



Groupe d'Etats contre la corruption
Group of States against corruption

DIRECTORATE GENERAL I – HUMAN RIGHTS AND RULE OF LAW
INFORMATION SOCIETY AND ACTION AGAINST CRIME DIRECTORATE



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Third Evaluation Round

Evaluation Report on Switzerland on Incriminations (ETS 173 and 191, GPC 2)

(Theme I)

Adopted by GRECO
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I. INTRODUCTION

1. Switzerland joined GRECO on 1 July 2006. GRECO adopted the report on the joint first and second evaluation rounds (Greco Eval I-II Rep (2007) 1E) at its 37th meeting (31 March- 4 April 2008). The aforementioned evaluation report, and the corresponding compliance report, are available on the GRECO web site (<http://www.coe.int/greco>).
2. The current Third Evaluation Round, which started on 1 January 2007, covers the following themes:
 - **Theme I – Incriminations:** articles 1a and 1b, 2 to 12, 15 to 17 and 19.1 of the Criminal Law Convention on Corruption (ETS 173), articles 1 to 6 of its Additional Protocol (ETS 191) and Guiding Principle 2 (incrimination of corruption).
 - **Theme II - Transparency of Political Party Funding:** articles 8, 11, 12, 13b, 14 and 16 of Recommendation Rec(2003)4 on common rules against corruption in the funding of political parties and electoral campaigns and – more generally – Guiding Principle 15 on financing of political parties and election campaigns.
3. The GRECO Evaluation Team (hereafter referred to as the “GET”), which carried out an on-site visit to Switzerland on 9 and 10 May 2011, comprised Mr Ergin ERGÜL, Head of the Legal Department, Sub-secretariat of Public Order and Security, Office of the Prime Minister (Turkey) and Ms Claire HUBERTS, *Attachée* at the Principles of Criminal Law and Procedure Department, Directorate General of Fundamental Rights and Freedoms, Federal Public Service, Justice (Belgium). The GET was assisted by Ms Sophie MEUDAL-LEENDERS of the GRECO secretariat. Prior to the visit the GET received replies to the evaluation questionnaire (Greco Eval III (2011) 5F, Theme I) and copies of relevant legislation.
4. The GET met representatives of the following authorities: Federal Office of Justice, Federal and Cantonal prosecutors and Police representatives, Judges of first instance and an Appeal Court Judge. The GET also met representatives of the bar, academia, Transparency International and the press.
5. The current report on theme I of GRECO's 3rd evaluation round – corruption offences – is based on answers to the questionnaire and information supplied during the on-site visit. The main purpose is to assess the effectiveness of measures adopted by the Swiss authorities to comply with the provisions referred to in paragraph 2. The report presents a description of the situation, followed by a critical analysis. The conclusions include a list of recommendations adopted by GRECO and addressed to Switzerland on how to improve compliance with the provisions under consideration.
6. The report on theme II – transparency of political party funding – appears in Greco Eval III Rep (2011) 4E, Theme II.

II. OFFENCES

Description of the situation

7. Switzerland ratified the Criminal Law Convention on Corruption (ETS 173) on 31 March 2006 and it came into force in the country on 1 July 2006. Switzerland has entered two reservations, one on the offence of trading in influence¹, and the other on its jurisdiction². On the basis of Article 36 of the Convention, it has also made a declaration on active and passive bribery³, particularly of foreign public officials.
8. Switzerland also ratified the Additional Protocol to the Criminal Law Convention on Corruption (ETS 191) on 31 March 2006 and this came into force on 1 July 2006. There was a similar declaration to that made in respect of the Convention⁴. These reservations and the declaration will be considered in more detail below.

Bribery of domestic public officials (ETS 173, articles 1-3 and 19)

Definition of the offence

9. Articles 322^{ter} to 322^{sexies} of the criminal code (CP), jointly labelled bribery of Swiss public officials, establish the offences of the active and passive bribery of public officials, while drawing a distinction between bribery for the purposes of securing an act of commission or omission in relation to their official activity, but contrary to their duty or dependent on their discretion (articles 322^{ter} and 322^{quater} CP) and bribery so that they will carry out their official duties (articles 322^{quinquies} and 322^{sexies} CP, which carry a lesser sentence).

Article 322^{ter} CP – bribery of Swiss public officials – active bribery

Persons who offer, promise or give an undue advantage 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, for their own benefit or that of a third party, in exchange for carrying out or failing to carry out actions in connection with their official activities that are incompatible with their duties or the exercise of their discretion shall be liable to a custodial sentence not exceeding five years or to a monetary penalty.

¹ "Switzerland reserves its right to apply Article 12 of the Convention only if the conduct referred to, constitutes an offence under the Swiss legislation".

² "Switzerland reserves its right to apply Article 17, paragraph 1, subparagraphs b and c, only if the conduct is also punishable where it has been committed and insofar as the author is in Switzerland and will not be extradited to a foreign State."

³ "Switzerland declares that it will punish active and passive bribery in the meaning of Articles 5, 9 and 11 only if the conduct of the bribed person consists in performing or refraining from performing an act contrary to his/her duties or depending on his/her power of estimation."

⁴ "Switzerland declares that it will punish offences in the meaning of Articles 4 and 6 of the Additional Protocol only if the conduct of the bribed person consists in performing or refraining from performing an act contrary to his/her duties or depending on his/her power of estimation."

Article 322^{quater} CP – bribery of Swiss public officials – passive bribery

Persons who as a member of a judicial or other authority, as a public official, officially-appointed expert, translator or interpreter, or as an arbitrator or a member of the armed forces solicit, receive a promise of or accept an undue advantage, for their own benefit or that of a third party, in exchange for carrying out or failing to carry out actions in connection with their official activities that are incompatible with their duties or the exercise of their discretion, shall be liable to a custodial sentence not exceeding five years or to a monetary penalty.

Article 322^{quinquies} CP – bribery of Swiss public officials – granting an advantage

Persons who offer, promise or give an undue advantage 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 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.

Article 322^{sexies} CP – bribery of Swiss public officials – accepting an advantage

Persons who as a member of a judicial or other authority, as a public official, officially-appointed expert, translator or interpreter, or as an arbitrator, or a member of the armed forces solicit, receive a promise of or accept 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.

Article 322^{octies} CP – General provisions

1. (repealed)
2. 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.
3. Private individuals who fulfil official duties are subject to the same provisions as public officials.

Elements of the offence

Domestic public officials

10. Articles 322^{ter} to 322^{sexies} CP apply to members of judicial or other authorities, public officials, officially-appointed experts, translators or interpreters, arbitrators or members of the armed forces. The notion of public official is defined more precisely in Articles 110 al. 3 CP and 322^{octies} ch. 3 CP:

Article 110 al. 3 CP - public officials

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.

11. The provisions of the Criminal Code are supplemented by the "message" of 10 November 2004 of the Federal Council to the Swiss Parliament on the application and implementation of the Criminal Law Convention and its Protocol. Such "messages" serve as reference documents for Swiss courts and practitioners. They contain detailed comments on Switzerland's application of the Convention and its Protocol and how its provisions should be interpreted. In connection with the notion of public official, the message states that *"apart from public officials, the corruption legislation refers to officials of judicial or other authorities as the perpetrators or targets of acts of bribery. This wording encompasses all persons with an executive or legislative mandate. In this respect, Swiss law quite explicitly gives a wider definition to the notion of public official than does the Convention [...]. Article 1 b [of the Convention] states that the term "judge" referred to in subparagraph a. shall include prosecutors and holders of judicial offices. This clarification does not raise any legal problems in Switzerland, where no real distinction is made between the bribery of judges and of public officials. If, for example, a prosecutor [...] acting according to instructions received is not considered to be a member of a judicial authority he will still be liable to the same criminal law provisions of corruption in his capacity of public official"*. Moreover, according to case-law, *"the criminal law notion of public official, under Article 110.3 CP, includes officials in both the formal and material senses. The former case includes officials in a public law sense and employees of the public service. As for the others, the legal form in which they 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 the criminal law those carrying them out are considered to be public officials [...]"* (judgment of the federal court (ATF) 135 IV 198 (21.8.2009), consid. 3.3 and ATF 6B_921/2008 (21.8.2009), consid. 4.3). Finally persons in a post or job on a provisional basis or who perform public duties temporarily must also be considered to be public officials (ATF 123 IV 75 (19.2.1997))".

Promising, offering or giving (active bribery)

12. These elements are explicitly offences under articles 322^{ter} and 322^{quinquies} CP, through the use of the terms "offer, promise or give". These terms have been clarified in a federal court judgment (SK 2007.6 (21.8.2008)): *"offer signifies a proposed gift or donation by the perpetrator to the public official. It is sufficient for the offer to reach the recipient [...]. If an intended recipient is given to understand that there will be an advantage this already constitutes a promise. Receipt of the promise is once again sufficient – an acknowledgement or other reaction is not necessary. When an advantage is passed from the perpetrator directly or via an intermediary to the recipient it is deemed to have been given"*.

Request or receipt of any undue advantage, or the acceptance of an offer or a promise (passive bribery)

13. Articles 322^{quater} and 322^{sexies} CP make it an offence to "solicit, secure the promise of or accept an advantage". These terms have also been clarified by the federal court (ATF 135 IV 198 (21.8.2009), consid. 3.3): *"for the condition of a request to be satisfied a unilateral declaration of willingness on the part of the official is sufficient. The request must reach the intended recipient. However, it is not necessary for the recipient to honour the request or let it be understood that that is the intention. "Secure the promise" is understood to mean the explicit or implicit acceptance of the offer of a future advantage and not simply the receipt of such an offer. Acceptance signifies the receipt of an advantage in one's own area of discretion [...]"*.

Any undue advantage

14. Articles 322^{ter} to 322^{sexies} CP refer to “undue advantages” but do not specify whether these advantages can be of any nature. The courts have however ruled that *“any gift or donation, material or non-material, given with no consideration, must be considered to be an advantage”* (ATF 135 IV 198 (21.8.2009), consid. 6.3.) Moreover a federal court judgment (Sk. 2006.18 (31.05.2007), consid. 6.3) states that *“a financial or legal improvement in a public official's situation is considered to be a material advantage”*.
15. The courts interpret the notion of undue advantage in the same way as the Criminal Law Convention on Corruption. An advantage is undue when it does not come to its recipient lawfully and the latter has no claim to it⁵. Among such advantages considered to be undue have been drinks to a value of a few hundred francs offered to an official and prostitutes in his company⁶, five invitations to dinner and various drinks offered⁷ and the payment of several hundred francs⁸.
16. Like the Convention, Article 322^{octies} ch. 2 CP excludes from the notion of undue advantage, ones that are *“permitted under the regulations on the conduct of official duties as well as negligible advantages that are common social practice.”*

Directly or indirectly

17. In the various articles quoted above there is no reference to the involvement of intermediaries between those giving and receiving a bribe. However, according to the Federal Council message of 10 November 2004, *“even though the criminal code does not say so explicitly, perpetrators are equally guilty whether they pass on an advantage themselves or via a third party”*. The Swiss authorities have also supplied an example of such an interpretation in case-law: *“he promised, however, to use his relationships, which extended to the highest levels, and thus to ensure that Lippuner [the public official] received this advantage via a third party, which is also an offence under the law”* (ATF 100 IV 56 (12.3.1974), consid. 2a).

For themselves or others

18. Articles 322^{ter} and 322^{quater} CP make explicit reference to the notion of third party beneficiaries by using the term *“for their own benefit or that of a third party”*. However, there is no such reference in articles 322^{quinquies} and 322^{sexies} CP, which concern, respectively, granting advantages to and receiving advantages by public officials in exchange for carrying out their official duties. According to the Federal Council message of 10 November 2004, *“the definition of bribery in the Convention, and in Swiss criminal law, makes explicit reference to the granting of advantages to third parties. Whether an advantage goes or is intended to go to third parties or to public officials themselves is of no relevance, so long as there is a sufficient link between the advantage and the administrative act or decision”*.

⁵ Federal criminal court judgment SK.2006.18 (31.5.2007), consid. 3.5

⁶ Canton of Zurich, summary order of 28 January 2003, B-3/2000/533

⁷ Canton of Solothurn, 12/13 September 2002, STAPA 2001.23

⁸ Supreme court of the Canton of Zurich, 28 October 2002, SB020400/u/gk

To perform or refrain from performing actions in the exercise of their duties

19. The criminal code makes a distinction between requesting or giving advantages in exchange for officials' carrying out or failing to carry out actions in connection with their official activities that are incompatible with their duties or the exercise of their discretion (art. 322^{ter} and 322^{quater} CP) and cases where the advantage is in exchange for carrying out official duties (art. 322^{quinquies} and 322^{sexies} CP). The Swiss authorities quote several examples from case-law concerning articles 322^{ter} and 322^{quater} CP to show that delaying a decision or failing to act fall within the scope of acts that are contrary to officials' duties⁹ and that actions or decisions already carried out or made in the exercise of officials' duties when an advantage is received still constitute punishable offences¹⁰.
20. In connection with officials' power of discretion, another federal criminal court judgment (SK. 2006.25 (12.6.2007), consid. 2.1) states that *"when Article 322^{quater} CP came into force on 1 May 2000, parliament explicitly intended it to cover cases in which a decision was objectively defensible but where the official concerned had nevertheless traded his neutrality [...]. This means that carrying out or failing to carry out acts in connection with officials' power of discretion when these are linked to gifts or donations constitute activities contrary to their duties, even if the actions cannot be criticised objectively"*. For example, a public official who failed to try to obtain a price that reflected market conditions was deemed to have exceeded his power of discretion¹¹.
21. Finally, the replies to the questionnaire state that the Swiss criminal code also makes it an offence for public officials to request advantages in exchange for actions that are compatible with their duties and do not require them to exercise their power of discretion. Thus, Article 322^{quinquies} CP *"makes it an offence to grant an advantage, even if this is not related to a specific administrative act, and this also covers the granting of a series of small favours"*¹². The same applies to Article 322^{sexies} CP¹³, concerned with passive bribery. In other words, it is not necessary to establish a link between an undue advantage and a specific administrative act or decision.

Committed intentionally

22. The notion of intention does not appear in the aforementioned offences but Swiss criminal law (article 12. 1 and 2 CP) states that, in principle, offences are always intentional and that any intent is sufficient. For example, perpetrators are already acting intentionally when they contemplate the possibility of an offence and would accept it if it were committed. A federal court judgment ATF 126 IV 141 (20.5.2000), consid. 2a) in a bribery case stated that *"it was sufficient for the person giving the bribe to acknowledge, rashly, that the official concerned might accept the advantage offered and could possibly be influenced by it"*.

Sanctions

23. The same penalties apply to the bribery of Swiss public officials, whether active or passive (art. 322^{ter} and 322^{quater} CP), namely up to five years' imprisonment or a fine. As these offences carry

⁹ Federal criminal court judgment ATF 126 IV 141 (20.5.2000), consid. 2a

¹⁰ Federal criminal court judgment SK.2006.10 (19.12.2006), consid. 3.2.2

¹¹ Federal criminal court judgment SK.2007.6 (21.8.2008).

¹² Federal Council message of 10 November 2004

¹³ Federal criminal court judgment SK.2006.25 (12.6.2007), consid. 3.1

a prison sentence in excess of three years, they constitute serious offences (*crimes*) under Article 10. 2 CP.

24. Nor does the criminal code draw a distinction between granting and accepting advantages (art. 322^{quinqies} and 322^{sexies} CP), for which the penalties are up to three years' imprisonment or a fine. These offences constitute lesser offences (*délits*) under Article 10. 3 CP.
25. The following general rules also apply to all corruption offences:
 - under Article 102 CP, legal persons are liable to fines of up to 5 million Swiss francs (CHF – about € 4.11 million)¹⁴;
 - where there is a concurrence of several offences¹⁵, the upper limits of the penalties may be increased by a half. This means that in the event of such multiple offences, for example repeated bribery offences, the maximum penalty is 7½ years for bribing a public official;
 - Article 67 CP authorises the courts to prohibit both those giving and those receiving bribes from exercising a trade or profession for 6 months to 5 years if the custodial sentence handed down is more than 6 months or the fine is higher than 180 day-fines.
26. The penalties for active and passive bribery (art. 322^{ter} and 322^{quater} CP) correspond to those for comparable offences of breach of official duties. For example, other offences liable to the same five-year sentence include misuse of authority (art. 312 CP), dishonest management of public interests (art. 314 CP) and falsity of title committed in the exercise of public duties (art. 317 CP). Dishonest management (art. 158 CP) carries a sentence of up to three years' imprisonment, and five for the aggravated form. Offences against property that are comparable to bribery, such as fraud and handling stolen goods, are also liable to up to five years' imprisonment or even ten for certain aggravated forms, such as professional fraud.

Statistics

27. The replies to the questionnaire indicate the following data:

Number of convictions by year (the judgements are counted once they come into force so the 2008 and 2009 figures are still provisional:

	2005	2006	2007	2008	2009
322^{ter} CP	12	9	11	9	5
322^{quater} CP	1	2	4	2	5
322^{quinqies} CP	0	0	0	0	0
322^{sexies} CP	0	1	1	0	1
322^{septies} CP	0	0	0	0	1
Total	13	12	16	11	12

Source: criminal records

¹⁴ According to the exchange rate of 04.10.2011 : 1 CHF = 0.82 €

¹⁵ Art. 49.1 CP: Concurrence of offences – “If, as a result of one or more acts, the perpetrator fulfils the conditions for several penalties of the same type, the court may impose the sentence for the most serious offence and increase it proportionately. However, this may not exceed the penalty for this offence by more than a half. It is also bound by the legal maximum for each type of penalty”

Number of criminal investigations under way (at 31 January 2011):

322^{ter} CP	23
322^{quater} CP	9
322^{quinqüies} CP	2
322^{sexies} CP	1
322^{septies} CP	2
Total	37

Source: criminal records

28. Based on its own figures, the federal prosecution service states that there are 32 sets of proceedings under way for transnational bribery, which covers Article 322^{septies} and money laundering where the prior offence concerned transnational bribery.

Bribery of members of domestic public assemblies (Article 4, ETS 173)

29. The bribery of members of domestic public assemblies is covered by articles 322^{ter} à 322^{sexies} CP, as noted in the Federal Council message of 10 November 2004: *"The persons covered by Article 4 of the Criminal Law Convention are all included in the notion of public official in Swiss criminal law. As they are not, in principle, in a relationship of dependency vis-à-vis the public authority, within the meaning of Article 322^{ter} ff, they are considered not to be civil servants but members of other authorities."*
30. The elements of the offence of bribing a public official apply equally to members of assemblies. The replies to the questionnaire indicate that there have been no specific judicial decisions concerning members of domestic public assemblies.

Bribery of foreign public officials (Article 5, ETS 173)

31. As noted in paragraph 7, Switzerland made the following declaration when it ratified the Convention: *"Switzerland declares that it will punish active and passive bribery in the meaning of Articles 5, 9 and 11 only if the conduct of the bribed person consists in performing or refraining from performing an act contrary to his/her duties or depending on his/her power of estimation."*
32. The relevant provision is Article 322^{septies} CP:

Article 322^{septies} CP – Bribery of foreign public officials

Persons who offer, promise or give an undue advantage to a person acting for a foreign state or an international organisation 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 for the benefit of one of them or of a third party, in exchange for carrying out or failing to carry out actions in connection with their official activities that are incompatible with their duties or the exercise of their discretion,

Persons acting for a foreign state or an international organisation 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 who solicit, receive a promise of or accept for their own benefit or that of third parties, an undue advantage in exchange for carrying out or failing to carry out actions in connection with their official activities that are incompatible with their duties or the exercise of their discretion,
shall be liable to a custodial sentence not exceeding five years or to a monetary penalty.

33. This article is concerned with the bribery of foreign public officials, who may be *"persons acting for a foreign state or an international organisation 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"*. As described earlier in paragraphs 10 and 11, public official is defined in Articles 110. 3 CP and 322^{octies} ch. 3 CP.
34. Article 322^{septies} CP is conceived in a similar fashion to articles 322^{ter} and 322^{quater} CP on the bribery of domestic public officials and the elements described in these articles, including the penalties to which they are liable, apply in the same way to foreign public officials, except that cases in which the advantage is required or granted in exchange for legal and obligatory administrative acts, in other words when the public official's envisaged conduct is not contrary to his duty or dependent on his discretion, do not constitute offences, in accordance with Switzerland's declaration under Article 36 of the Convention.
35. According to the Federal Council message of 10 November 2004: *"The key point is that in practice, situations covered by article 5, in conjunction with Article 2, of the Convention but not covered by article 322^{septies} CP should not occur. Article 322^{septies} refers not only to acts contrary to the officials' duty but also ones that are dependent on their discretion. In fact the situations in question here only concern the payment of bribes to underpaid local officials. According to the Convention, such gifts and donations are only punishable if they are undue, in other words advantages that are not of low value. In practice, gifts given for acts that public officials are in any case required to carry out would not often exceed this limit. Finally, like the OECD Convention, this Convention acknowledges explicitly that Article 5 (and articles 9 and 11) may be applied in domestic law by criminal law provisions stating that the active or passive bribery of foreign public officials only applies if there has been a breach of their official duties. Hence the declaration provided for in Article 36 that was made when the Convention was ratified."*
36. The replies to the questionnaire indicate that there are no judicial decisions or case-law concerning specific elements of the offence of bribing foreign public officials, but because the legal wording of articles 322^{ter}, 322^{quater} and 322^{septies} CP is effectively the same reference may be made to decisions on cases of the bribery of domestic public officials.

Bribery of members of foreign public assemblies (Article 6, ETS 173)

37. Members of foreign public assemblies are covered by the notion of *"a person acting for a foreign state ...as a member of ..[an] other authority"* in Article 322^{septies} CP.
38. The elements described in connection with the bribery of domestic public officials therefore apply in the same way to members of foreign public assemblies, except – as with foreign public officials – that no offence is committed if an advantage is given in exchange for an obligatory administrative act. The Federal Council message of 10 November 2004 states that *"unlike the case of bribery of officials under Article 5 of the Convention, there is no gap here, at least in theory, since Article 6 [of the Convention] is solely concerned with elected or appointed members of collegial bodies, who by definition are not subordinate to the public authority. The members of these bodies do not have to carry out obligatory administrative tasks, which could make them open to bribes. Corruption in such cases could therefore only be in connection with a breach of duties or, more specifically, an act or decision arising from the power of discretion of the individual concerned."* For this reason, the declaration made by Switzerland (see paragraph 31)

does not concern Article 6 of the Convention. The replies to the questionnaire indicate that there are no relevant judicial decisions.

Bribery in the private sector (Articles 7 and 8, ETS 173)

Definition of the offence

39. Active and passive bribery in the private sector are offences under sections 4a and 23 of the federal Unfair Competition Act (Loi fédérale contre la concurrence déloyale - LCD), as revised in 2006. The basic elements of these provisions are similar to those governing the bribery of public officials.

Section 4a LCD: Active and passive bribery

1. Persons who:

a. offer, promise or grant an undue advantage to employees, partners, agents or other representatives of third parties in the private sector, for the benefit of those persons or of third parties, in exchange for carrying out or failing to carry out actions in connection with their occupational or commercial activities that are incompatible with their duties or the exercise of their discretion;

b. as employees, partners, agents or other representatives of third parties in the private sector, solicit, receive a promise of or accept for their own benefit or that of third parties, an undue advantage in exchange for carrying out or failing to carry out actions in connection with their occupational or commercial activities that are incompatible with their duties or the exercise of their discretion;
are acting unfairly.

2. Advantages that are agreed by contract or ones that are very small and are compatible with normal social usage are not considered to be undue advantages.

Section 23 LCD: Unfair competition

¹ Persons who are intentionally guilty of unfair competition within the meaning of articles 3, 4, 4a, 5 or 6 shall, following a complaint, be liable to a custodial sentence not exceeding three years or to a monetary penalty.

² Complaints may be filed by persons who are authorised to bring civil actions under articles 9 and 10.

Elements of the offence

Persons who direct or work for private sector entities

40. Section 4a of the LCD refers to any "employees, partners, agents or other representatives of third parties in the private sector". The Federal Council message of 10 November 2004 states that this concerns any person collaborating with a third party on the latter's behalf in whatever capacity.

Promising, offering or giving (active bribery)

41. As with the offence of active bribery of public officials, section 4a LCD uses the term "offer, promise or grant an undue advantage".

Request or receipt of any undue advantage, or the acceptance of an offer or a promise (passive bribery)

42. As with the offence of passive bribery of public officials, section 4a LCD uses the term "*solicit, receive a promise of or accept an undue advantage*".

Any undue advantage

43. As with public sector bribery, the offence of bribery in the private sector uses the term "*undue advantage*", as also used in the Criminal Convention. The scope of these terms is discussed under the bribery of a public official (see paragraphs 14 to 16).

Directly or indirectly

44. As with the bribery of public officials, section 4a LCD makes no reference to the possible involvement of intermediaries between the two parties. However, according to the Federal Council message of 10 November 2004, when the advantage is not passed directly by the giver to the recipient and a third party undertakes the task, there is still a punishable offence.

For themselves or others

45. The active and passive aspects of the offence state clearly that the undue advantage may be given or received "*for the benefit of those persons or of third parties*". The Federal Council message of 10 November 2004 states that there is still a punishable offence if the advantage goes not directly to the briber but to a third party. The wording is again the same as that used for the bribery of public officials.

Acting or refraining from acting; in the course of business activity, in breach of their duties

46. The offence of active and passive bribery in the private sector refers explicitly to these elements and uses the term "*for carrying out or failing to carry out actions in connection with their occupational or commercial activities*".
47. The offence is concerned with actions or omissions incompatible with their duties or falling within their margin of discretion. Further clarification appears in the Federal Council message of 10 November 2004: "*More precisely, 'actions incompatible with their duties' refers to duties arising from contractual relations, even implicit ones. They may also be more general duties such as the duty of care and loyalty of the employee to the employer, the duty of care of an agent or the duty of care between partners. The notion of 'actions incompatible with the exercise of their discretion' covers cases where, without expressly breaching their contractual duties, employees, partners, agents or others opt, in exchange for remuneration, to exercise their discretion on behalf of a third party, for example by choosing one bid rather than other equivalent ones. What counts is that the choice was not dictated by objective criteria but was influenced by the payment of a sum of money, thus harming the interests of the other bidders and, more generally undermining the workings of the market. If actions and decisions that were subject to discretion were not included, many acts of bribery would remain unpunished.*"
48. Finally, the notion of intentionality does not appear in the relevant legislation, but the Federal Council message of 10 November 2004 states that "*private sector bribery is only punishable if it is committed intentionally*". Possible intention is also covered for the same reasons as those specified in paragraph 22, since the general principles of the criminal code are applicable to criminal offences under the LCD.

Sanctions

49. Under section 23 of the LCD, active and passive bribery in the private sector is liable to a custodial sentence not exceeding three years or to a monetary penalty. According to the replies to the questionnaire, these offences are lesser offences under Article 10. 3 CP and the rules governing the liability of the enterprise, the concurrence of several offences (maximum penalty 4 ½ years) and the prohibition on exercising a trade or profession are applicable in the same way as for public sector bribery.

Statistics and judicial decisions

50. No relevant case-law or official statistics has been reported. However a questionnaire sent by the federal justice office to all the cantonal prosecuting authorities in 2009 revealed that three sets of proceedings had been brought for private sector corruption.

Bribery of international public officials (Article 9 of ETS 173)

51. Switzerland's previously mentioned declaration (see paragraph 31) when it ratified the Criminal Law Convention on Corruption also applies to Article 9. Thus, the bribery of international public officials is only an offence *"if the conduct of the bribed person consists in performing or refraining from performing an act contrary to his/her duties or depending on his/her power of estimation."*
52. This form of bribery is the subject of Article 322^{septies} CP, which covers persons acting for an international organisation in the same way as those acting for a foreign state. The Federal Council message of 10 November 2004 adds the following clarifications: *"The corresponding criminal provision must therefore cover employees of the organisation – who are public officials in the formal sense – and other persons carrying out administrative duties for it – who are public officials in the material sense. Swiss criminal law makes this distinction because it is equally concerned with established public officials, or civil servants, and persons acting as state employees. The Convention's notion of international or supranational public organisation is slightly narrower than that in Article 322^{septies} CP (or in the OECD Convention) in that it is confined to organisations of which the state party is a member. Otherwise the provisions match."*
53. The elements discussed with reference to Article 322^{septies} CP therefore apply in this case. The replies to the questionnaire indicate that there are no relevant judicial decisions.

Bribery of members of international parliamentary assemblies (Article 10, ETS 173)

54. Article 322^{septies} CP makes no explicit reference to members of international parliamentary assemblies but they are clearly covered by this article, as the Federal Council message of 10 November 2004 makes clear: *"The persons covered by Article 10 of the Convention are covered by Article 322^{septies} CP, by the notion of "person acting for ... an international organisation as a member of a judicial or other authority".* The elements of the bribery of foreign public officials therefore apply equally to members of international parliamentary assemblies¹⁶. The replies to the questionnaire indicate that there are no relevant judicial decisions.

¹⁶ See paragraphs 31 to 36 and the Federal Council message of 10 November 2004, p. 6569.

Bribery of judges and officials of international courts (Article 11 of ETS 173)

55. Bribing judges and officials of international courts is an offence under Article 322^{septies} CP, which specifically covers persons operating in international courts as members of a judicial authority or as public officials. According to the Federal Council message of 10 November 2004: *"persons with judicial functions are covered by the notion of member of a judicial authority. Other public officials such as prosecutors of United Nations courts and tribunals, registrars and court administrative employees come into the category of public officials, as defined in criminal law. Besides, the courts mentioned, which are organisations that form part of the United Nations or the Council of Europe, can anyway be considered to be covered by the notion of international organisation under Article 322^{septies} of the criminal code."*
56. The elements of the latter article and Switzerland's declaration when it ratified the Convention, as discussed earlier (see paragraphs 31 ff), are therefore applicable to this case. The replies to the questionnaire indicate that there are no relevant judicial decisions or case-law.

Trading in influence (Article 12 of ETS 173)

Reservation

57. Switzerland entered a reservation when it ratified the Criminal Convention concerning the offence of trading in influence in Article 12, and this was renewed on 16 February 2009 for a period of three years. *"Switzerland reserves its right to apply Article 12 of the Convention only if the conduct referred to constitutes an offence under the Swiss legislation."*
58. However the replies to the questionnaire indicate that certain serious cases of trading in influence are offences under articles 322^{ter} to 322^{septies} CP. For example, when the intermediary is a public official who accepts an advantage in order to exercise his influence over a third party who is also performing public duties, the latter is guilty of either passive bribery (art. 322^{quater} CP), or of accepting an undue advantage (art. 322^{sexies} CP). Meanwhile the person giving the advantage may be prosecuted under Article 322^{ter} CP (active bribery) or Article 322^{quinquies} CP (granting an undue advantage). However, the advantage given or planned has to be seen in relation to the intermediary's function. In other words, an offence is committed if a public official asks for or is granted an undue advantage from or by an individual in order to misuse his influence *vis-à-vis* another public official or member of an authority, so long as that influence is linked to the relevant official's function.
59. When the intermediary is a private individual, the offence of bribery is only applicable in certain cases. However where the official to be influenced takes part in and accepts the "bargain", in most cases the offence of bribery will be applicable. For example as noted in the Federal Council message of 10 November 2004, depending on the content of the agreement between the various protagonists, the third party will be guilty of active bribery (or of inciting active bribery), the public official of passive bribery and the intermediary of active bribery (or incitement or complicity). When 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 constitutes intended incitement of active bribery, which is an offence under Article 24. 2 CP.

Bribery of domestic arbitrators (Articles 1 to 3 of ETS 191)

60. Articles 322^{ter} to 322^{sexies} CP also cover domestic arbitrators, as the Federal Council message notes: *"Both the previous and the current criminal law on bribery refer explicitly to arbitrators as the potential recipients of bribes or the perpetrators of such acts. In legal theory, they are deemed to be private judges who are hired by the parties to rule on disputes between them. The definition of arbitrator in Swiss criminal law therefore corresponds perfectly to that in the Additional Protocol"*. The elements of these articles, as considered from the standpoint of the bribery of public officials, therefore also apply to the bribery of domestic arbitrators. The replies to the questionnaire indicate that there are no relevant judicial decisions.

Bribery of foreign arbitrators (Article 4 of ETS 191)

61. Switzerland made the following declaration when it ratified the Additional Protocol to the Convention: *"Switzerland declares that it will punish the active and passive bribery in the meaning of Articles 4, 6 and 11 only if the conduct of the bribed person consists in performing or refraining from performing an act contrary to his/her duties or depending on his/her power of estimation."*
62. The relevant provision is Article 322^{septies} CP, which refers explicitly to a person acting for a foreign state as an arbitrator. The elements of these articles, as considered from the standpoint of the bribery of foreign public officials, therefore also apply to the bribery of foreign arbitrators. The replies to the questionnaire indicate that there are no relevant judicial decisions.

Bribery of domestic jurors (Article 1, section 3 and Article 5 of ETS 191)

63. Articles 322^{ter} to 322^{sexies} CP apply to domestic jurors as members of a judicial authority. The Federal Council message of 10 November 2004 adds the following clarifications: *"the term judicial authority is taken to include not only jurors in the narrow sense but also non-professional judges operating in district and other lower courts under the judicial organisation legislation of the canton concerned."* The elements of these articles, as considered from the standpoint of the bribery of public officials, therefore also apply to the bribery of domestic jurors. The replies to the questionnaire indicate that there are no relevant judicial decisions.

Bribery of foreign jurors (Article 6 of ETS 191)

64. The situation regarding the offence of bribing foreign jurors is the same as that regarding the bribery of foreign arbitrators (see paragraphs 61 and 62). This means that the declaration made when the Additional Protocol was ratified also applies to Article 6 and the applicable provision is Article 322^{septies} CP, which refers to a person acting for a foreign state as a member of a judicial authority. The elements of these articles, as considered from the standpoint of the bribery of foreign public officials, therefore also apply to the bribery of foreign jurors. The replies to the questionnaire indicate that there are no relevant judicial decisions.

Other issues

Participatory acts

65. The replies to the questionnaire indicate that the relevant articles are 24 CP on incitement and 25 CP on complicity. In connection with the latter, both legal theory and case-law make it clear that the way in which the assistance is provided is of little importance. Complicity encompasses

any causal contribution that helps to facilitate the commission of the offence in such a way that, without this assistance, it would have been committed differently.

Article 24 CP – Participation. Incitement

¹ Anyone who has intentionally decided to commit a serious or lesser offence is liable, if the offence has been committed, to the penalty applicable to the perpetrator of the offence.

² Anyone who has tried to persuade another person to commit a serious offence is liable to the penalty for attempting to commit this offence..

Article 25 CP – Participation. Complicity

The penalty is reduced for anyone who has intentionally given assistance to the perpetrator for the commission of a serious or lesser offence.

Jurisdiction

66. The relevant provisions are articles 3, 6 and 7 CP.

Article 3 CP – Conditions of place. Serious and lesser offence committed in Switzerland

¹ This code is applicable to anyone who commits a serious or lesser offence in Switzerland.

² If, as a result of this offence, the perpetrator has been convicted abroad and has served part or all of the sentence handed down, the court shall take account of the sentence served in the sentence to be handed down.

³ Subject to serious violation of the fundamental principles of constitutional law and the European Convention on Human Rights, a perpetrator prosecuted abroad at the Swiss authorities' request cannot be prosecuted in Switzerland for the same offence:

- a. if he has been acquitted abroad in a final judgment;
- b. if he has served the sentence handed down abroad, or the latter has been remitted or is time-barred;

⁴ If the perpetrator prosecuted abroad at the Swiss authorities' request has not served the sentence handed down, it shall be served in Switzerland and if only part has been served abroad the remainder shall be served in Switzerland. . The court shall decide if he must serve or continue serving in Switzerland the sentence that has not been or has only partially been served abroad.

Article 6 CP – Conditions of place. Serious and lesser offences committed abroad and prosecuted under an international agreement

¹ This code is applicable to anyone who commits abroad a serious or lesser offence that Switzerland has undertaken to prosecute under an international agreement::

- a. if it is also an offence in the state where it was committed or the place where the offence was committed falls outside any criminal jurisdiction;
- b. if the perpetrator is in Switzerland and is not extradited.

² The court shall hand down a sentence that ensures that the perpetrator is not treated more severely than he would have been in the place where the offence was committed.

³ Subject to serious violation of the fundamental principles of constitutional law and the European Convention on Human Rights, a perpetrator may no longer be prosecuted in Switzerland for the same offence:

- a. if he has been acquitted abroad in a final judgment;

b. if he has served the sentence handed down abroad, or the latter has been remitted or is time-barred.

⁴ If, as a result of this offence, the perpetrator has been convicted abroad and has served part or all of the sentence handed down, the court shall deduct the sentence served from the sentence to be handed down. It shall decide whether the sentence handed down and partially carried out abroad must be continued or taken into account in the sentence handed down.

Article 7 CP – Other serious and lesser offences committed abroad

¹ This code is applicable to anyone who commits an offence abroad if the conditions laid down in articles 4, 5 or 6 are not met:

a. if it is also an offence in the state where it was committed or the place where the offence was committed falls outside any criminal jurisdiction;

b. if the perpetrator is in Switzerland or is returned to Switzerland on account of the offence and

c. if the offence is extraditable under Swiss law but the perpetrator is not extradited.

² When the perpetrator is not of Swiss nationality and the offence was not committed against a Swiss citizen, sub-paragraph 1 is only applicable if:

a. the extradition request was rejected for reasons other than the nature of the offence or

b. the perpetrator has committed a particularly serious offence proscribed by the international community.

³ The court shall hand down a sentence that ensures that the perpetrator is not treated more severely than he would have been in the place where the offence was committed..

⁴ Subject to serious violation of the fundamental principles of constitutional law and the European Convention on Human Rights, a perpetrator may no longer be prosecuted in Switzerland for the same offence:

a. if he has been acquitted abroad in a final judgment;

b. if he has served the sentence handed down abroad, or the latter has been remitted or is time-barred.

⁵ If, as a result of this offence, the perpetrator has been convicted abroad and has served part or all of the sentence handed down, the court shall deduct the sentence served from the sentence to be handed down. It shall decide whether the sentence handed down and partially carried out abroad must be continued or taken into account in the sentence handed down.

67. Paragraph 3 therefore establishes Switzerland's jurisdiction for all offences committed fully or in part in Swiss territory, whatever the perpetrator's or perpetrators' nationality. According to case-law¹⁷ and legal theory, it is sufficient for the offence to have been partly committed in Switzerland. Article 6 CP gives Swiss courts jurisdiction to try offences committed abroad that Switzerland has undertaken to prosecute under an international agreement, such as the Criminal Law Convention and its additional Protocol. Finally, Article 7 CP gives Swiss courts jurisdiction to try other offences committed abroad when the perpetrator is in Switzerland and the offence is an extraditable one under Swiss law.

68. Articles 6 and 7 both make Swiss courts' jurisdiction dependent on whether what took place is also an offence in the place where it was committed (the dual criminality condition) and the perpetrator is in Switzerland and has not been extradited. Switzerland has therefore entered a reservation regarding jurisdiction for offences committed abroad¹⁸, the reasons for which are considered in the Federal Council message of 10 November 2004: "*The criminal code does not*

¹⁷ See, for example, Federal criminal court judgment ATF 111 IV 1 (06.02.85), consid. 2a

¹⁸ "Switzerland reserves its right to apply Article 17, paragraph 1, subparagraphs b and c, only if the conduct is also punishable where it has been committed and insofar as the author is in Switzerland and will not be extradited to a foreign State."

go as far as the Convention, which has a slightly broader definition of jurisdiction. It does not appear to be justified to establish new legal provisions to meet all the requirements of Article 17.1 b and c, which in the final analysis have only very limited significance in practice. In particular, neither the seriousness nor the characteristics of acts of bribery committed abroad are sufficient to justify waiving the dual criminality condition."

69. So, as the Federal Council message states, Switzerland acknowledges its jurisdiction to hear cases of offences committed abroad by Swiss citizens, Swiss public officials of foreign nationality, or members of Swiss public assemblies of foreign nationality – the hypothesis of Article 17.1.b of the Criminal Convention – and cases of bribery committed abroad involving Swiss nationals who are international public officials, members of international parliamentary assemblies or judges or officials of an international court - the hypothesis of Article 17.1.c of the Convention – so long as the dual criminality condition is met. The replies to the questionnaire indicate that there are no relevant judicial decisions.

Time limit for prosecution

70. Under Article 97 CP¹⁹, the time limit for prosecution is 15 years if the offender is liable to a custodial sentence of more than three years and 7 years for lesser sentences. This means that the time-limit for prosecution is 15 years for bribery offences in articles 322^{ter}, 322^{quater} and 322^{septies} CP, and 7 years for granting or accepting an advantage (articles 322^{quinquies} and 322^{sexies} CP), and for private sector bribery (articles 4a and 23 LCD). There is no provision for the time limit to be suspended or interrupted. On the other hand, the time limit always ceases to apply if a judgment at first instance has been handed down before it elapses.

Defences

71. According to the replies to the questionnaire, there are no specific provisions in Swiss law concerning bribery offences that would exempt individuals from criminal liability or mitigate the sentence.

¹⁹ Article 97 CP: Time limits for prosecution:

"1: Criminal prosecution is time-barred after:

- a. 30 years for offences that carry a life sentence,
- b. 15 years for offences liable to a custodial sentence of more than three years;
- c. 7 years for offences liable to another penalty.

² In the case of sexual offences against children (art. 187) and dependent minors (art. 188), and offences against children aged under 16 specified in articles 111, 113, 122, 182, 189 to 191 and 195, the time limit for criminal prosecution shall at all events continue until the victim is 25.

The time limit ceases to apply if a judgment at first instance has been handed down.

⁴ In the case of sexual offences against children (art. 187) and dependent minors (art. 188), and offences against children aged under 16 specified in arts. 111, 113, 122, 182, 189 à 191 and 195 committed before the amendment of 5 October 2001, the time limit for criminal prosecution shall be as laid down in sub-paragraphs. 1 to 3, if it had not already lapsed at that date.

III. ANALYSIS

72. The Swiss legal and judicial landscape has evolved considerably in recent years, particularly following the country's ratification of the various international anti-corruption instruments. Legal persons' criminal liability was introduced into the criminal code in 2003. The federal criminal court was established in 2004 to hear criminal cases concerning the interests of the Confederation at first instance, including offences committed by and against federal public officials. The criminal code (CP) and the unfair competition law (LCD) were amended in 2005 – entry into force in July 2006 – to implement the Criminal Law Convention on Corruption (ETS 173, hereinafter the Convention) and its Additional Protocol (ETS 191, hereinafter the Additional Protocol). Protection for whistleblowers against unfair dismissal was introduced in 2009. More recently a unified code of criminal procedure, which replaced 26 cantonal ones, came into force on 1 January 2011.
73. Swiss criminal law on bribery is well developed. The relevant articles do not explicitly mention all the elements required by the Convention and its Additional Protocol but they are given a broad interpretation by the courts, based on the Federal Council message of 10 November 2004 to the Swiss parliament on the approval and implementation of the Criminal Convention and the Additional Protocol. This contains detailed comments on the interpretation of the law on bribery and corruption and serves as a reference document for Swiss practitioners. Overall, therefore, articles 322^{ter} to 322^{septies} of the CP and section 4 of the LCD on private sector corruption as interpreted by the courts on the basis of the Federal Council message meet the requirements of the Convention and the Additional Protocol. Other offences make it possible to prosecute other conduct amounting to corruption, in particular unfair competition (art. 158 CP) and money laundering (art. 305^{bis} CP). However, the number of bribery convictions remains stable and fairly low in relation to the number of investigations opened. Thus, between 1999 and 2009 there was an average of 15 convictions each year, almost all of them for bribery of domestic public officials²⁰. According to the Swiss authorities, 37 criminal investigations were in hand on 31 January 2011, including 23 for active bribery of a public official in the strict sense of the term (see paragraph 27).
74. Turning to the categories of persons covered by bribery offences, articles 322^{ter} to 322^{sexies} of the CP combined with articles 110.3 and 322^{octies} ch. 3 CP, as interpreted in the light of the 2004 Federal Council message and the case-law of the federal court, give a broad interpretation to the notion of public official. It includes not just established officials and other employees of public departments but also members of judicial authorities, including jurors, persons with elective executive or legislative mandates and arbitrators. Temporary posts and mandates are also covered, as are individuals carrying out public duties. The GET therefore considers that Switzerland's definition of what constitutes a domestic public official meets the requirements of articles 2, 3 and 4 of the Convention and articles 2, 3 and 5 of the Protocol.
75. There are two levels of offences for which domestic public officials can be prosecuted for bribery. Firstly, articles 322^{ter} and 322^{quater} CP define the active and passive bribery of domestic public officials in the strict sense and make it a serious offence (*crime*). These articles are concerned with offers of or requests for undue advantages in exchange for public officials' carrying out or failing to carry out actions in connection with their official activities that are incompatible with their duties or the exercise of their discretion. The second level of offences appears in articles 322^{quinquies} and 322^{sexies} CP, which make it an offence to offer or receive an advantage in exchange for carrying out official duties. These are lesser offences (*délits*) that are concerned

²⁰ "Processus de corruption: corruption publique, corruption privée et trafic d'influence" (public and private bribery and trading in influence), course notes of Professor Queloz, December 2010, p. 16.

with the granting of a series of small favours ²¹ or with the official's obligatory duties, where no discretion can be exercised. These latter offences can therefore serve as a safety net when the action requested or offered could not be identified in terms of bribery in the strict sense or the link between the advantage and the action could not be established. Generally speaking, the Swiss authorities and persons met on the visit agree that bribery in the strict sense has a broad personal scope and that a two tier criminal law armoury serves a useful purpose. It means that when it is difficult to establish the elements of bribery in the strict sense the lesser offences of granting or accepting an advantage can still be relied on.

76. The constituent elements of active and passive bribery of domestic public officials in articles 2 and 3 of the Convention appear in articles 322^{ter} ff of the criminal code. In Swiss law, the expression "*offer, promise or give an undue advantage*" is used for the offences of active bribery (art. 322^{ter}) and granting an advantage (art. 322^{quinquies}), and "*solicit, receive a promise of or accept an undue advantage*" for passive bribery (art. 322^{quater}) and accepting an advantage (art. 322^{sexies}). It is clear from the legislation and the on-site meetings that active and passive bribery are quite distinct offences and can be prosecuted separately without the need to prove the existence of an agreement.
77. Although the wording of articles 322^{ter} ff of the criminal code does not state it explicitly, the courts have clearly established that the advantage may be material or non-material and encompasses improvements to the official's financial, legal and social situation. Article 322^{octies} of the CP, which contains certain general provisions on bribery, excludes from the notion of undue advantage, ones that are permitted under the regulations on the conduct of official duties as well as negligible advantages that are common social practice. However, those whom the GET met on the visit explained that an advantage was qualified as undue as soon as it was likely to influence the official's conduct, irrespective of its value²². Low value presents and gifts are thus included in this notion. The GET welcomes this interpretation and considers that the notion of undue advantage is consistent with the requirements of the Convention.
78. Nor do articles 322^{ter} ff of the criminal code make any reference to the possible involvement of intermediaries between those giving and receiving bribes. However, the 2004 Federal Council message makes it clear that for both the active and passive aspects of the offence, "*perpetrators are equally guilty whether they pass on an advantage themselves or via a third party*". This interpretation has been confirmed by the courts²³ and is unanimously accepted by legal theorists. As for the intermediary, s/he would be punished according to the general provisions of the criminal code on participation (articles 24 and 25 CP). The GET therefore considers that the lack of any explicit reference to the notion of intermediary does not pose any problems with regard to articles 2 and 3 of the Convention.
79. The situation is less clear however in cases where the undue advantage is intended for a third party rather than the official him or herself. Third party beneficiaries are explicitly mentioned in articles 322^{ter} and 322^{quater} CP on active and passive bribery in the strict sense but not in articles 322^{quinquies} and 322^{sexies} CP on granting or accepting an advantage. The Swiss authorities and those met on the visit say that this situation would usually be covered by the notion of indirect

²¹ Called *alimentation progressive*, these small favours are given to the official in view of his/her position and are meant to maintain favourable relations with him/her, without any link with a specific act on his/her part.

²² For instance, giving CHF 10 to a police officer in order to avoid a traffic ticket of CHF 40 would be considered as an undue advantage. See also a decision by the Supreme Court of the canton of Zurich of 16.11.2010, published in *forum poenale* 2/2011, p. 66.

²³ See federal court judgment ATF 100.IV. 56 (12.3.1974), consid. 2a

advantage for the bribed official when a personal or family link with the third party beneficiary or an improvement in the bribed official's situation, even a non material one, could be established. However, certain interlocutors expressed doubts about the applicability of articles 322^{quinqies} and 322^{sexies} CP in the event of an advantage given to a political party or an association of which the public official was a member. Even if the Swiss authorities' interpretation does mean that articles 322^{quinqies} and 322^{sexies} CP can be applied in the majority of cases where an advantage is offered to a third party, the GET notes that this has not yet been confirmed by the courts and that this does seem to leave certain situations – even if infrequently – outside the scope of the offences in articles 322^{quinqies} and 322^{sexies} CP. It also has the consequence of shifting the burden of proof on to the undue improvement to the official's situation rather than that of the political party or association. Such proof may be more difficult to adduce in practice. The GET considers finally that the mere fact that third party beneficiaries are mentioned in certain articles on bribery and not in others is a source of uncertainty. The GET therefore recommends that steps be taken **to ensure that the offences of granting and receiving advantages in articles 322^{quinqies} and 322^{sexies} of the criminal code cover, unambiguously, cases in which the advantage is intended for a third party.**

80. The Convention's notion of "acting in the exercise of his or her functions" is reflected in articles 322^{ter} and 322^{quater} CP by the expression "actions in connection with their official activities ". This is interpreted broadly. For example, in 2006, the federal court held that *"it is sufficient for the violation to have been made possible by the official position of the person receiving the bribe. It is therefore irrelevant whether the official acted autonomously within the limits of his discretion or took advantage of his position in the hierarchy to exercise a decisive influence"*²⁴.
81. Articles 322^{ter} and 322^{quater} CP comprise two additional, and alternative, elements to those provided for in articles 2 and 3 of the Convention: The first is the notion of violation of officials' duties and the second that of their power of discretion. The 2004 Federal Council message states that *"Article 322^{ter} covers not only cases where public officials exceed or misuse their power of discretion, which is clearly in breach of their official duties, but also ones where they act in accordance with the discretion granted to them"* ²⁵. However, as the message notes, articles 322^{ter} and 322^{quater} CP cannot apply if the action sought is compatible with an official's duties and leaves no room for discretion. In such cases, articles 322^{quinqies} and 322^{sexies} CP may be applicable, without even the need to establish a link between the advantage and the actual administrative action or decision. In the Swiss authorities' view, confirmed by all the persons whom the GET met and by established case-law, these alternative notions of articles 322^{ter} and 322^{quater} CP are interpreted very broadly. In particular, breach of duty includes breaches of the obligation to treat users of public services equally and fairly²⁶. In connection with the notion of discretion, it is sufficient for officials to have "sold" their neutrality, even if their decisions cannot be criticised from an objective standpoint²⁷. The GET considers that in this context the Convention's objective of maintaining public confidence in the fairness of the administrative system is satisfied and concludes that the two tier definition of bribery in Switzerland, as

²⁴ Federal criminal court judgment SK.2005.10 (20.02.06), consid. 2.5

²⁵ Federal Council message of 10 November 2004, p. 6564

²⁶ See the Zurich district court judgment of 21/8/1995 in H. and the café-restaurant owners case, cited by Professor Queloz, op. cit., p. 7: The court found that the mere fact of an official dealing with an application in an expedited fashion was in breach of his official duties if that treatment resulted in non-objective circumstances that placed various applicants on an unequal footing or led to partiality. In connection with a delayed treatment, see federal court judgment ATF 126 IV 141 (20.5.2000), consid. 2a.

²⁷ Federal criminal court judgment SK.2006.25 (12.06.07), consid. 2.1, and federal court judgment ATF 6S. 180/2006 (14.07.2006), consid. 3.2.3.

interpreted and applied, satisfies the requirements of articles 2 and 3 of the Convention in this respect.

82. In contrast to the offences relating to domestic officials, with their two complementary tiers of bribery in the strict sense and simply granting or accepting an advantage, Article 322^{septies} CP, which is concerned with foreign and international public officials, including members of foreign and international public and parliamentary assemblies, judges and officials of international courts and foreign arbitrators and jurors, is only concerned with bribery in the strict sense. This covers acts and omissions which constitute breaches by officials of their duty, as well as acts and omissions linked to the exercise of their discretion. As with domestic bribery, the two notions are interpreted broadly. On the other hand, bribery for the purpose of securing an action or decision linked to an official's responsibilities, for example stamping a document, which the official must in any case carry out, is not an offence and there are no other legal provisions to act as a "safety net". The Swiss authorities have therefore made a declaration on the basis of Article 36 of the Convention²⁸. The lack of an offence of granting/accepting an advantage in exchange for carrying out one's responsibilities is not a problem in the case of members of foreign and international public and parliamentary assemblies, since they are not required to perform administrative tasks that do not allow them any discretion. Any actions they took would therefore relate to a breach of their duties or the exercise of their discretion.
83. In connection with the offence of bribing foreign and international public officials, judges and officials of international courts and foreign arbitrators and jurors, the GET believes that the lack of the "safety net" provided by the offence of granting or accepting an advantage in exchange for carrying out one's duties raises several problems. Firstly, under the Convention, domestic and foreign public officials should, in principle, be treated in a similar manner. Secondly, its attention was drawn, on the visit, to several problems arising from the absence of this safety net. Some of those spoken to said that not making an offence of *"the payment of bribes to underpaid local officials [...], for an act that the public official must perform anyway"*, as the 2004 Federal Council message itself put it, sent out an ambiguous message to Swiss companies. Yet it may be difficult to define the boundary between cases involving small, low-value bribes, particularly as value is a relative concept and what is low value for a Swiss company is not necessarily so in the eyes of a local official, and cases covered by 322^{septies} CP. A series of small payments may serve to mask a more significant bribe. Moreover it may be difficult, or even impossible, to establish what are an official's precise powers and responsibilities when the events take place abroad. Finally, the GET notes that Article 322^{septies} CP has so far been very seldom applied²⁹: three convictions (in 2001, 2009 and 2010) and two criminal investigations under way on 31 January 2011. An offence of granting or receiving advantages, similar to the one applicable to domestic public officials, would go a considerable way to rectifying these difficulties. The GET therefore recommends **to consider extending the offence of bribery of foreign and international public officials, judges and officials of international courts and foreign arbitrators and jurors to include acts that do not constitute a breach of duty or that do not relate to the exercise of their**

²⁸ "Switzerland declares that it will punish active and passive bribery in the meaning of Articles 5, 9 and 11 only if the conduct of the bribed person consists in performing or refraining from performing an act contrary to his/her duties or depending on his/her power of estimation." There is a similar declaration relating to articles 4 and 6 of the Additional Protocol to the Convention.

²⁹ The Swiss authorities and several practitioners have pointed to the difficulties in conducting successful investigations into bribery abroad, particularly because of the refusal of certain governments to provide mutual assistance, the scale of bribery and extortion in some countries and agreements reached abroad as part of more rapid plea bargaining procedures, which generally provide for confidentiality with regard to the conduct covered by the agreement and prevent the Swiss judicial system, in accordance with the *non bis in idem* principle, from opening proceedings in these cases.

discretion, and thus withdrawing or not renewing its declarations under Article 36 of the Convention and Article 9 paragraph 1 of the Additional Protocol.

84. Private sector bribery is an offence under section 4a of the federal Unfair Competition Act (LCD), as revised in 2006³⁰. Its wording matches that of articles 322^{ter} and 322^{quater} CP on the bribery (in the strict sense) of domestic public officials. This symmetry is to be welcomed, but the penalties are ones applicable to lesser offences. There were no criticisms during the on-site visit of the fact that private sector bribery was classified as a lesser offence, other than in connection with the anti-money laundering legislation, which was subject to the commission of a serious offence. This point has already been considered by GRECO in the joint 1st and 2nd round evaluations³¹.
85. The material scope of the offence of private sector bribery is limited to business activities, as is the case with the Convention. The 2004 Federal Council message states that the LCD is only applicable to NGOs and other associations, particularly sporting ones, in relation to their business dealings. However, several persons whom the GET met expressed regrets that these entities were not more widely covered by the offence of private sector bribery. Since Switzerland is the headquarters of very many associations, particularly sporting ones, the Swiss authorities might consider extending the offence of private sector bribery to these associations, as the Convention allows.
86. Under section 23 of the LCD, any prosecution for private sector bribery must be preceded by a complaint, which may be lodged by an individual, a company, an association (for example a consumer association) or even the Confederation, if it considers it necessary to protect Switzerland's reputation and the persons entitled to take action live abroad. The Swiss authorities and several interlocutors emphasised the length of the list of persons authorised by the LCD to lodge complaints, compared to the criminal code, which only authorised complaints from injured parties. This was one of the reasons why it had been decided to include the provisions on private sector bribery in this law. The Swiss authorities referred to the difficulties experienced by the prosecuting authorities in establishing the facts in private bribery cases, and thus the value of the reporting of these facts by clients, aggrieved companies or professional associations and of their collaboration in the investigation, as justification for the complaint requirement. The 2004 Federal Council message also states that *"the nature of the interests concerned and the level of seriousness of these offences, compared with the bribery of public officials, points to the conclusion that it is reasonable to retain the complaint requirement"*³². In certain cases, the authorities bring prosecutions of their own motion for aggravated dishonest management under Article 158 CP, but several interlocutors, including practitioners, said that it was difficult under Article 158 CP to build a prosecution case against the giver of the bribe via the instigator. Prosecutions therefore had less chance of succeeding than ones based on section 4 LCD.
87. The GET notes that to date there have been no convictions on the basis of this offence, even though most of those it spoke to thought that private sector bribery did exist in Switzerland. It has however heard that a case appears to be under way in the canton of Geneva, as well as the three referred to in paragraph 50. During the visit, various reasons were put forward for the absence of

³⁰ In 2004, in connection with the reform of the LCD, a minority of those concerned proposed the incorporation of the offence into the criminal code and its classification as a serious offence, which would enable the authorities to prosecute it of their own motion and attach stricter penalties. However, the government preferred the LCD option, particularly because of the advantages with regard to the persons authorised to lodge complaints (Federal Council message of 10 November 2004, p. 6560 and 6573). The Swiss authorities re-examined these issues during the 1st and 2nd joint evaluation rounds, in connection with recommendation vi on the anti-laundering legislation (see RC I-II (2009) 2F, paragraph 33).

³¹ See GRECO Eval I-II Rep (2007) 1F, paragraph 104.

³² 2004 Federal Council message, p.6574

convictions. For the majority of those met, whether practitioners or academics, the need for a complaint was a real obstacle to prosecutions³³. One practitioner also thought that in most of the cases of dishonest management that he had known, the absence of a complaint, had this been a requirement, would have often hindered proceedings. In addition, the withdrawal of a complaint during an investigation forces the prosecutor to rely on another offence³⁴. Finally several persons thought that in the national market companies all knew each other and were in regular contact, so that aggrieved parties would opt to keep quiet and await better days. The GET is not convinced by the Swiss authorities' arguments. It believes that the formal requirement in Swiss law for a complaint is an obstacle to prosecution that is against the spirit of the Convention, which calls upon state parties to limit differences between the rules applicable to bribery in the public and the private sectors. The GET therefore recommends **to abolish the requirement for a prior complaint before prosecutions are brought for bribery in the private sector**.

88. Trading in influence is not an offence as such in Switzerland. However, according to the 2004 Federal Council message³⁵ and those whom the GET met certain cases can be prosecuted under articles 322^{ter} to 322^{sexies} on bribery and under Article 24. 2 CP on attempted incitement. However, if the intermediary is a public official, the condition that the advantage granted relates to the specific office will have to be met. If the intermediary is a private individual, prosecution will only be possible if it is planned to associate the official whom it is intended to influence. Switzerland has therefore entered a reservation to Article 12 of the Convention to limit the application of the Convention to cases covered by its criminal law.
89. The 2004 Federal Council message states that legal theorists are divided on the advisability of making trading in influence an offence and considers that a specific offence is not necessary. Firstly, the influence of personal and social links has to be seen in the context of the Swiss political system. The latter is characterised by a collegial approach, multiple parties and direct democracy, all of which are obstacles to the emergence of a generalised system of cronyism. Moreover, existing legislation, particularly relating to public procurement and the internal monitoring of administrative activity, should help to prevent certain situations from degenerating, leading to an upsurge of corruption. The message also presupposes that the result might be to penalise what is simply lobbying³⁶ and that the general enforcement system could be weakened by the adoption of legislation that would quickly turn out to be ineffective. The Swiss authorities have therefore opted for a preventive approach to the problem³⁷. The GET is not convinced by the authorities' arguments to justify the reservation. It considers that the criminalisation of trading in influence is an important tool to safeguard the transparency and impartiality of decisions taken by the public authorities and eliminate any risk of establishing a climate of corruption in that area. Switzerland's existing legislation does not cover all the cases of so-called "background corruption", thus making it possible to sanction persons close to power who try to use their position to obtain advantages. Moreover, during the visit one practitioner acknowledged that the lack of an offence of trading in influence could pose problems in the granting of mutual assistance from the standpoint of the dual criminality requirement and for prosecuting on the basis of money laundering. The GET therefore recommends **to consider criminalising trading in influence in**

³³ See also Professor Queloz, *op. cit.*, p.11 and 22.

³⁴ However, the authorities have reported that a questionnaire sent in 2009 by the federal Office of Justice to all the cantonal prosecuting authorities appeared to show that there were no actual cases of bribery where the absence of a complaint might have been an obstacle and no case was known where the withdrawal of the complaint had led to the abandonment of the bribery prosecution.

³⁵ 2004 Federal Council message, p.6579

³⁶ The GET recalls in this respect that according to the Convention, the offence of trading in influence is not meant to cover recognised forms of lobbying.

³⁷ 2004 Federal Council message, p.6580 and 6581

accordance with the various elements of Article 12 of the Criminal Law Convention on Corruption (ETS 173) and thus withdrawing or not renewing the reservation concerning this article of the Convention.

90. The penalties for public sector bribery in the strict sense are a maximum of five years' custody or a fine, which is the same as for aggravated dishonest management, while granting or accepting an advantage and private sector bribery carry a maximum three year sentence or a fine. The penalties may be increased in the event of concurrence, for example, for repeated bribery offences): up to 7½ years for public sector bribery in the strict sense and 4½ years for granting or accepting an advantage and private sector bribery. In principle, first offenders have sentences of under two years entirely suspended. The court sets the level of the fine, which may not exceed 360 day-fines³⁸, depending on the perpetrator's personal and financial situation when sentence is handed down. The court may also order confiscation and professional or occupational disqualification, and in the case of suspended sentences certain rules of conduct. Legal persons may receive fines of up to CHF 5 000 000 (approximately € 4.11 million). All those spoken to thought that these penalties were effective and proportionate to the gravity of the offence. The on-site discussions suggested that the pecuniary sanctions, which rose in proportion to the individual's assets and could be very high, and media coverage of the case, which for a company quoted on the stock market or a politician could be very damaging, were particularly dissuasive factors. The GET considers that the sanctions applicable to the various bribery offences seem to be effective, proportionate and sufficiently dissuasive.
91. The analysis of Swiss legislation and the on-site discussions did not reveal any particular problems with regard to territorial and extraterritorial jurisdiction. Article 6. 1 CP authorises Switzerland, on the basis of its international undertakings, to prosecute bribery offences in cases not covered by Article 7 CP, on extraterritorial jurisdiction. However, Articles 6 and 7 and the reservation to Article 17 of the Convention make Switzerland's extraterritorial jurisdiction dependent on whether what took place is also an offence in the place where it was committed (the dual criminality requirement) and the perpetrator is in Switzerland and has not been extradited. The Swiss authorities justify their reservation by the extremely limited scope, in practice, of cases not covered by articles 6 and 7 CP, having regard to the requirements of Article 17 paragraph 1 b and c of the Convention. They state that "*in particular, neither the seriousness nor the characteristics of acts of bribery committed abroad are sufficient to justify waiving the dual criminality requirement*"³⁹. The GET considers that this condition reduces the Swiss authorities' scope for combating bribery committed abroad and is detrimental to the image the country wishes to give of its firm commitment to opposing corruption. It therefore recommends **to consider abolishing the dual criminality requirement for bribery offences committed abroad and thus withdrawing or not renewing the reservation to Article 17 of the Criminal Law Convention on Corruption (ETS 173)**.
92. The time limit for prosecution varies according to whether the offence is categorised as serious (*crime* – 15 years) or lesser (*délit* – 7 years). It is therefore 15 years for the bribery offences in articles 322^{ter}, 322^{quater} and 322^{septies} CP, and 7 years for granting or accepting an advantage (articles 322^{quinquies} and 322^{sexies} CP), and for private sector bribery (articles 4a and 23 LCD). In the case of private sector bribery it is also possible, in some cases, to prosecute on the basis of dishonest management, which is a serious offence. In every case, the time limit ceases to apply if a judgment at first instance has been handed down before it elapses. Most of the practitioners spoken to thought that the time limits were satisfactory. In the light of this information, the GET

³⁸ The maximum day-fine is CHF 3 000 (approximately € 2 460).

³⁹ 2004 Federal Council message, p. 6586

considers that these time limits are no obstacle to prosecution and that in this regard Swiss criminal procedure meets the requirements of the Convention.

IV. CONCLUSIONS

93. Switzerland has a solid body of legislation, extended in 2006, that in a very large measure satisfies the requirements of the Convention and its Additional Protocol. Given its economic and financial importance and the large number of multinationals with their headquarters there, Switzerland appears to be particularly exposed to the risks of bribery in the private sector and of foreign public officials. However the number of convictions is low in relation to the number of investigations opened and these almost solely concern the bribery of Swiss public officials. To date there have been no convictions for private sector bribery. The GET considers this to be a matter of concern and raises the question of the effectiveness of Switzerland's criminal provisions. To increase this effectiveness, it recommends repealing the requirement for a prior complaint in order to prosecute the offence of bribery in the private sector. The GET also notes that the offences of private sector and international bribery are defined more narrowly than those applicable to domestic public officials and that Switzerland has restricted its jurisdiction in cases with a transnational dimension. These restrictions are regrettable given the country's importance in the international economy and the scale of many of its business undertakings. Finally, although trading in influence appears to be partially covered by a number of criminal provisions, it is not an offence as such. Yet such an offence can offer additional and valuable protection for the transparency and impartiality of administrative decisions. Switzerland is therefore invited to consider modifying its legislation in this respect and withdrawing its reservation to Article 12 of the Convention.

94. In the light of the foregoing, GRECO addresses the following recommendations to Switzerland:

- i. **to ensure that the offences of granting and receiving advantages in articles 322^{quinquies} and 322^{sexies} of the criminal code cover, unambiguously, cases in which the advantage is intended for a third party** (paragraph 79);
- ii. **to consider extending the offence of bribery of foreign and international public officials, judges and officials of international courts and foreign arbitrators and jurors to include acts that do not constitute a breach of duty or that do not relate to the exercise of their discretion, and thus withdrawing or not renewing its declarations under Article 36 of the Convention and Article 9 paragraph 1 of the Additional Protocol** (paragraph 83);
- iii. **to abolish the requirement for a prior complaint before prosecutions are brought for bribery in the private sector** (paragraph 87);
- iv. **to consider criminalising trading in influence in accordance with the various elements of Article 12 of the Criminal Law Convention on Corruption (ETS 173) and thus withdrawing or not renewing the reservation concerning this article of the Convention** (paragraph 89);
- v. **to consider abolishing the dual criminality requirement for bribery offences committed abroad and thus withdrawing or not renewing the reservation to Article 17 of the Criminal Law Convention on Corruption (ETS 173)** (paragraph 91).

95. Pursuant to Rule 30.2 of the Rules of Procedure, GRECO invites the Swiss authorities to present a report on the implementation of the above-mentioned recommendations by 30 April 2013.
96. Finally, GRECO invites the Swiss authorities to authorise publication of this report as soon as possible, translate it into the other official languages and publish these translations.