance Officers of banks and other financial intermediaries.

**(b) Observations on the implementation of the provision**

263. It has been observed that there is close cooperation between financial institutions and the authorities responsible for investigations and prosecutions, including MLRO which, although having no coercive powers, processes reports received before transmitting them to the law enforcement authorities. Switzerland is in compliance with this provision.

**(c) Successes and good practices**

264. The extent and the quality of cooperation between public authorities and the private sector shall be noted as a good practice.

**Article 39 Cooperation between national authorities and the private sector**

**Paragraph 2**

*2. Each State Party shall consider encouraging its nationals and other persons with a habitual residence in its territory to report to the national investigating and prosecuting authorities the commission of an offence established in accordance with this Convention.*

**(a) Summary of information relevant to reviewing the implementation of the provision**

265. Switzerland reported that in the public sector, the Federal Council designated in 2003 the Federal Audit Office (FAO) as the official channel for those wishing to alert the authorities to irregularities. This channel is not limited to persons employed in the federal administration, but extends to any person who becomes aware of irregularities in the activities of the Confederation. Switzerland further stated that encouragement to report is promoted by a legislative amendment of 1 January 2011: section 22a of the Personnel Law (LPers). The introduction of this new provision will also enable a new awareness campaign on a large scale. The law mentioned above, introducing an obligation to report against federal employees, also includes a component for strengthening the protection of persons reporting suspected violations or irregularities. On the one hand, an employer will be obliged to propose to an employee dismissed as a result of whistle-blowing his or her reinstatement to the position he or she held previously, or if this is not possible, to offer him or her another job that can reasonably be required of him or her. On the other hand, according to the new article 22a paragraph 5 of the LPers, no person shall suffer professional disadvantage for having, in good faith, denounced a reported violation or irregularity or for testifying as a witness. In addition, practical initiatives, including reporting suspicions anonymously, have already been implemented by federal agencies, such as the "whistle-blowing" hotline of the Federal Audit Office and "Armasuisse", and the online mailbox for employees of the Federal Roads Office (FEDRO), who are already subject to a reporting requirement, the coordination office for whistleblowers, since October 2008, at the Federal Office of Police (Fedpol).

266. Switzerland added that while most cantons already have a reporting requirement, following a letter dated 20 August 2008 sent to all cantonal governments and inviting them to consider the adoption of measures regarding the obligation to report suspicions of

corruption and protection of whistleblowers, to date the federal invitation has led to initiatives in at least five of them.

267. The same applies to the private sector. The Federal Council put up for consultation on 5 December 2008 a draft revision of the Code of Obligations for "Protection in case of reporting of wrongdoing by the worker." The draft proposed to regulate the conditions of reporting as part of the provisions governing the employment contract. It also described being given notice owing to lawful reporting as abusive. The Federal Council took note of the results of the consultation on 16 December 2009. It decided to submit the issue of the sanction for improper or unfair dismissal to special scrutiny, particularly to ensure sufficiently effective protection in case of reporting. To this effect, it made a new draft the subject of consultation on 1 October 2010, entitled "Partial revision of the Code of Obligations (penalty for improper or unfair discharge)". The draft proposes to increase from six to twelve months [salary] the maximum penalty for improper or unfair discharge. The consultation ended 14 January 2011.

268. Switzerland reported that, in the public sector, the Audit Office annually receives a number of communications, of which about a dozen are high-quality and allow a real improvement in financial supervision, even the opening of a criminal investigation. This figure falls short of the numbers observed in the private sector.

**(b) Observations on the implementation of the provision**

269. During the country visit, Swiss officials informed the reviewers of specific cases of awareness raising, aiming at drawing the attention of the public to the need of reporting to authorities acts of corruption. Switzerland applies adequately the measures contained in the non-mandatory provision under review.

**Article 40 Bank secrecy**

*Each State Party shall ensure that, in the case of domestic criminal investigations of offences established in accordance with this Convention, there are appropriate mechanisms available within its domestic legal system to overcome obstacles that may arise out of the application of bank secrecy laws.*

**(a) Summary of information relevant to reviewing the implementation of the article**

270. Switzerland noted that banking secrecy, although protected by article 47 paragraph 1 of the Law on Banks which criminalizes breach of bank secrecy, does not preclude the investigation of law enforcement authorities or those of the administrative authority responsible for oversight of the financial markets (FINMA). The Law on Banks, in its article 47 paragraph 5, expressly reserves the obligation to inform the authorities and testify in court. Swiss law is thus in full compliance with the Convention.

**(b) Observations on the implementation of the article**

271. Switzerland is in compliance with this article.

**(c) Successes and good practices**

272. It is observed that contrary to preconceived ideas, Swiss law provides for effective and efficient mechanisms for the lifting of banking secrecy in an expedient manner, which deserves to be noted as a good practice .

**Article 41 Criminal record**

*Each State Party may adopt such legislative or other measures as may be necessary to take into consideration, under such terms as and for the purpose that it deems appropriate, any previous conviction in another State of an alleged offender for the purpose of using such information in criminal proceedings relating to an offence established in accordance with this Convention.*

**(a) Summary of information relevant to reviewing the implementation of the article**

273. Switzerland reported that, as part of sentencing, the court takes into account the previous offences of the defendant, including any conviction abroad. This presupposes that Switzerland is aware of such a conviction, as is prescribed in the framework of bilateral agreements and in the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959.

**(b) Observations on the implementation of the article**

274. Switzerland applies the measures set forth in this optional provision of the Convention.

**Article 42 Jurisdiction**

**Paragraph 1**

*1. Each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when:*

*(a) The offence is committed in the territory of that State Party; or*

*(b) The offence is committed on board a vessel that is flying the flag of that State Party or an aircraft that is registered under the laws of that State Party at the time that the offence is committed.*

**(a) Summary of information relevant to reviewing the implementation of the provision**

275. Switzerland noted that jurisdiction for offences committed on Swiss territory is established by article 3 of the Criminal Code, whereas for offences committed on board ships under Swiss flag jurisdiction is clearly established by article 4 of the Federal law of 23 September 1953 on marine navigation under the Swiss flag. Article 97 of the Federal

Law of 21 December 1948 on Aviation contains a similar provision applicable to offences committed on board an aircraft.

**(b) Observations on the implementation of the provision**

276. Switzerland is in compliance with the provision under review.

**Article 42 Jurisdiction**

**Paragraph 2**

*2. Subject to article 4 of this Convention, a State Party may also establish its jurisdiction over any such offence when:*

*(a) The offence is committed against a national of that State Party; or*

*(b) The offence is committed by a national of that State Party or a stateless person who has his or her habitual residence in its territory; or*

*(c) The offence is one of those established in accordance with article 23, paragraph 1 (b) (ii), of this Convention and is committed outside its territory with a view to the commission of an offence established in accordance with article 23, paragraph 1 (a) (i) or (ii) or (b) (i), of this Convention within its territory; or*

*(d) The offence is committed against the State Party.*

**(a) Summary of information relevant to reviewing the implementation of the provision**

277. Switzerland reported that pursuant to the principle of active and passive personality under article 7 paragraph 1 of the Criminal Code, felonies and misdemeanours committed abroad by or against a person of Swiss nationality also come under Swiss criminal jurisdiction; insofar as the offence is also liable to prosecution in the state where it was committed, or the place of commission is not subject to any criminal law jurisdiction. The jurisdiction of Swiss courts is, in principle, established in the other cases referred to in sub-paragraph (b), as well as in the cases covered by sub-paragraph (d). As far as subparagraph c of paragraph 2 is concerned, Switzerland noted that Swiss law applies if an offence is committed in Switzerland, regardless of the place where the act of participation took place.

**(b) Observations on the implementation of the provision**

278. Article 4 paragraph 1 of the Criminal Code, which states that "this code is applicable to anyone who commits abroad a criminal offence against the state and national defence" seems to establish the jurisdiction of Swiss courts for crimes committed abroad against Switzerland. Switzerland applies the measures mentioned in paragraph 2 of Article 42 of the Convention..

## Article 42 Jurisdiction

### Paragraph 3

*3. For the purposes of article 44 of this Convention, each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when the alleged offender is present in its territory and it does not extradite such person solely on the ground that he or she is one of its nationals.*

#### **(a) Summary of information relevant to reviewing the implementation of the provision**

279. Switzerland noted that it applies the principle of active personality in the field of criminal jurisdiction, which is enshrined in art. 7 al. A PC, and therefore it meets the requirements of paragraph 3 of Article 42.

#### **(b) Observations on the implementation of the provision**

280. Switzerland is in compliance with the provision under review.

## Article 42 Jurisdiction

### Paragraph 4

*4. Each State Party may also take such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when the alleged offender is present in its territory and it does not extradite him or her.*

#### **(a) Summary of information relevant to reviewing the implementation of the provision**

281. Switzerland referred to article 7 paragraph 2 of the Criminal Code, cited above.

#### **(b) Observations on the implementation of the provision**

282. Article 7 paragraph 2 of the Criminal Code establishes the jurisdiction of Switzerland with respect to a foreign national who is present in its territory and is not extradited if certain conditions are met. Switzerland applies the measures contained in this optional provision.

## Article 42 Jurisdiction

### Paragraph 5

*5. If a State Party exercising its jurisdiction under paragraph 1 or 2 of this article has been notified, or has otherwise learned, that any other States Parties are conducting an investigation, prosecution or judicial proceeding in respect of the same conduct, the competent authorities of those States Parties shall, as appropriate, consult one another with a view to coordinating their actions.*

**(a) Summary of information relevant to reviewing the implementation of the provision**

283. Switzerland reported that its authorities consult with their counterparts abroad to coordinate their actions. For the rest, Switzerland referred to Chapter IV on International Cooperation.

**(b) Observations on the implementation of the provision**

284. Switzerland is in compliance with this provision.

**Article 42 Jurisdiction**

**Paragraph 6**

*6. Without prejudice to norms of general international law, this Convention shall not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law.*

**(a) Summary of information relevant to reviewing the implementation of the provision**

285. Switzerland referred to the information provided with regard to article 42, paragraph 1 (1) above.

**(b) Observations on the implementation of the provision**

286. It is noted that pursuant to article 7 paragraph 2 of the Criminal Code, the criminal jurisdiction of Swiss courts is established even with regard to crimes committed abroad where the alleged offender and the victim are both foreign nationals, when the crimes are particularly serious and proscribed by the international community or the extradition request has been refused on grounds not related to the nature of the act (principle of non-refoulement for example).



## **Chapter IV. International cooperation**

### **Article 44 Extradition**

#### **Paragraph 1**

*1. This article shall apply to the offences established in accordance with this Convention where the person who is the subject of the request for extradition is present in the territory of the requested State Party, provided that the offence for which extradition is sought is punishable under the domestic law of both the requesting State Party and the requested State Party.*

#### **(a) Summary of information relevant to reviewing the implementation of the provision**

287. The applicable legal provision is article 35 of the Federal Act on International Mutual Assistance in Criminal Matters (IMAC):

Federal Act on International Mutual Assistance in Criminal Matters

Art. 35

1 Extradition shall be permitted if, according to the documents supporting the request, the offence

a) is punishable under Swiss law and under the law of the requesting State by a sanction with deprivation of liberty for a maximum period of at least one year or with a more severe sanction and

b) is not subject to Swiss jurisdiction.

2 In determining if an act is punishable under Swiss law, there shall not be taken into account

a) special conditions of the law regarding guilt and punishment.

b) the personal and temporal scope of application of the provisions of the Swiss Military Penal Code of 13 June 1927 concerning genocide, crimes against humanity and war crimes.

#### **(b) Observations on the implementation of the article**

288. Article 35(1)(a) IMAC allows extradition under conditions of dual criminality. Since the offences established in accordance with UNCAC are covered by Swiss criminal law, Switzerland is in compliance with article 44(1) of the Convention.

### **Article 44 Extradition**

#### **Paragraph 2**

*2. Notwithstanding the provisions of paragraph 1 of this article, a State Party whose law so permits may grant the extradition of a person for any of the offences covered by this Convention that are not punishable under its own domestic law.*

#### **(a) Summary of information relevant to reviewing the implementation of the provision**

289. Switzerland conditions extradition on the existence of dual criminality. Thus, if the offence is not punishable in Switzerland, the person in question may not be extradited. The Swiss authorities informed the reviewers that Switzerland has to date not had any problems related to issues of dual criminality in matters pertaining to corruption. The Swiss authorities also reported that statistical data on extradition cases was not available.

**(b) Observations on the implementation of the provision**

290. Switzerland does not apply article 44(2) of the Convention, which is a non-mandatory provision.

**Article 44 Extradition**

**Paragraph 3**

*3. If the request for extradition includes several separate offences, at least one of which is extraditable under this article and some of which are not extraditable by reason of their period of imprisonment but are related to offences established in accordance with this Convention, the requested State Party may apply this article also in respect of those offences.*

**(a) Summary of information relevant to reviewing the implementation of the provision**

291. As provided by article 35 IMAC, “it is sufficient for one of the offences to be extraditable for the other offences to also be subject to extradition provided that the conditions for extradition are met (dual criminality, etc.)”. Article 36(2) IMAC states specifically that “If one of several offences is an extraditable one (article 35, paragraph 1) extradition may be granted for all offences.”

**(b) Observations on the implementation of the article**

292. Switzerland is in compliance with article 44(3) of the Convention.

**Article 44 Extradition**

**Paragraph 4**

*4. Each of the offences to which this article applies shall be deemed to be included as an extraditable offence in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them. A State Party whose law so permits, in case it uses this Convention as the basis for extradition, shall not consider any of the offences established in accordance with this Convention to be a political offence.*

**(a) Summary of information relevant to reviewing the implementation of the provision**

293. Pursuant to article 35 of IMAC, Switzerland may extradite even without the existence of a treaty or convention.

294. An example of a multilateral extradition treaty to which Switzerland is a state party is the European Extradition Treaty of 13 December 1957 and its two additional protocols. An example of a bilateral extradition treaty is the extradition treaty of 14 November 1990 between Switzerland and the United States of America.

295. Article 55(2) of IMAC provides for a special procedure to be followed where the person whose extradition is requested claims to be charged with a political offence or if the investigation reveals serious reasons to believe that the offence is of a political nature. However, the reviewers are satisfied that the existence of this procedure does not detract from effective implementation in Switzerland of article 44(4) of UNCAC.

**(b) Observations on the implementation of the provision**

296. Switzerland is in compliance with article 44(4) of the Convention.

**Article 44 Extradition**

**Paragraphs 5 and 6**

*5. If a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention the legal basis for extradition in respect of any offence to which this article applies.*

*6. A State Party that makes extradition conditional on the existence of a treaty shall:*

*(a) At the time of deposit of its instrument of ratification, acceptance or approval of or accession to this Convention, inform the Secretary-General of the United Nations whether it will take this Convention as the legal basis for cooperation on extradition with other States Parties to this Convention; and*

*(b) If it does not take this Convention as the legal basis for cooperation on extradition, seek, where appropriate, to conclude treaties on extradition with other States Parties to this Convention in order to implement this article.*

**(a) Summary of information relevant to reviewing the implementation of the provision**

297. Switzerland does not make extradition dependant on the existence of a treaty.

**(b) Observations on the implementation of the provision**

298. Since Switzerland does not make extradition dependant on the existence of a treaty, application of article 44, implementation of paragraphs 5 and 6 was not reviewed.

## Article 44 Extradition

### Paragraph 7

*7. States Parties that do not make extradition conditional on the existence of a treaty shall recognize offences to which this article applies as extraditable offences between themselves.*

#### (a) Summary of information relevant to reviewing the implementation of the provision

299. On the basis of article 35 of IMAC, Switzerland may extradite even without the existence of a treaty or convention. Extradition is subject to the condition of dual criminality. Where an existing treaty or agreement includes a list of extraditable offences, Switzerland applies the principle of favourable treatment. In line with this principle, which has been developed on the basis of case law, Switzerland will interpret the provisions of UNCAC in a manner that is most favourable to international cooperation in judicial matters.

#### (b) Observations on the implementation of the provision

300. Switzerland is in compliance with article 44(7) of the Convention.

#### (c) Successes and good practices

301. This application of the principle of favourable treatment, which is related to the similarly named principle used when applying human rights instruments, is an example of how policy and jurisprudence can promote international cooperation.

## Article 44 Extradition

### Paragraph 8

*8. Extradition shall be subject to the conditions provided for by the domestic law of the requested State Party or by applicable extradition treaties, including, inter alia, conditions in relation to the minimum penalty requirement for extradition and the grounds upon which the requested State Party may refuse extradition.*

#### (a) Summary of information relevant to reviewing the implementation of the provision

302. Articles 32 through 62 of IMAC set out the conditions to which extradition is subject under Swiss law. Of these, article 37 of IMAC establishes the grounds for refusal and article 38 of IMAC establishes the conditions for extradition.

##### Art. 37 - Refusal

1 Extradition may be refused if Switzerland can assume the prosecution of the offence or the execution of the foreign criminal judgment and if this appears to be indicated with regard to the social rehabilitation of the person pursued.

2. Extradition shall be refused if the request is based on a verdict rendered in the absence of the defendant and if the minimum rights of the defence to which a defendant acknowledgedly is entitled were not respected in the proceedings preceding the verdict; this rule shall not apply if the requesting State gives sufficient assurances to guarantee the person pursued the right to a new court proceeding where the rights of the defence are respected.

3 Extradition shall also be denied if the requesting State does not give the guarantee that the person pursued will not be condemned to death, that an already pronounced death penalty will not be carried out, or that he will not be subjected to treatment that will impair his physical integrity.

#### Art. 38 - Conditions

1 The person pursued may be extradited only on condition that the requesting State:

- a. shall neither prosecute nor sentence nor re-extradite him to a third State for any offence committed prior to his extradition and for which extradition was not granted;
- b. shall not deprive him of his liberty on any other ground that existed before his extradition;
- c. shall not bring him before an extraordinary court; and moreover
- d. shall send the Swiss authorities, upon their request, an officially certified copy of the decision which concludes the penal proceedings.

2 The conditions of paragraph 1, letters a and b, shall no longer be applicable if:

- a. the person pursued or extradited explicitly renounces; or
- b. the person extradited:
  1. in spite of being advised of the consequences, did not leave the territory of the requesting State within forty-five days after his conditional or final release although he had the opportunity to do so, or if, after leaving that territory, he has returned; or
  2. has been returned by a third State.

303. Switzerland notes that, in the case of a request for extradition for the enforcement of a sentence, domestic law does not establish a minimum sentence. In theory, extradition would be possible for the enforcement of a very short sentence. Practical considerations, however, preclude extradition if the sentence to be enforced is only a few months in length.

#### **(b) Observations on the implementation of the provision**

304. Switzerland is in compliance with article 44(8) of the Convention.

### **Article 44 Extradition**

#### **Paragraph 9**

*9. States Parties shall, subject to their domestic law, endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto in respect of any offence to which this article applies.*

**(a) Summary of information relevant to reviewing the implementation of the provision**

305. The Swiss authorities referred to several provisions that expedite extradition procedures. Among them is article 12(2) of IMAC, which curtails the possibility of suspension of extradition procedures. Article 17a establishes a general obligation to execute requests promptly and rule without delay. The Federal Office may intervene if unjustified delays are encountered.

306. Moreover, article 54 of IMAC provides for a simplified extradition procedure in cases where the person whose extradition is requested consents to the extradition. The Federal Office of Justice is responsible for simplified extradition. According to the Swiss authorities, this simplified procedure is applied in somewhat over one half of the cases of extradition. Depending on the circumstances, the simplified procedure may lead to extradition within only a few days, or even only a few hours, of the receipt of the request.

**(b) Observations on the implementation of the provision**

307. Switzerland is in compliance with article 44(9) of the Convention.

**(c) Successes and good practices**

308. The use of simplified extradition in Switzerland can be deemed an example of good practice.

**Article 44 Extradition**

**Paragraph 10**

*10. Subject to the provisions of its domestic law and its extradition treaties, the requested State Party may, upon being satisfied that the circumstances so warrant and are urgent and at the request of the requesting State Party, take a person whose extradition is sought and who is present in its territory into custody or take other appropriate measures to ensure his or her presence at extradition proceedings.*

**(a) Summary of information relevant to reviewing the implementation of the provision**

309. Article 44 of IMAC provides that foreign nationals may be arrested if their extradition has been requested. According to article 51, such arrest is part of standard practice in extradition cases. The release of the person (possibly on bail) might exceptionally be considered if the prospects of extradition are deemed low or the health of the person in question warrants release.

310. Additionally, article 45 of IMAC provides that objects and assets which can serve as evidence in foreign criminal proceedings or which originate from the offence shall be seized at the time of the arrest.

**(b) Observations on the implementation of the provision**

311. Switzerland is in compliance with article 44(10) of the Convention.

**Article 44 Extradition**

**Paragraph 11**

*11. A State Party in whose territory an alleged offender is found, if it does not extradite such person in respect of an offence to which this article applies solely on the ground that he or she is one of its nationals, shall, at the request of the State Party seeking extradition, be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution. Those authorities shall take their decision and conduct their proceedings in the same manner as in the case of any other offence of a grave nature under the domestic law of that State Party. The States Parties concerned shall cooperate with each other, in particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecution.*

**(a) Summary of information relevant to reviewing the implementation of the provision**

312. Articles 85-86 specify the principle that, if extradition is not granted, Switzerland may exercise its jurisdiction instead of the State where the offence was committed. The Swiss authorities stressed that, despite the use of the word “may” in article 85, prosecution would follow in Switzerland as a matter of course in cases where the case appears substantiated, in accordance with the principles governing initiation of prosecution in Swiss law. Article 32 of the Criminal Procedure Code deals with the forum in case of offences committed abroad or in case of uncertainty about the place of commission.

313. The Swiss authorities note that treaties with Austria, Germany and Italy allow direct transfer of criminal prosecution, which results in rapid proceedings.

**(b) Observations on the implementation of the provision**

314. Switzerland is in compliance with article 44(11) of the Convention.

**Article 44 Extradition**

**Paragraph 12**

*12. Whenever a State Party is permitted under its domestic law to extradite or otherwise surrender one of its nationals only upon the condition that the person will be returned to that State Party to serve the sentence imposed as a result of the trial or proceedings for which the extradition or surrender of the person was sought and that State Party and the State Party seeking the extradition of the person agree with this option and other terms that they may deem appropriate, such conditional extradition or surrender shall be sufficient to discharge the obligation set forth in paragraph 11 of this article.*

**(a) Summary of information relevant to reviewing the implementation of the article**

315. Article 7(1) of IMAC provides the basic principle that no Swiss national may, without his or her written consent, be extradited or surrendered to a foreign State for prosecution or execution of a sentence. The consent may be withdrawn up to the time when the surrender is ordered.

**(b) Observations on the implementation of the article**

316. Switzerland does not apply article 44(12) of the Convention, which is a non-mandatory provision.

**Article 44 Extradition**

**Paragraph 13**

*13. If extradition, sought for purposes of enforcing a sentence, is refused because the person sought is a national of the requested State Party, the requested State Party shall, if its domestic law so permits and in conformity with the requirements of such law, upon application of the requesting State Party, consider the enforcement of the sentence imposed under the domestic law of the requesting State Party or the remainder thereof.*

**(a) Summary of information relevant to reviewing the implementation of the provision**

317. As noted above in connection with the review of implementation of article 44, paragraph 11 of UNCAC, articles 85 – 87 of IMAC set out the principle of “aut dedere, aut judicare”. In the case of requests for extradition for the purpose of enforcement of sentence, articles 94-108 contain parallel provisions, which set out in detail the procedure to be applied. The Swiss authorities noted that this procedure is rarely applied in practice.

**(b) Observations on the implementation of the provision**

318. Switzerland is in compliance with article 44(13) of the Convention.

**Article 44 Extradition**

**Paragraph 14**

*14. Any person regarding whom proceedings are being carried out in connection with any of the offences to which this article applies shall be guaranteed fair treatment at all stages of the proceedings, including enjoyment of all the rights and guarantees provided by the domestic law of the State Party in the territory of which that person is present.*

**(a) Summary of information relevant to reviewing the implementation of the provision**



319. The transfer of criminal prosecution in case of non-extradition due to insufficient guarantees for human rights is explicitly provided for in articles 85 to 87 of IMAC. Furthermore, the matter is dealt with in the Federal Constitution of the Swiss Confederation of 18 April 1999, which prohibits extradition where the foreign proceedings do not fulfil the standard set by the European Convention for the Protection of Human Rights and Fundamental Proceedings of 4 November 1950 or the International Covenant on Civil and Political Rights of 16 December 1966, these proceedings seek to prosecute or punish a person on account of his or her political opinions, social group, race, religion or nationality, these proceedings could result in aggravating the situation of the person whose extradition is requested for any of the reasons just mentioned, or these proceedings are otherwise tainted with grave defects.

320. In extradition cases where there is a risk of violations of the European Convention on Human Rights and/or where the person sought invokes this risk, Switzerland routinely asks for specific guarantees from the requesting country. If the requested guarantees are not provided, extradition will be refused. Moreover, in the context of extradition proceedings, the applicable principles of the European Convention on Human Rights and the International Covenant on Civil and Political Rights are taken into account at all levels of decision making.

**(b) Observations on the implementation of the provision**

321. Switzerland is in compliance with article 44(14) of the Convention.

**Article 44 Extradition**

**Paragraph 15**

*15. Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person's position for any one of these reasons.*

**(a) Summary of information relevant to reviewing the implementation of the provision**

322. In their response, the Swiss authorities referred to the same provisions dealt with immediately above, in connection with article 44, paragraph 14. Moreover, the Swiss authorities specified that where a concrete risk of violation of fundamental rights exists, extradition is refused (pre-eminence of *jus cogens* in Swiss law). In view of this, guarantees are required solely when the possibility of a violation of fundamental rights is not totally excluded and one can rely on the assurances offered on compliance with the principles set forth in the European Convention on Human Rights and the International Covenant on Civil and Political Rights. This is regardless of whether or not the guarantees in question are required by the accused person.

**(b) Observations on the implementation of the provision**

323. Switzerland is in compliance with article 44(15) of the Convention.

## **Article 44 Extradition**

### **Paragraph 16**

*16. States Parties may not refuse a request for extradition on the sole ground that the offence is also considered to involve fiscal matters.*

#### **(a) Summary of information relevant to reviewing the implementation of the provision**

324. As noted in the foregoing, Switzerland has criminalized most of the offences established in accordance with the Convention. These offences may be punished by deprivation of liberty for a term of several years. The reviewers were assured by the Swiss authorities that, if the facts in the case are considered by the Swiss authorities to constitute an act of corruption established under the Convention, the question of whether or not the offences is of a fiscal nature simply does not rise.

#### **(b) Observations on the implementation of the provision**

325. The issue of fiscal offences has been an issue of interest in the particular case of international cooperation involving Switzerland. Article 3(3) of IMAC established the basic limit of cooperation in this regard: "A request shall not be granted if the subject of the proceeding is an offence which appears to be aimed at reducing fiscal duties or taxes or which violates regulations concerning currency, trade or economic policy." Nonetheless, the same provision goes on to say that a request may be granted when the subject of the proceeding is tax fraud (direct and indirect taxes) and aggravated tax fraud within the meaning of article 14(4) of the Federal Act of 22 March 1974 on Administrative Criminal Law. To simplify: if the subject of the request is tax evasion, which is punishable in Switzerland by a fine, the request may be refused. If the subject is tax fraud or aggravated tax fraud, which is punishable by imprisonment, the request will generally be granted. In this regard, Switzerland specified that extradition requests are reviewed according to the conditions of Art. 3, para. 3 IMAC. The prescribed sentence must be at least one year of imprisonment. If the requirement of dual criminality is fulfilled but the penalty is less than one year of imprisonment, an accessory extradition may be possible subject to the regulations of the Schengen Agreement

326. The reviewers were informed that the Swiss Government intends to extend the scope of mutual legal assistance in cases involving fiscal offences. Similarly to the work already carried out in the area of mutual administrative assistance, the Government intends to initiate consultation with all interested parties towards the middle of 2012 with regard to the extension of mutual legal assistance in fiscal matters through amendment of the Federal Act on International Mutual Assistance in Criminal Matters and the incorporation in Swiss legislation of the relevant additional protocols of the Council of Europe.

327. Switzerland is in compliance with article 44(16) of the Convention.

#### **(c) Successes and good practices**

328. The Swiss policy of further expanding the scope of mutual legal assistance in cases involving fiscal offences can be deemed good practice.

## **Article 44 Extradition**

### **Paragraph 17**

*17. Before refusing extradition, the requested State Party shall, where appropriate, consult with the requesting State Party to provide it with ample opportunity to present its opinions and to provide information relevant to its allegation.*

#### **(a) Summary of information relevant to reviewing the implementation of the provision**

329. The reviewers were informed that, in general, when the extradition request is unclear and thus does not allow immediate extradition, the Swiss authorities routinely give the requesting State the opportunity to supplement the application. There are explicit references to requests for consultations in such cases in, for example, article 13 of the European Convention on Extradition, and for example article 10 of the Extradition Treaty between Switzerland and the United States of America. Switzerland specified that the opportunity to supplement the application is generally granted only where it is not possible to rule on the application. It also may be requested when it appears the request will have to be denied if it is maintained.

#### **(b) Observations on the implementation of the provision**

330. Switzerland is in compliance with article 44(17) of the Convention.

## **Article 44 Extradition**

### **Paragraph 18**

*18. States Parties shall seek to conclude bilateral and multilateral agreements or arrangements to carry out or to enhance the effectiveness of extradition.*

#### **(a) Summary of information relevant to reviewing the implementation of the provision**

331. Switzerland is gradually extending its regime of treaties in the field of international cooperation in criminal matters. Among the states with which it has negotiated treaties or is on track to do so include, in addition to its European neighbours, states applying Anglo-American law (including the United States of America, Canada and Australia), Latin American states (e.g. Peru and Ecuador), Asian states (e.g. the Philippines), African states (e.g. Egypt and Morocco). It should also be noted that Switzerland participates in the work of the Council of Europe relating to the development of the Third and Fourth Additional Protocols to the European Convention on Extradition.

332. Switzerland has also become a party to several treaties that include provisions governing extradition. Examples are United Nations instruments against terrorism and organized crime.

**(b) Observations on the implementation of the provision**

333. Switzerland is in compliance with article 44(17) of the Convention. Switzerland is encouraged to expand the network of treaties.

**(c) Successes and good practices**

**Article 45 Transfer of sentenced persons**

*States Parties may consider entering into bilateral or multilateral agreements or arrangements on the transfer to their territory of persons sentenced to imprisonment or other forms of deprivation of liberty for offences established in accordance with this Convention in order that they may complete their sentences there.*

**(a) Summary of information relevant to reviewing the implementation of the article**

334. Article 1(1) of IMAC specifies that said Act governs (among other issues) the procedure to be followed in transferring the punishment for an offence, and in transferring the enforcement of a foreign criminal judgment. Article 8(a) of IMAC provides that the Federal Council may conclude bilateral agreements with foreign States regarding the transfer of convicted persons, insofar as these agreements respect the principles of the European Convention of 21 March 1983 on the Transfer of Sentenced Persons.

335. Switzerland has entered into a number of bilateral and multilateral agreements that provide for the possibility of transfer of persons sentenced to imprisonment. Among these are the Convention on the Transfer of Sentenced Persons (1983) and its Additional Protocol (1997), and bilateral agreements, in particular with Barbados, Cuba, Morocco, Paraguay, Thailand, and Peru.

**(b) Observations on the implementation of the article**

336. Switzerland is in compliance with the Convention.

**Article 46 Mutual legal assistance**

**Paragraph 1**

*1. States Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention.*

**(a) Summary of information relevant to reviewing the implementation of the provision**

337. The Law on International Mutual Assistance in Criminal Matters (IMAC) provides for a very wide range of mutual legal assistance. In addition, agreements on mutual legal assistance have been entered into with a large number of countries.

338. Switzerland has provided the following statistical data on mutual legal assistance in corruption-related cases (1/1/2006 to 31/1/2012):

Cases	Nature of request	2006	2007	2008	2009	2010	2011	2012
Requests to Switzerland	Requests for evidence	78	95	100	88	80	138	7
	Restitution of assets	1	--	4	6	3	3	--
Requests from Switzerland		22	14	19	29	45	18	2
Spontaneous transmittal of information from Switzerland		4	7	3	5	4	2	1

**(b) Observations on the implementation of the provision**

339. Switzerland is in compliance with article 46(1) of the Convention.

**Article 46 Mutual legal assistance**

**Paragraph 2**

*2. Mutual legal assistance shall be afforded to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State Party with respect to investigations, prosecutions and judicial proceedings in relation to the offences for which a legal person may be held liable in accordance with article 26 of this Convention in the requesting State Party.*

**(a) Summary of information relevant to reviewing the implementation of the provision**

340. IMAC allows mutual legal assistance also in the case of legal persons. Other provisions on the liability of legal persons are to be found, for example, in the Federal Law of 10 October 1997 concerning the fight against money laundering and terrorist financing in the financial sector, and the Federal Law of 1 October 2010 on the restitution of assets of illicit origin of politically exposed persons. The Swiss authorities informed the reviewers that to date, there have been no requests for judicial assistance in corruption cases in which there would have been direct reference to the liability of a legal person. Requests for assistance primarily concern the directors of legal persons. In practice, Switzerland has never refused a request for legal assistance on the grounds that legal persons would not be liable under Swiss law, even before the possibility of punishing a legal person was introduced into the Swiss Penal Code on 1 October 2003 (article 102).

341. Switzerland is in compliance with article 46(2) of the Convention.

## Article 46 Mutual legal assistance

### Subparagraph 3 (a)-(i)

*3. Mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes:*

- (a) Taking evidence or statements from persons;*
- (b) Effecting service of judicial documents;*
- (c) Executing searches and seizures, and freezing;*
- (d) Examining objects and sites;*
- (e) Providing information, evidentiary items and expert evaluations;*
- (f) Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;*
- (g) Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;*
- (h) Facilitating the voluntary appearance of persons in the requesting State Party;*
- (i) Any other type of assistance that is not contrary to the domestic law of the requested State Party;*

### **(a) Summary of information relevant to reviewing the implementation of the provision**

342. On the basis of art. 63, Switzerland may provide assistance in the form of the transmission of information, as well as procedural acts and other official acts permitted under Swiss law, insofar as these acts appear to be necessary for proceedings carried out abroad in criminal matters or serve to retrieve the proceeds of the offence. These acts of assistance shall include in particular the service of documents, obtaining of evidence (in particular search of persons and rooms, seizure, order to produce, expert opinion, hearing and confrontation of persons), and the production of documents and papers.

343. On the basis of art. 69, safe conduct shall be granted to a person who voluntarily appears in the requesting State Party.

### **(b) Observations on the implementation of the provision**

344. Switzerland is in compliance with article 46(2) (a)-(i) of the Convention.

## Article 46 Mutual legal assistance

### Subparagraph 3 (j)-(k)

*3. Mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes:*

- (j) Identifying, freezing and tracing proceeds of crime in accordance with the provisions of chapter V of this Convention;*

*(k) The recovery of assets, in accordance with the provisions of chapter V of this Convention.*

**(a) Summary of information relevant to reviewing the implementation of the provision**

345. Pursuant to art. 18 and 74a of IMAC, all provisional measures aimed at guaranteeing asset recovery (Chapter V) in corruption cases are applicable:

Federal Act on International Mutual Assistance in Criminal Matters

Art. 18 -Provisional Measures

1 Upon explicit request by another State, provisional measures may be taken by the competent authority to preserve the existing situation, to safeguard threatened legal interests or to protect jeopardized evidence if the proceeding according to this act does not appear obviously inadmissible or inappropriate.

2 If any delay were to jeopardize the proceedings and if there is sufficient information so as to determine whether all the conditions are met, the Federal Office may likewise order these measures as soon as a request is announced. These measures shall be lifted if the foreign State does not make the request within the deadline set.

3 Appeals filed against rulings based on this article do not have suspensive effect.

Federal Act on International Mutual Assistance in Criminal Matters

Art. 74a - Handing Over [of Property] for the Purpose of Forfeiture or Return

1 Upon request, the objects or assets subject to a precautionary seizure may be handed over to the competent foreign authority after conclusion of the mutual assistance proceeding (art. 80d) for the purpose of forfeiture or return to the person entitled.

2 The objects or assets referred to in paragraph 1 include:

a. instruments which served to commit the offence;

b. products or profits of the offence, their replacement value and an illicit advantage;

c. gifts and other benefits which served to instigate the offence or recompense the offender, as well as their replacement value.

3 The handing over may intervene at any stage of the foreign proceeding, as a rule based on a final and executable order of the requesting State.

346. Reference can also be made to the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime, to which Switzerland is a party.

347. The Swiss authorities noted one specific issue which arises in respect of the return of assets. As noted under article 20 (above), Article 260-third of the Swiss Penal Code establishes the partial reversal of the burden of proof in the context of assets belonging to a person who has participated in or supported a criminal organization. Pursuant to article 72 of the Penal Code, these assets are presumed, until proven otherwise, as being at the disposal of the organization and are therefore subject to confiscation. The prosecuting authority must still prove that the defendant's prior conduct is punishable (membership or support for the criminal organization). On the basis of these provisions, considerable sums have been returned to, for example, Nigeria and Haiti. The Federal Law of 1 October 2010 on the restitution of assets of illicit origin of politically exposed persons recognizes a similar principle. This allows, without a criminal conviction of the politically exposed

person or his associates, to confiscate assets of illicit origin. Under certain conditions, the illicit origin of assets is assumed.

**(b) Observations on the implementation of the provision**

348. The Swiss authorities provided the reviewers with statistics giving the amounts seized in Switzerland and returned within the context of judicial assistance. The sums returned have totalled hundreds of millions of US dollars over the years. Among the more notable sums returned were USD 40 million to Nigeria in 2006 and USD 74 million to Mexico in 2008.

349. Switzerland is in compliance with article 46(3) of the Convention.

**(c) Successes and good practices**

350. The assets returned by Switzerland to a number of states can be taken as both a success and as signs of good practice. Furthermore, art. 260-third of the Swiss Penal Code and the Federal Law of 1 October 2010 on the restitution of assets of illicit origin of politically exposed persons, with their partial reversal of the burden of proof in respect of assets, are deserving of international study.

**Article 46 Mutual legal assistance**

**Paragraph 4**

*4. Without prejudice to domestic law, the competent authorities of a State Party may, without prior request, transmit information relating to criminal matters to a competent authority in another State Party where they believe that such information could assist the authority in undertaking or successfully concluding inquiries and criminal proceedings or could result in a request formulated by the latter State Party pursuant to this Convention.*

**(a) Summary of information relevant to reviewing the implementation of the provision**

351. The spontaneous transmittal of information and evidence is dealt with in art. 67a of IMAC, according to which an authority who is prosecuting offences may spontaneously transmit to a foreign authority information or evidence that it has gathered in the course of its own investigation, when it determines that this transmittal permits the opening of a criminal procedure or facilitates a criminal investigation that is in progress.

**(b) Observations on the implementation of the provision**

352. Switzerland is in compliance with article 46(4) of the Convention.

**Article 46 Mutual legal assistance**

**Paragraph 5**



*5. The transmission of information pursuant to paragraph 4 of this article shall be without prejudice to inquiries and criminal proceedings in the State of the competent authorities providing the information. The competent authorities receiving the information shall comply with a request that said information remain confidential, even temporarily, or with restrictions on its use. However, this shall not prevent the receiving State Party from disclosing in its proceedings information that is exculpatory to an accused person. In such a case, the receiving State Party shall notify the transmitting State Party prior to the disclosure and, if so requested, consult with the transmitting State Party. If, in an exceptional case, advance notice is not possible, the receiving State Party shall inform the transmitting State Party of the disclosure without delay.*

**(a) Summary of information relevant to reviewing the implementation of the article**

353. Art 67(a) of IMAC sets out the framework for the spontaneous transmittal of information and evidence. Switzerland provided the following clarifications with regard to the way that the requirement of confidentiality and restrictions on the use of information is addressed: Irrespective of its form, the spontaneous transmittal of information and evidence constitute one of the acceptable means of assistance given by Switzerland to foreign countries (Art. 67a IMAC, Art. 11 of the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters [ECMA], Art. 10 of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (CBI). Its primary goal is to encourage the development of criminal proceedings abroad. It primarily serves the interests of the State receiving the information communicated. In spontaneously giving information, Switzerland may provide information as if in response to a requesting state while actually not yet having been seized by a request from abroad, or having been seized by a request not specifically intended for the information spontaneously provided. However, a spontaneous transmittal of evidence that touches upon confidential information shall be authorized only if it makes possible the submission of a mutual legal assistance request to Switzerland (art. 67a, para. 4 and 5 IMAC).

354. In Switzerland, the handling of information is governed by the ordinance concerning protection of information of the Swiss Confederation (OPrl, RS 510.411). The ordinance provides for a classification of confidentiality according to the categories “secret,” “confidential,” and “internal.” Similarly, it provides for the methods of processing and transmission of such information according to each category. In international exchanges of information, the modalities for confidentiality restrictions are governed by the legislation pursuant to which transmission of information is performed. In bilateral exchanges, the transmission and use of information is governed by provisions found in bilateral agreements on judicial or law enforcement cooperation, in consideration of the measures requested and the legal assistance to be provided. In the area of law enforcement, for instance, it is possible to cite article 15 of the Cooperation Agreement with the Republic of Albania (RS 0360.123.1).

**(b) Observations on the implementation of the provision**

355. Switzerland is in compliance with article 46(5) of the Convention.

*(Application of article 46, paragraphs 6 and 7 do not require review)*

## **Article 46 Mutual legal assistance**

### **Paragraph 8**

*8. States Parties shall not decline to render mutual legal assistance pursuant to this article on the ground of bank secrecy.*

#### **(a) Summary of information relevant to reviewing the implementation of the provision**

356. The Swiss provisions on bank secrecy have been a subject of considerable discussion nationally and internationally, and the Swiss authorities provided detailed information on the relevant legislation. They emphasized that in criminal cases bank secrecy can be lifted, and in an effective manner.

357. Article 13 of the Federal Constitution of the Swiss Confederation states: "Everyone has the right to respect for his private and family life." Income and assets fall under this law. It is only in cases against the law, especially when criminal in nature, that client banking confidentiality can be lifted at the request of law enforcement authorities.

358. One of the guarantees of this fundamental right of respect for privacy is the Swiss bank-client confidentiality. Thus article 47 of the Federal Law on Banks and Savings Banks, which came into force on 8 November 1934, stipulates that anyone acting in his capacity as member of a body, employee, agent or liquidator of a bank, or a member of a body or an employee of a firm of auditors, has no right to release information he learned as part of his duties. The same principle applies to stock exchanges and securities dealers, as stipulated in article 43 of the Federal Law of 24 March 1995 on Stock Exchanges and Securities Trading. However, these articles specifically state that "The federal and cantonal provisions on the duty to provide evidence or on the duty to provide information remain reserved. Thus, where evidence or information is needed in a criminal case, bank secrecy is to be lifted.

359. These provisions show that banks cannot rely on banking secrecy or refuse to provide the required documents when called upon to collaborate within the context of criminal assistance. However, banking secrecy may be lifted by order of a judicial authority only in cases where the offence referred to in the request constitutes an offence also under Swiss law (art. 64 of IMAC). The principle of dual criminality thus applies.

#### **(b) Observations on the implementation of the provision**

360. Switzerland is in compliance with article 46(8) of the Convention.

## **Article 46 Mutual legal assistance**

### **Subparagraph 9 (a)**

9. (a) A requested State Party, in responding to a request for assistance pursuant to this article in the absence of dual criminality, shall take into account the purposes of this Convention, as set forth in article 1;

**(a) Summary of information relevant to reviewing the implementation of the provision**

361. Switzerland follows the international practice of distinguishing between mutual legal assistance requests requiring coercive measures (compulsory measures), and those that do not require such measures. The basic principle is that requests requiring coercive measures will be granted on condition of dual criminality (art. 64(1) of IMAC). However, even in the absence of dual criminality, a request for assistance involving coercive measures (which according to Switzerland include search, seizure, production orders, handing over files, records and documents), may be granted in the following cases:

Federal Act on International Mutual Assistance in Criminal Matters

Art. 64 para. 2 - Compulsory Measures

If the offence prosecuted abroad is not punishable in Switzerland, measures according to article 63 which require the use of coercion provided for in the procedural law shall be allowed:

- a. for the exoneration of a person pursued;
- b. for the prosecution of offences constituting sexual acts with minors.

362. Other requests for assistance that do not involve coercion are executed even in absence of dual criminality as long as the grounds for refusal set out in articles 2 or 3 of IMAC do not apply. These grounds refer, for example, to the foreign proceedings not fulfilling the standard set by the European Convention for the Protection of Human Rights and Fundamental Proceedings of 4 November 1950 or the International Covenant on Civil and Political Rights of 16 December 1966, these proceedings seek to prosecute or punish a person on account of his or her political opinions, social group, race, religion or nationality, these proceedings could result in aggravating the situation of the person whose extradition is requested for any of the reasons just mentioned, or these proceedings are otherwise tainted with grave defects.

**(b) Observations on the implementation of the provision**

363. Switzerland is in compliance with article 46(9)(a) of the Convention.

**Article 46 Mutual legal assistance**

**Subparagraph 9 (b)**

9.( b) States Parties may decline to render assistance pursuant to this article on the ground of absence of dual criminality. However, a requested State Party shall, where consistent with the basic concepts of its legal system, render assistance that does not involve coercive action. Such assistance may be refused when requests involve matters of a *de minimis* nature or matters for which the cooperation or assistance sought is available under other provisions of this Convention;

**(a) Summary of information relevant to reviewing the implementation of the provision**

364. As noted under article 46(9)(a) above requests for assistance that do not involve coercion are executed as long as the grounds for refusal set out in articles 2 or 3 of IMAC do not apply. Art. 4 of IMAC provides for the refusal of a request “if the importance of the offence does not justify the proceedings.”

**(b) Observations on the implementation of the provision**

365. Switzerland is in compliance with article 46(9)(b) of the Convention.

**Article 46 Mutual legal assistance**

**Subparagraph 9 (c)**

*9. (c) Each State Party may consider adopting such measures as may be necessary to enable it to provide a wider scope of assistance pursuant to this article in the absence of dual criminality.*

**(a) Summary of information relevant to reviewing the implementation of the provision**

366. The Swiss authorities state that in certain serious cases it is possible to render wider scope of assistance. According to art. 64(2) of IMAC, even coercive measures can be used despite the absence of dual criminality where mutual legal assistance is requested (a) for the exoneration of a person being prosecuted, or (b) for the prosecution of offences constituting sexual acts with minors.

**(b) Observations on the implementation of the provision**

367. Switzerland is in compliance with article 46(9)(c) of the Convention.

**Article 46 Mutual legal assistance**

**Paragraph 10**

*10. A person who is being detained or is serving a sentence in the territory of one State Party whose presence in another State Party is requested for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for investigations, prosecutions or judicial proceedings in relation to offences covered by this Convention may be transferred if the following conditions are met:*

- (a) The person freely gives his or her informed consent;*
- (b) The competent authorities of both States Parties agree, subject to such conditions as those States Parties may deem appropriate.*

**(a) Summary of information relevant to reviewing the implementation of the provision**

368. Switzerland has for many years included in its treaties on mutual assistance in criminal matters one or more provisions governing the temporary presence of parties in the proceedings in the requested State. Examples include art. 9 of the Treaty on mutual legal assistance in criminal matters of 12 May 2004 with Brazil and art. 8 of the Treaty on mutual legal assistance in criminal matters of 11 November 2005 with Mexico. The matter is also dealt with in articles 7 et seq. of the European Convention on Mutual Assistance in Criminal Matters. The treaties in question are not limited to a list of offences. In Swiss domestic law, the relevant provisions are to be found in articles 70 to 73 of IMAC.

**(b) Observations on the implementation of the provision**

369. Switzerland is in compliance with article 46(10) of the Convention.

**Article 46 Mutual legal assistance**

**Paragraph 11**

*11. For the purposes of paragraph 10 of this article:*

*(a) The State Party to which the person is transferred shall have the authority and obligation to keep the person transferred in custody, unless otherwise requested or authorized by the State Party from which the person was transferred;*

*(b) The State Party to which the person is transferred shall without delay implement its obligation to return the person to the custody of the State Party from which the person was transferred as agreed beforehand, or as otherwise agreed, by the competent authorities of both States Parties;*

*(c) The State Party to which the person is transferred shall not require the State Party from which the person was transferred to initiate extradition proceedings for the return of the person;*

*(d) The person transferred shall receive credit for service of the sentence being served in the State from which he or she was transferred for time spent in the custody of the State Party to which he or she was transferred.*

**(a) Summary of information relevant to reviewing the implementation of the provision**

370. The Swiss domestic law provisions relevant to article 46(11) of UNCAC are art. 70 and 72 of IMAC. Pursuant to art. 70, persons held in custody in Switzerland may be transferred to a foreign authority for the purpose of investigation if they are guaranteed safe conduct and if it is assured that they will be kept in custody and returned to Switzerland upon request. Persons who are not indicted abroad and Swiss citizens may be transferred only with their written consent. Article 72 of IMAC concerns the keeping of a person in custody when he or she is surrendered to the Swiss authorities in response to a request. Finally, article 14 of IMAC provides that credit for the period of all kinds of detention spent abroad in the context of proceedings pursuant to the IMAC shall be determined in accordance to the relevant provisions of the Penal Code.

**(b) Observations on the implementation of the provision**

371. Switzerland is in compliance with article 46(11) of the Convention.

## **Article 46 Mutual legal assistance**

### **Paragraph 12**

*12. Unless the State Party from which a person is to be transferred in accordance with paragraphs 10 and 11 of this article so agrees, that person, whatever his or her nationality, shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in the territory of the State to which that person is transferred in respect of acts, omissions or convictions prior to his or her departure from the territory of the State from which he or she was transferred.*

### **(a) Summary of information relevant to reviewing the implementation of the provision**

372. Article 46(12) of UNCAC refers to the safe conduct of detainees in the States where they are transferred for purposes of identification or testimony.

373. The relevant provisions are: article 73 of IMAC and article 14 of the European Extradition Convention.

#### **Art. 73 -Safe Conduct in Switzerland**

1 A person with habitual residence abroad and who appears in Switzerland in a criminal case pursuant to a summons may neither be prosecuted nor restricted in his personal freedom for reasons that occurred prior to his entry into Switzerland.

2 The person pursued shall enjoy no safe conduct regarding the offences specified in the summons.

3 The safe conduct provided in paragraph 1 shall cease when this person leaves Switzerland but at the latest three days after he is dismissed by the summoning authorities.

#### **Article 14 - Rule of Speciality**

1. A person who has been extradited shall not be proceeded against, sentenced or detained with a view to the carrying out of a sentence or detention order for any offence committed prior to his surrender other than that for which he was extradited, nor shall he be for any other reason restricted in his personal freedom, except in the following cases:

a) when the Party which surrendered him consents. A request for consent shall be submitted, accompanied by the documents mentioned in Article 12 and a legal record of any statement made by the extradited person in respect of the offence concerned. Consent shall be given when the offence for which it is requested is itself subject to extradition in accordance with the provisions of this Convention;

b) when that person, having had an opportunity to leave the territory of the Party to which he has been surrendered, has not done so within 45 days of his final discharge, or has returned to that territory after leaving it.

2. The requesting Party may, however, take any measures necessary to remove the person from its territory, or any measures necessary under its law, including proceedings by default, to prevent any legal effects of lapse of time.

3. When the description of the offence charged is altered in the course of proceedings, the

extradited person shall only be proceeded against or sentenced in so far as the offence under its new description is shown by its constituent elements to be an offence which would allow extradition.

**(b) Observations on the implementation of the provision**

374. Switzerland is in compliance with article 46 (12) of the Convention.

**Article 46 Mutual legal assistance**

**Paragraph 13**

*13. Each State Party shall designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution. Where a State Party has a special region or territory with a separate system of mutual legal assistance, it may designate a distinct central authority that shall have the same function for that region or territory. Central authorities shall ensure the speedy and proper execution or transmission of the requests received. Where the central authority transmits the request to a competent Authority for execution, it shall encourage the speedy and proper execution of the request by the competent authority. The Secretary-General of the United Nations shall be notified of the central authority designated for this purpose at the time each State Party deposits its instrument of ratification, acceptance or approval of or accession to this Convention. Requests for mutual legal assistance and any communication related thereto shall be transmitted to the central authorities designated by the States Parties. This requirement shall be without prejudice to the right of a State Party to require that such requests and communications be addressed to it through diplomatic channels and, in urgent circumstances, where the States Parties agree, through the International Criminal Police Organization, if possible.*

**(a) Summary of information relevant to reviewing the implementation of the provision**

375. The Federal Office of Justice has been designated as the Swiss central authority for purposes of mutual legal assistance (art. 17 of IMAC). The Secretary-General of the United Nations has been notified of this designation.

376. According to article 29 paragraph 1 of IMAC, Switzerland allows the designated Office to receive requests directly from the Ministry of Justice of the requesting State. Switzerland does not require that requests for assistance and communications relating thereto be addressed to it through diplomatic channels. Switzerland has also given notice that, in case of emergency, requests for mutual legal assistance and communications relating thereto be addressed to it through the International Criminal Police Organisation. As set out in article 29 paragraph 2 of IMAC, direct correspondence is always permitted in the case of an emergency. This direct transmission may be made through Interpol and be addressed directly to the Federal Office of Justice, which is the central authority.

Requests may also be addressed directly to the requested competent authority on the basis of information in the data bank established ad hoc by the European Judicial Network, the Judicial Atlas. These requests are subsequently confirmed by a transmission through official channels. For instance, Spain frequently uses Interpol channels to anticipate the transmission of its requests between central authorities. In addition, direct correspondence between judicial authorities (tribunals, prosecutors' offices, investigating magistrates, etc.) is now possible and common in Europe based on several instruments: the supplementary agreements to the ECMA, the Second Additional Protocol to the ECMA, the Schengen Application Agreement, and the AAF.

**(b) Observations on the implementation of the provision**

377. Switzerland is in compliance with article 46(13) of the Convention.

**Article 46 Mutual legal assistance**

**Paragraph 14**

*14. Requests shall be made in writing or, where possible, by any means capable of producing a written record, in a language acceptable to the requested State Party, under conditions allowing that State Party to establish authenticity. The Secretary-General of the United Nations shall be notified of the language or languages acceptable to each State Party at the time it deposits its instrument of ratification, acceptance or approval of or accession to this Convention. In urgent circumstances and where agreed by the States Parties, requests may be made orally but shall be confirmed in writing forthwith.*

**(a) Summary of information relevant to reviewing the implementation of the provision**

378. According to art. 28 of the IMAC, requests shall be submitted in German, French or Italian or be accompanied by a certified translation into one of those languages. The Secretary-General of the United Nations has been notified of this requirement. The Swiss authorities informed the reviewers that, although domestic Swiss law is silent in regards to the possibility of using other languages in oral requests in urgent cases, this is normal international procedure which is applied in Switzerland as well.

379. In practice, when a request for legal assistance is submitted in other than an official language of Switzerland, Switzerland generally requires a translation, in line with the above.

**(b) Observations on the implementation of the provision**

380. Switzerland is in compliance with article 46(14) of the Convention.

**Article 46 Mutual legal assistance**

**Paragraphs 15 and 16**



15. *A request for mutual legal assistance shall contain:*

- (a) The identity of the authority making the request;*
- (b) The subject matter and nature of the investigation, prosecution or judicial proceeding to which the request relates and the name and functions of the authority conducting the investigation, prosecution or judicial proceeding;*
- (c) A summary of the relevant facts, except in relation to requests for the purpose of service of judicial documents;*
- (d) A description of the assistance sought and details of any particular procedure that the requesting State Party wishes to be followed;*
- (e) Where possible, the identity, location and nationality of any person concerned; and*
- (f) The purpose for which the evidence, information or action is sought.*

16. *The requested State Party may request additional information when it appears necessary for the execution of the request in accordance with its domestic law or when it can facilitate such execution.*

**(a) Summary of information relevant to reviewing the implementation of the provision**

381. Article 46(15) and (16) of UNCAC are implemented by art. 28 of UNCAC, which provides that requests shall be made in writing, and that the following shall be stated in the request:

- the office from which it emanates and if necessary, the authority having criminal jurisdiction;
- the subject matter of and the reason for the request;
- the legal qualification of the offence;
- indications that are as exact and comprehensible as possible on the person sought for the criminal proceedings;
- a summary of the relevant facts, except in cases of requests for service of process;
- the text of the regulations applicable at the place where the offence was committed, except in cases of requests for assistance according to the third part of this law.

If a request does not meet the formal requirements, its correction or completion may be demanded by the competent authority; the ordering of precautionary measures will not be affected thereby.

**(b) Observations on the implementation of the provision**

382. Switzerland is in compliance with article 46 paragraphs (15) and (16) of the Convention.

**Article 46 Mutual legal assistance**

**Paragraph 17**

17. *A request shall be executed in accordance with the domestic law of the requested State Party and, to the extent not contrary to the domestic law of the requested State Party and where possible, in accordance with the procedures specified in the request.*

**(a) Summary of information relevant to reviewing the implementation of the provision**

383. According to the basic provision in Swiss law (art. 80a of IMAC), mutual legal assistance is to be executed in accordance with Swiss procedural law. However, art. 65 of IMAC provides that, when explicitly requested by the foreign State, the statements of witnesses or experts shall be affirmed in the form prescribed by the laws of the requesting State, even if the applicable Swiss law does not provide such a form; and forms necessary to obtain other evidence that is admissible in court may be taken into consideration. However, such forms for obtaining and affirming evidence are to be compatible with Swiss law, and may not cause essential prejudice to the persons involved. Testimony may also be refused as far as the law of the requesting State so provides or if the fact of testifying may cause penal or disciplinary sanctions to be taken according to the laws of that State or of the State where the examined person lives.

384. Art. 65(2) of IMAC provides that foreign law may not be applied if it is incompatible with Swiss law or if it causes serious prejudice to the participants in the proceedings.

**(b) Observations on the implementation of the provision**

385. Switzerland is in compliance with article 46(17) of the Convention.

**Article 46 Mutual legal assistance**

**Paragraph 18**

*18. Wherever possible and consistent with fundamental principles of domestic law, when an individual is in the territory of a State Party and has to be heard as a witness or expert by the judicial authorities of another State Party, the first State Party may, at the request of the other, permit the hearing to take place by video conference if it is not possible or desirable for the individual in question to appear in person in the territory of the requesting State Party. States Parties may agree that the hearing shall be conducted by a judicial authority of the requesting State Party and attended by a judicial authority of the requested State Party.*

**(a) Summary of information relevant to reviewing the implementation of the provision**

386. Art. 144 of the Swiss Criminal Procedure Code allows the prosecutor or the competent court to order a hearing by video conference if the person to be heard is unable to appear in person or his or her appearance “would cause disproportionate damage”. The Swiss authorities noted that video conferences are a rather common method in certain cases in Switzerland, and usually involves testimony by complainants or by witnesses resident in Switzerland. In the area of international mutual legal assistance, the utilization of videoconference doesn’t depend on the nature of the offence; videoconference thus may certainly be used in corruption cases. The only requirement is that this measure is provided for in a treaty between Switzerland and the requesting state.

**(b) Observations on the implementation of the provision**

387. Switzerland is in compliance with article 46(18) of the Convention.

## **Article 46 Mutual legal assistance**

### **Paragraph 19**

*19. The requesting State Party shall not transmit or use information or evidence furnished by the requested State Party for investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested State Party. Nothing in this paragraph shall prevent the requesting State Party from disclosing in its proceedings information or evidence that is exculpatory to an accused person. In the latter case, the requesting State Party shall notify the requested State Party prior to the disclosure and, if so requested, consult with the requested State Party. If, in an exceptional case, advance notice is not possible, the requesting State Party shall inform the requested State Party of the disclosure without delay.*

### **(a) Summary of information relevant to reviewing the implementation of the provision**

388. Art. 67 of IMAC embodies the principle of speciality in mutual legal assistance.

#### **Art. 67 - Principle of Speciality**

1 Information and documents obtained through the means of mutual assistance shall not be used for investigative purposes nor be introduced into evidence in the requesting State in any proceeding relating to an offence for which assistance is not admissible.

2 Any further use shall be subject to approval by the Federal Office. This approval is not necessary:

- a. if the facts which are the basis of the request constitute another offence for which mutual assistance would be granted; or
- b. if the foreign criminal proceeding is directed against other persons having participated in committing the offence.

3 Presence in the acts of mutual assistance and access to the files shall be admitted under the same conditions (art. 65a, para.1).

Furthermore, Switzerland noted that this principle was reproduced in various forms in the conventions on matters of mutual legal assistance or in bilateral agreements concluded by Switzerland. Absent from the ECMA and optional in the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (CBI), the principle of speciality was the subject of a reservation by Switzerland. As a consequence, the requesting state is not legally bound except when the reservation was formulated expressly at the time of the handover of the documents relating to the execution, when Switzerland makes use of the restriction on specialty, in accordance with its reservation to Article 2 ECMA or Article 32 CBI. The principle of speciality currently tends to be incorporated systematically in mutual legal assistance treaties. Even as regards states that are not bound to Switzerland by a treaty, there is no need for an express assurance that the principle of speciality would be respected when the requesting State has committed in its mutual legal assistance request to respect this limitation or when a reservation was clearly

stated at the occasion of the transmission of the documents of execution of the request. A reservation would prohibit the use of evidence and would be binding on all mutual legal assistance requests, on respecting the principle of specialty. An explanatory form is moreover systematically attached to the correspondence transmitting the documents executing the request.

**(b) Observations on the implementation of the provision**

389. Switzerland is in compliance with article 46(19) of the Convention.

**Article 46 Mutual legal assistance**

**Paragraph 20**

*20. The requesting State Party may require that the requested State Party keep confidential the fact and substance of the request, except to the extent necessary to execute the request. If the requested State Party cannot comply with the requirement of confidentiality, it shall promptly inform the requesting State Party.*

**(a) Summary of information relevant to reviewing the implementation of the provision**

390. The publicity and the confidentiality of mutual legal assistance requests is regulated by art. 80b of IMAC, which provides as follows:

**Art. 80b: Assistance in the Proceeding and Access to the Files**

1 The persons entitled may assist in the proceeding and have access to the files to the extent the safeguard of their interest requires it.

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

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

3 Access to the files or assistance in the proceeding may only be denied for files or procedural measures for which there is a restriction of secrecy.

**(b) Observations on the implementation of the provision**

391. Switzerland is in compliance with article 46(20) of the Convention.

**Article 46 Mutual legal assistance**

**Paragraph 21**

*21. Mutual legal assistance may be refused:*

- (a) If the request is not made in conformity with the provisions of this article;*

*(b) If the requested State Party considers that execution of the request is likely to prejudice its sovereignty, security, ordre public or other essential interests;*

*(c) If the authorities of the requested State Party would be prohibited by its domestic law from carrying out the action requested with regard to any similar offence, had it been subject to investigation, prosecution or judicial proceedings under their own jurisdiction;*

*(d) If it would be contrary to the legal system of the requested State Party relating to mutual legal assistance for the request to be granted.*

**(a) Summary of information relevant to reviewing the implementation of the provision**

392. The Swiss authorities refer to the responses provided in respect of the earlier provisions contained in article 46 of UNCAC, regarding the form and substance of requests and the principle of dual criminality. In particular, grounds for refusal are dealt with in articles 28 para. 6, 1, 5, 66 and 3 of IMAC. Switzerland reported that information on cases where mutual legal assistance was refused by or to Switzerland was not available

**(b) Observations on the implementation of the provision**

393. Switzerland is in compliance with article 46(21) of the Convention.

**Article 46 Mutual legal assistance**

**Paragraph 22**

*22. States Parties may not refuse a request for mutual legal assistance on the sole ground that the offence is also considered to involve fiscal matters.*

**(a) Summary of information relevant to reviewing the implementation of the provision**

394. The Swiss authorities refer to the national legislation and international agreements. Administrative assistance or legal assistance may be given depending on the case, even if it involves fiscal matters. (In particular regarding the Swiss concepts of tax fraud and tax evasion, see above, in connection with article 44(16) of UNCAC).

395. Article 3(3) of IMAC sets the limits for cooperation in fiscal matters. More specifically, “A request is inadmissible if the proceedings relate to an offence that appears to be aimed at reducing fiscal duties or taxes or violates regulations concerning currency, trade or economic policy. However, the following requests are admissible:

(a) A request for judicial assistance under the third part of this Act, if the proceedings relate to a duty or tax fraud [either direct or indirect taxation];

(b) A request under all parts of this Act, if the proceedings relate to an aggravated duty or tax fraud in the sense of article 14, paragraph 2, of the Federal Act on Administrative Criminal Law of 22 March 1974 [which is restricted to indirect taxation]”.

396. However, it should be noted that Switzerland has during the recent years extended its mutual legal assistance in tax evasion cases. Now Switzerland gives administrative assistance in simple tax evasion cases where legal assistance is not applicable.
397. To the extent that an offence subject to assistance is made, the assistance may be given even if it involves fiscal matters. The use of means of evidence, however, are subject to the principle of specialty.
398. In the context of international relations, Switzerland has two possibilities for the exchange of fiscal information. The exchange of information between fiscal authorities takes place through administrative assistance, on the basis of bilateral double taxation agreements (DTA). The judicial authorities may take the path of legal assistance to exchange information. Judicial assistance is governed by the Federal Act on International Mutual Assistance in Criminal Matters (IMAC).
399. As part of the Schengen area association agreement and the bilateral agreement on the fight against fraud, Switzerland and the EU have agreed to cooperate closely in the field of indirect taxes and customs duties (MLA and administrative assistance). Therefore, contrary to existing instruments, this assistance must be accorded not only at the request of judicial authorities, but also on the application of administrative authorities. This makes it possible to extradite people, to impose coercive (compulsory) measures of simple procedures of administrative law and contribute to the recovery of foreign fiscal claims. Any form of crime, including simple avoidance or smuggling, is a sufficient condition. The limitation to important cases is given by setting minimum values: the amount avoided must be at least 25,000 euros, the value of goods to at least EUR 1 million (see article 50 of the Schengen Application Agreement).
400. In the field of direct taxation, the commitment of Switzerland to grant legal assistance in cases of tax fraud in the Convention with Italy can be considered as a new development.
401. On 29 May 2009, the Federal Council decided to extend mutual legal assistance in cases of tax evasion. This is a second step, since this extension has already been settled in connection with administrative assistance. On 13 March 2009, the Federal Council decided to strengthen cooperation with other States in respect of tax offences and to resume, under administrative assistance in tax matters, the standards provided for in art. 26 of the Model OECD Convention. As a result, Switzerland now gives administrative assistance in cases of simple tax evasion, for which existing law does not grant legal assistance.
402. Between 2005 and 2008, some 80 to 100 foreign requests for mutual legal assistance motivated by fiscal cases were sent to Switzerland. Switzerland, in turn, has made only about five requests per year.
403. To avoid the legal regime applicable to such materials being marred by gaps and contradictions, the Federal Council intends to adapt the law governing mutual legal assistance to the new principles governing international cooperation in the fight against fiscal crimes. After the expansion phase of administrative assistance to support the review of bilateral double taxation agreements, Switzerland will take similar solutions in the field of mutual legal assistance. This extension will be primarily by international agreements.

The Federal Council will not consider until later amending the Law on International Criminal Assistance.

**(b) Observations on the implementation of the provision**

404. Switzerland is in compliance with article 46(22) of the Convention.

**Article 46 Mutual legal assistance**

**Paragraph 23**

*23. Reasons shall be given for any refusal of mutual legal assistance.*

**(a) Summary of information relevant to reviewing the implementation of the provision**

405. Art. 27(5) of IMAC provides explicitly that “Reasons must be given for decisions of inadmissibility or refusal of a request.”

**(b) Observations on the implementation of the provision**

406. Switzerland is in compliance with article 46(23) of the Convention.

**Article 46 Mutual legal assistance**

**Paragraph 24**

*24. The requested State Party shall execute the request for mutual legal assistance as soon as possible and shall take as full account as possible of any deadlines suggested by the requesting State Party and for which reasons are given, preferably in the request. The requesting State Party may make reasonable requests for information on the status and progress of measures taken by the requested State Party to satisfy its request. The requested State Party shall respond to reasonable requests by the requesting State Party on the status, and progress in its handling, of the request. The requesting State Party shall promptly inform the requested State Party when the assistance sought is no longer required.*

**(a) Summary of information relevant to reviewing the implementation of the provision**

407. Art. 17a of IMAC obliges the competent authority to execute requests promptly and to rule without delay. Upon the request of the Federal Office, the competent authority shall inform on the status of the proceeding, the reasons for a possible delay and the measures considered. If the delay is not justified, the Federal Office may intervene with the appropriate authority of supervision.

408. The Swiss authorities informed the reviewers that the Federal Office has rarely received requests for information such as those referred to in art. 46 (24) of the Convention. However, when needed, the Federal Office of Justice (or the implementing

authority in case of direct contact) is able to quickly and systematically inform the requesting authority of the state of the procedure. Pursuant to article 17 of IMAC, the Federal Office of Justice calls the executing authority and invites it to submit the requested information (of the procedure, reasons for any delay, expected date of delivery of the assistance, etc.). The Federal Office of Justice then transmits this information to the requesting authority.

409. The usual reason for making a request for an extension of time to execute foreign requests for assistance is appeal proceedings before the Federal Criminal Court and, if needed, the Federal Court.

410. The Swiss authorities informed the reviewers that it is not possible to provide precise information on the average length of time required to respond to a request for mutual legal assistance. This duration depends on the complexity of the case and the actions requested. The usual duration ranges from six to twelve months. However, some measures are implemented immediately, such as the seizure of monetary values. The competent authority, which may be a Swiss judicial authority or the Federal Office of Justice, may order the freezing of a bank account practically within the hour (on the condition that the offices of the bank in question are open). That authority issues a temporary order with a briefly reasoned opinion which is notified to the banking establishment concerned.

#### **(b) Observations on the implementation of the provision**

411. Switzerland is in compliance with article 46(24) of the Convention.

### **Article 46 Mutual legal assistance**

#### **Paragraph 25**

*25. Mutual legal assistance may be postponed by the requested State Party on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding.*

#### **(a) Summary of information relevant to reviewing the implementation of the provision**

412. Art. 74 of IMAC provides that handing over to a foreign authority of objects, documents or assets seized as evidence in a case can be delayed if the objects, documents or assets are necessary for a pending criminal proceeding in Switzerland. According to the same provision, if a third party with rights acquired in good faith, an authority, or the victim who has his habitual residence in Switzerland claim that they have rights over these objects, documents or assets, their handing over shall be subject to the condition that the requesting State gives the guarantee to return them without costs after the conclusion of the proceeding.

413. Moreover, Art. 74a of IMAC provides for the handing over to the competent foreign authority of objects or assets subject to a precautionary seizure, for the purpose of forfeiture or return to the person entitled. However, these objects or assets may be retained in Switzerland if they are necessary for a pending criminal proceeding in Switzerland or appear, because of their nature, to be subject to forfeiture in Switzerland. Spontaneously



or upon request of the requesting authority to authorize the transmission of copies of documents and records from the files of Swiss authorities concerning a domestic investigation having the same factual context as the one described in the mutual legal assistance request, the Swiss judicial authority concerned may extract from its domestic criminal proceedings any document deemed useful, even those not mentioned in the request, and make it available in the context of the mutual legal assistance process, to the extent that it is not detrimental to the conduct of its own investigation.

**(b) Observations on the implementation of the provision**

414. Switzerland is in compliance with article 46(25) of the Convention.

**Article 46 Mutual legal assistance**

**Paragraph 26**

*26. Before refusing a request pursuant to paragraph 21 of this article or postponing its execution pursuant to paragraph 25 of this article, the requested State Party shall consult with the requesting State Party to consider whether assistance may be granted subject to such terms and conditions as it deems necessary. If the requesting State Party accepts assistance subject to those conditions, it shall comply with the conditions.*

**(a) Summary of information relevant to reviewing the implementation of the provision**

415. Art. 80p of IMAC allows the Swiss authorities to set conditions on the granting of mutual legal assistance. This provision allows for the consultation referred to in article 46(26) of UNCAC.

**(b) Observations on the implementation of the provision**

416. Switzerland is in compliance with article 46(26) of the Convention. Switzerland is encouraged to apply the relevant provisions of IMAC whenever the refusal of request envisaged.

**Article 46 Mutual legal assistance**

**Paragraph 27**

*27. Without prejudice to the application of paragraph 12 of this article, a witness, expert or other person who, at the request of the requesting State Party, consents to give evidence in a proceeding or to assist in an investigation, prosecution or judicial proceeding in the territory of the requesting State Party shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in that territory in respect of acts, omissions or convictions prior to his or her departure from the territory of the requested State Party. Such safe conduct shall cease when the witness, expert or other person*

*having had, for a period of fifteen consecutive days or for any period agreed upon by the States Parties from the date on which he or she has been officially informed that his or her presence is no longer required by the judicial authorities, an opportunity of leaving, has nevertheless remained voluntarily in the territory of the requesting State Party or, having left it, has returned of his or her own free will.*

**(a) Summary of information relevant to reviewing the implementation of the provision**

417. Safe conduct is dealt with specifically in art. 69(3) and 73 of IMAC:

Federal Act on International Mutual Assistance in Criminal Matters

Art. 69 para 3 -Service of Summons. Safe Conduct

1 Whoever accepts a summons to appear before a foreign authority shall be under no obligation to comply.

2 Summons containing threats of compulsion shall not be served.

3 Service of a summons may be subjected to the condition that the recipient shall be guaranteed safe conduct for an appropriate period of time and that he will not be prevented from freely leaving the territory of the requesting State. If the recipient so requires, the authority effecting service shall ask the requesting State to give a writ-ten assurance thereof before proof of service is furnished.

**Art. 73: Safe Conduct in Switzerland**

1 A person with habitual residence abroad and who appears in Switzerland in a criminal case pursuant to a summons may neither be prosecuted nor restricted in his personal freedom for reasons that occurred prior to his entry into Switzerland.

2 The person pursued shall enjoy no safe conduct regarding the offences specified in the summons.

3 The safe conduct provided in paragraph 1 shall cease when this person leaves Switzerland but at the latest three days after he is dismissed by the summoning authorities.

**(b) Observations on the implementation of the provision**

418. Switzerland is in compliance with article 46(27) of the Convention.

**Article 46 Mutual legal assistance**

**Paragraph 28**

*28. The ordinary costs of executing a request shall be borne by the requested State Party, unless otherwise agreed by the States Parties concerned. If expenses of a substantial or extraordinary nature are or will be required to fulfil the request, the States Parties shall consult to determine the terms and conditions under which the request will be executed, as well as the manner in which the costs shall be borne.*

**(a) Summary of information relevant to reviewing the implementation of the provision**

419. The main principle established by art. 31 of IMAC is that foreign requests for mutual legal assistance shall be executed free of charge. The Federal Council shall fix the conditions under which the requesting State may be charged the costs completely or partially. According to art. 12 of the Ordinance on the IMAC, the Swiss authorities may ask the requesting State for reimbursement for all costs incurred in the discharge of the request, where the activity of Swiss authorities represents more than one working day and if Switzerland cannot get free assistance of the requesting State.

**(b) Observations on the implementation of the provision**

420. Swiss law seems to allow the Swiss authorities to charge on their own initiative the requesting State with the costs involved in the execution of a request, without prior consultation or agreement as required by the Convention. Switzerland should avoid charging requesting States with such cost without their consent or prior consultation so as to not depart from the requirements of the Convention. In this regard, Switzerland clarified that it applied the principle of free mutual legal assistance. However, the costs generated by hearings by videoconference, particularly by the establishment and provision of the video link and interpreters, are an exception to the rule of free mutual assistance and are at the cost of the requesting authority. This constitutes however an exception and the issue of costs in such a case is always discussed beforehand with the requesting State.

421. It can be concluded that Switzerland is in compliance with article 46 (28) of the Convention.

**Article 46 Mutual legal assistance**

**Subparagraph 29 (a)**

*29. The requested State Party:*

*(a) Shall provide to the requesting State Party copies of government records, documents or information in its possession that under its domestic law are available to the general public;*

**(a) Summary of information relevant to reviewing the implementation of the provision**

422. The Swiss authorities informed the reviewers that, although there is no specific provision addressing the issue covered by article 46(29)(a) of UNCAC, the records, documents and information referred to therein would be provided on request. Since this information is publicly accessible, it is not necessary to include provisions in a treaty to regulate the modalities of their transmission.

**(b) Observations on the implementation of the provision**

423. Switzerland is in compliance with article 46(29)(a) of the Convention.

**Article 46 Mutual legal assistance**

## **Subparagraph 29 (b)**

*29. The requested State Party:*

*(b) May, at its discretion, provide to the requesting State Party in whole, in part or subject to such conditions as it deems appropriate, copies of any government records, documents or information in its possession that under its domestic law are not available to the general public.*

### **(a) Summary of information relevant to reviewing the implementation of the provision**

424. Pursuant to art. 63(2)(c) of IMAC, the Swiss authorities may provide the copies, documents and information referred to in the present subparagraph.

### **(b) Observations on the implementation of the provision**

425. Switzerland is in compliance with article 46(29)(b) of the Convention.

## **Article 46 Mutual legal assistance**

### **Paragraph 30**

*30. States Parties shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to or enhance the provisions of this article.*

### **(a) Summary of information relevant to reviewing the implementation of the provision**

426. Switzerland has entered into a large number of bilateral and multilateral agreements or arrangements that serve to implement article 46(30). These include the European Convention on Mutual Assistance in Criminal Matters, the Second Additional Protocol to the Convention on Mutual Assistance in Criminal Matters, the Criminal Law Convention of 27 January 1999 on corruption, and bilateral agreements with Algeria (2006), Australia (1991), Brazil (2004), Canada (1993), Ecuador (1997), Egypt (2000), India (1989), Japan (1937), Mexico (2005), Peru (1997), the Philippines (2002) and the United States of America (1973), as well as with Hong Kong, China (1999)

### **(b) Observations on the implementation of the provision**

427. Switzerland is in compliance with article 46(30) of the Convention.

## **Article 47 Transfer of criminal proceedings**

*States Parties shall consider the possibility of transferring to one another proceedings for the prosecution of an offence established in accordance with this Convention in cases where such transfer is considered to be in the interests of the proper administration of justice, in particular in cases where several jurisdictions are involved, with a view to concentrating the prosecution.*

**(a) Summary of information relevant to reviewing the implementation of the article**

428. Pursuant to the general principle contained in article 85 of IMAC, criminal proceedings may be transferred to Switzerland. The subsequent articles (86 – 93) contain provisions on applicable law, jurisdiction, the effects of transfer, documentation, the taking of a decision on the request for transfer, the validity of foreign acts of investigation, and costs. The Swiss authorities informed the reviewers that Switzerland has excellent relations with its partners and, on a daily basis, transmits and receives many such requests, some even by the direct route; Direct route refers to direct correspondence between judicial authorities (tribunals, prosecutors' offices, investigating magistrates, etc.), which is currently both possible and commonly practiced in Europe on the basis of various instruments: the supplementary agreements to the ECMA, the Second Additional Protocol to the ECMA, the Schengen Application Agreement, and the AAF.

**(b) Observations on the implementation of the article**

429. Switzerland is in compliance with article 47 of the Convention.

**Article 48 Law enforcement cooperation**

**Subparagraph 1 (a)**

*1. States Parties shall cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat the offences covered by this Convention. States Parties shall, in particular, take effective measures:*

*(a) To enhance and, where necessary, to establish channels of communication between their competent authorities, agencies and services in order to facilitate the secure and rapid exchange of information concerning all aspects of the offences covered by this Convention, including, if the States Parties concerned deem it appropriate, links with other criminal activities;*

**(a) Summary of information relevant to reviewing the implementation of the provision**

430. The legal basis for international law enforcement cooperation by Swiss authorities is, in particular, article 13(2) of the Federal Law on the Central Criminal Police Bureaux of the Confederation (LOC), and articles 350 - 353 (collaboration with INTERPOL) as well as articles 355 - 362 (collaboration with Europol and the Schengen states) of the Swiss Penal Code.

431. The Swiss authorities engage in international law enforcement cooperation on several levels, including global (through Interpol), European (on the basis of the Schengen Agreement) and on the basis of the many bilateral and multilateral treaties concluded by Switzerland. The centres for police and customs cooperation in Geneva and Chiasso contribute to a significant extent to facilitating the exchange of information. In addition, Swiss police officers stationed abroad and foreign liaison officers seconded to Switzerland

make a major contribution to the most effective coordination between the authorities of the States Parties concerned.

432. With respect to bilateral and multilateral treaties, Switzerland has concluded to date more than 14 agreements on bilateral police cooperation. The most important are those with Albania (2005), Austria (1999), Bosnia-Herzegovina (2007), the Czech Republic (2005), France (2007), Germany (1999), Hungary (1999), Italy (1998), Latvia (2005), Liechtenstein (1999), Romania (2005), Serbia (2009), Slovenia (2004), the former Yugoslav Republic of Macedonia (2005) and the United States of America (2006).
433. The implementation of these agreements on police cooperation is also based on additional protocols and manuals that contain detailed explanations of their contents. In addition, the organization of regular meetings between the competent authorities and organizations with cross-border powers helps the interpretation and consistent application of the provisions of the agreements.
434. Currently, Switzerland has nine police attachés and one liaison officer stationed abroad. They are located at the Europol headquarters in The Netherlands, in Italy, the Czech Republic, the United States of America, Brazil, Thailand, Serbia and Kosovo<sup>1</sup> as well as at Interpol headquarters in France. The various police attachés also have parallel accreditation with Canada, Malta and Slovenia, Hungary, Poland and the Czech Republic, Malaysia, Indonesia and Bosnia-Herzegovina and Serbia. Currently, there are in addition foreign police officers from fourteen countries, accredited in Switzerland, including for example the United States of America, the United Kingdom, Germany, France and Brazil, who are involved in cooperation with the Swiss authorities. They are stationed in Switzerland or in another European country.
435. Police and Customs Cooperation Centres at Geneva-Cointrin and Chiasso facilitate and expedite police and customs cooperation across borders with France and Italy. These centres support the exchange of information. In addition, they coordinate compliance measures common in the border area and are responsible for preparing and supporting cross-border operations. Representatives of various police and customs authorities of the participating countries work at the centres. Among other things, five employees of the Federal Judicial Police working in these two Police and Customs Cooperation Centres.
436. On the European level, Switzerland is associated to the Schengen Agreement, which improves European police cooperation. The “Law on Exchange of Schengen Information” aims to improve the prosecution and prevention of crime through new forms of information exchange. It intends to ensure that the conditions for the transmission of information to law enforcement authorities of other (Schengen) States are not more stringent than those applied nationally. For this, the law lays down rules, deadlines and some formal requirements (application forms for request of information and the response) and mandates the spontaneous exchange of information in the fight against organized crime and terrorism.
437. This law applies to law enforcement agencies that are authorized under federal law to exercise a public authority to prevent and prosecute crimes and to implement measures of

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<sup>1</sup> All references to Kosovo in the present country review report of Switzerland should be understood to be in compliance with Security Council resolution 1244 (1999)

constraint. In principle, all information accessible without deploying coercive measures must be exchanged in a simplified manner for the purposes of that law.

438. In addition, Switzerland has joined forces with Europol (European Police Office) since 2006. This agreement allows for the exchange of strategic and operational information and specific knowledge. The mandate of cooperation covers 25 areas of crime, including corruption and money laundering.

439. With regard to police cooperation worldwide, Switzerland is a founding member of the International Criminal Police Organization (Interpol). According to articles 350-353 of the Penal Code, the Federal Office of Police is responsible for the transmission of information relevant to the police to prosecute criminal offences or to ensure the execution of punishments and measures. It can transmit information relevant to the criminal police for preventing crimes whether, in light of concrete evidence, it is very likely that a crime or offence will be committed. It can also transmit information to search for missing persons or identify unknown persons.

440. To ensure the strengthening of cooperation - including international cooperation - in investigations, Switzerland operates numerous information systems that are designed to make it easier to identify persons suspected of committing offences under the UNCAC convention, where they are and the nature of their activities as well as the place where others involved in these crimes may be.

#### **(b) Observations on the implementation of the provision**

441. Switzerland is in compliance with article 48(1)(a) the Convention.

### **Article 48 Law enforcement cooperation**

#### **Subparagraph 1 (b)**

*1. States Parties shall cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat the offences covered by this Convention. States Parties shall, in particular, take effective measures:*

*(b) To cooperate with other States Parties in conducting inquiries with respect to offences covered by this Convention concerning:*

*(i) The identity, whereabouts and activities of persons suspected of involvement in such offences or the location of other persons concerned;*

*(ii) The movement of proceeds of crime or property derived from the commission of such offences;*

*(iii) The movement of property, equipment or other instrumentalities used or intended for use in the commission of such offences;*

#### **(a) Summary of information relevant to reviewing the implementation of the provision**

442. At the operational level, exchange of information takes place on a daily basis through the channels of Interpol, Europol and bilateral exchanges by the operations unit of the Federal Police, the Centres for police and customs cooperation with France and Italy and police attachés.

443. As a member of Schengen, Switzerland is part of the "Schengen Information System" (SIS), which allows the exchange of information between the States of the European Union and associated States.

444. Switzerland is also a member of Interpol (see above, in connection with article 48(1)(a)). As part of this organization, there are a number of databases, with which Member States can exchange information either automatically or based on specific cases.

445. This mode of exchanging information also applies to offences covered by the Convention. Because of the confidentiality of the proceedings in question, more specific information cannot be given.

#### **(b) Observations on the implementation of the provision**

446. Switzerland is in compliance with article 48(1)(b) the Convention.

### **Article 48 Law enforcement cooperation**

#### **Subparagraph 1 (c)**

*1. States Parties shall cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat the offences covered by this Convention. States Parties shall, in particular, take effective measures:*

*(c) To provide, where appropriate, necessary items or quantities of substances for analytical or investigative purposes;*

#### **(a) Summary of information relevant to reviewing the implementation of the provision**

447. In the area of bilateral cooperation, Switzerland has concluded agreements with neighbouring and other states which establish, among other things, the possibility of forming working and analysis groups. Within this framework it is also possible to include exchanging information on items or quantities of substances. The Contracting Parties undertake to promote ongoing sharing of experiences and skills. This sharing can also affect this area of activity.

448. In addition, the association of Switzerland with Europol can include:

- exchange of operational information;
- exchange of specific knowledge (expertise);
- exchange of strategic knowledge (threat analyses);
- exchange of status reports on important topics;
- exchange of investigative methods and information on prevention;
- participation in training of one and the other party;



- advice and assistance in investigations.

449. These agreements allow the exchange of strategic and operational information and specific knowledge, including in the field of corruption and money laundering.

**(b) Observations on the implementation of the provision**

450. Switzerland is in compliance with article 48(1)(c) of the Convention.

**Article 48 Law enforcement cooperation**

**Subparagraph 1 (d)**

*1. States Parties shall cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat the offences covered by this Convention. States Parties shall, in particular, take effective measures:*

*(d) To exchange, where appropriate, information with other States Parties concerning specific means and methods used to commit offences covered by this Convention, including the use of false identities, forged, altered or false documents and other means of concealing activities;*

**(a) Summary of information relevant to reviewing the implementation of the provision**

451. The legislation and structures noted in the responses to earlier subparagraphs of article 48 (above) apply also to the international exchange of information on specific means and methods to commit offences.

452. In addition, Switzerland has a “Coordination Unit for Identity and Legitimation Documents (KILA)”, attached to the Federal Office of Police, which coordinates among other issues requests from Switzerland and abroad concerning forgeries and counterfeits.

**(b) Observations on the implementation of the provision**

453. Switzerland is in compliance with article 48(1)(d) of the Convention.

**Article 48 Law enforcement cooperation**

**Subparagraph 1 (e)**

*1. States Parties shall cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat the offences covered by this Convention. States Parties shall, in particular, take effective measures:*

*(e) To facilitate effective coordination between their competent authorities, agencies and services and to promote the exchange of personnel and other*

*experts, including, subject to bilateral agreements or arrangements between the States Parties concerned, the posting of liaison officers;*

**(a) Summary of information relevant to reviewing the implementation of the provision**

454. Measures undertaken by the Swiss authorities to facilitate effective coordination are described above in connection with article 48(1)(a). Among these measures are the negotiation of bilateral agreements, the expansion of the network of liaison officers, the centres for police and customs cooperation, and the possibility of forming working groups based on bilateral agreements. In addition, bilateral agreements on law enforcement cooperation allow for joint police training as well as joint investigation teams.
455. With regard to deployment of liaison officers in particular, Switzerland reported that it currently has police attachés in the following countries: Italy (also accredited to Slovenia and Malta), United States of America (also accredited to Canada), Brazil, Czech Republic (also accredited to Poland, Hungary and Slovakia), Serbia (also accredited to Bosnia and Herzegovina, Croatia and Montenegro), and Thailand (also accredited to Indonesia, Cambodia and Malaysia). Switzerland also has police attachés in Kosovo (also accredited to Albania and the Former Yugoslav Republic of Macedonia). Moreover, Switzerland has deployed a police attaché with the European Police Office (Europol) in the Hague and another with the International Police Organization (INTERPOL) in Lyon.
456. Police attachés are attached to the embassy of the country in question and therefore answer to the Swiss ambassador. They have diplomatic status. However, the activities of a police attaché are conducted under the supervision of the Police Attachés Commission of the Federal Police Office. The period of deployment is generally four years.
457. Generally, a police attaché backstops representatives of Swiss law enforcement authorities abroad and has operational and strategic duties. Among an attaché's operational duties are to initiate or support investigations relating to Switzerland. The attaché exchanges information relating to investigations with the host country authorities and, where necessary, acts as the contact point between the specialized units of the Federal Police Office, of the cantons and those of the host country. Strategic duties include the research and analysis of information relevant to 129 different units of the Federal Police Office and the criminal prosecution services in Switzerland and also the provision of advisory and support services to, and representation of, the Federal Police Office in the host country.
458. Increased attention to the fight against transnational crime and the proliferation of bilateral contacts have a significant influence on his work. It ensures the flow of information between Switzerland and the host country and supports law enforcement in the prosecution of offences. The police attaché advises representatives of law enforcement officials on official trips to the host country.
459. The Swiss authorities also informed the reviewers that Switzerland has made experts available for the provision of technical assistance abroad. Switzerland has sent experts to assist developing countries in improving investigations.

**(b) Observations on the implementation of the provision**

460. Switzerland is in compliance with article 48(1)(e) of the Convention.

**(c) Successes and good practices**

461. The initiative of Switzerland in providing technical assistance to other countries in the improvement of investigations and in the better formulation of requests for mutual legal assistance is an example of good practice.

**Article 48 Law enforcement cooperation**

**Subparagraph 1 (f)**

*1. States Parties shall cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat the offences covered by this Convention. States Parties shall, in particular, take effective measures:*

*(f) To exchange information and coordinate administrative and other measures taken as appropriate for the purpose of early identification of the offences covered by this Convention.*

**(a) Summary of information relevant to reviewing the implementation of the provision**

462. Several bilateral agreements that Switzerland has entered into with other States allows for the early identification of the offences covered by the Convention. These agreements refer, for example, to the spontaneous exchange of information deemed important to assist the other party in preventing or responding to crime, and the organization of briefings on the security situation in each country.

**(b) Observations on the implementation of the provision**

463. Switzerland is in compliance with article 48(1)(f) of the Convention.

**Article 48 Law enforcement cooperation**

**Paragraph 2**

*2. With a view to giving effect to this Convention, States Parties shall consider entering into bilateral or multilateral agreements or arrangements on direct cooperation between their law enforcement agencies and, where such agreements or arrangements already exist, amending them. In the absence of such agreements or arrangements between the States Parties concerned, the States Parties may consider this Convention to be the basis for mutual law enforcement cooperation in respect of the offences covered by this Convention. Whenever appropriate, States Parties shall make full use of agreements or arrangements, including international or regional organizations, to enhance the cooperation between their law enforcement agencies.*

**(a) Summary of information relevant to reviewing the implementation of the provision**

464. The agreements and practical arrangements into which Switzerland has entered and that implement this provision are referred to above in connection with article 48(1)(a). Swiss authorities stressed that, according to EUROPOL statistics, Switzerland is in second

place, after Norway, in terms of the quantity of messages exchanged between Europol and other states, and that cooperation is of very high quality.

465. Switzerland indicated that it does not consider the Convention as the basis for mutual law enforcement cooperation in respect of the offences covered by the Convention, and that it uses instead the arrangements and agreements mentioned above.

**(b) Observations on the implementation of the provision**

466. Switzerland is in compliance with article 48(2) of the Convention.

**Article 48 Law enforcement cooperation**

**Paragraph 3**

*3. States Parties shall endeavour to cooperate within their means to respond to offences covered by this Convention committed through the use of modern technology.*

**(a) Summary of information relevant to reviewing the implementation of the provision**

467. The agreements and practical arrangements referred to above in connection with article 48(1)(a) serve to implement also this provision. The international law enforcement cooperation in which Switzerland is involved does not distinguish between the level of technology used by offenders. All modern means may be implemented in the investigation of crime, within the framework established by Swiss law.

468. For example, sections 269 – 279 of the Swiss Criminal Procedure Code provide for the possibility of monitoring postal deliveries and telecommunications. These provisions extend for example to the surveillance of correspondence by email.

469. In addition, the Cybercrime Coordination Unit (SCOCI) of the Federal Police, which is the central point of contact for people wishing to report the existence of suspicious websites, takes on the search for illegal content on the Internet and conducts in-depth analysis in the area of Internet crime.

**(b) Observations on the implementation of the provision**

470. Switzerland is in compliance with article 48(3) of the Convention.

**Article 49 Joint investigations**

*States Parties shall consider concluding bilateral or multilateral agreements or arrangements whereby, in relation to matters that are the subject of investigations, prosecutions or judicial proceedings in one or more States, the competent authorities concerned may establish joint investigative bodies. In the absence of such agreements or arrangements, joint investigations may be undertaken by agreement on a case-by-case basis. The States Parties involved shall ensure that the sovereignty of the State Party in whose territory such investigation is to take place is fully respected.*

**(a) Summary of information relevant to reviewing the implementation of the article**

471. Some agreements on international cooperation in law enforcement allow for the formation of joint working groups. A specific example is the agreement with the United States which provides for the formation of joint investigation teams to fight against terrorism and its financing.

**(b) Observations on the implementation of the article**

472. Switzerland is in compliance with article 49 of the Convention.

**Article 50 Special investigative techniques**

**Paragraph 1**

*1. In order to combat corruption effectively, each State Party shall, to the extent permitted by the basic principles of its domestic legal system and in accordance with the conditions prescribed by its domestic law, take such measures as may be necessary, within its means, to allow for the appropriate use by its competent authorities of controlled delivery and, where it deems appropriate, other special investigative techniques, such as electronic or other forms of surveillance and undercover operations, within its territory, and to allow for the admissibility in court of evidence derived therefrom.*

**(a) Summary of information relevant to reviewing the implementation of the provision**

473. The monitoring of post deliveries and telecommunications may, under certain conditions, be ordered in the investigation of the offences listed in full at article 269(2) of the Swiss Code of Criminal Procedure. This list of offences includes corruption-related offences. Moreover, under certain conditions, the prosecution may use other technical means of surveillance (art. 280 of the Code of Criminal Procedure), use observation (art. 282 of the Code of Criminal Procedure), and monitor banking relationships (art. 284 of the Code of Criminal Procedure).

474. In a corresponding manner, the use of covert investigations may, under certain conditions, be ordered in the investigation of the offences listed in full at article 286(2) of the Swiss Code of Criminal Procedure. In the area of international cooperation, by contrast, covert investigations are only possible on the basis of a request for mutual legal assistance.

**(b) Observations on the implementation of the provision**

475. Switzerland is in compliance with article 50(1) of the Convention.

**Article 50 Special investigative techniques**

**Paragraph 2**

*2. For the purpose of investigating the offences covered by this Convention, States Parties are encouraged to conclude, when necessary, appropriate bilateral or multilateral agreements or arrangements for using such special investigative techniques in the context of cooperation at the international level. Such agreements or arrangements shall be concluded and implemented in full*

*compliance with the principle of sovereign equality of States and shall be carried out strictly in accordance with the terms of those agreements or arrangements.*

**(a) Summary of information relevant to reviewing the implementation of the provision**

476. The agreements and practical arrangements on law enforcement cooperation referred to above in connection with article 48(1)(a) serve to implement also this provision.

477. With regard to mutual legal assistance, reference can be made for example to the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, which includes provisions on cross-border observation, controlled delivery, covert investigations and joint investigative teams (art. 17-20). Art. 269 ff of the Swiss Code of Criminal Procedures provides the legislative basis for the use of special investigative techniques. These activities are also governed by bilateral agreements on law enforcement cooperation, particularly those with bordering states.

478. At the operational level, the exchange of information takes place on a daily basis through the channels of Interpol, Europol and those based on bilateral treaties by the operations unit of the Federal Police, the Centres for police and customs cooperation with France and Italy and police attachés.

**(b) Observations on the implementation of the provision**

479. Switzerland is in compliance with article 50(2) of the Convention.

**Article 50 Special investigative techniques**

**Paragraph 3**

*3. In the absence of an agreement or arrangement as set forth in paragraph 2 of this article, decisions to use such special investigative techniques at the international level shall be made on a case-by-case basis and may, when necessary, take into consideration financial arrangements and understandings with respect to the exercise of jurisdiction by the States Parties concerned.*

**(a) Summary of information relevant to reviewing the implementation of the provision**

480. The Swiss authorities have agreements as set forth above in connection with article 50(2). To the extent that Swiss law recognizes such agreements and arrangements, there is no reason to apply article 50(3).

**(b) Observations on the implementation of the provision**

481. Switzerland is in compliance with article 50(3) of the Convention.

**Article 50 Special investigative techniques**

**Paragraph 4**

*4. Decisions to use controlled delivery at the international level may, with the consent of the States Parties concerned, include methods such as intercepting and allowing the goods or funds to continue intact or be removed or replaced in whole or in part.*

**(a) Summary of information relevant to reviewing the implementation of the provision**

482. Law enforcement cooperation agreements provide for the undertaking of controlled deliveries. The decision on interception and substitution in whole or in part of goods is made between the contracting parties (ex. Art. 19, law enforcement cooperation agreement with Germany).

**(b) Observations on the implementation of the provision**

483. Switzerland is in compliance with article 50(4) of the Convention.

UNODC