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Review of implementation of the United Nations Convention against Corruption

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II. Executive summary

Switzerland

1. Introduction

1.1 The legal system of Switzerland

Switzerland is a federal State, with 26 cantons. Each canton has its own constitution and legislation. Cantons exercise all the rights and prerogatives that are not vested in the federal State, 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 needing to be incorporated into 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 that does not mean that international law takes precedence over domestic law in all circumstances. The Federal Supreme Court of Switzerland and the literature accept in principle the primacy of international over domestic law but admit some exceptions.

Switzerland signed the United Nations Convention against Corruption on 10 December 2003 and 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, guaranteeing the uniform interpretation and application of federal law and upholding the Federal Constitution.

Major reforms of criminal law have recently been introduced in Switzerland. The new Code of Criminal Procedure, in force since 1 January 2011, unified the procedural provisions existing at the cantonal and federal level. One feature of the new Code is the abolition of the powers of the examining magistrate. The Office of the Attorney-General is now in sole charge of conducting investigations and preliminary proceedings before the trial.

1.2 Overview of the anti-corruption legal and institutional framework

Switzerland is a party to the Organization for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, the Council of Europe Criminal Law Convention on Corruption and the Additional Protocol to the Latter.

Internally, Switzerland has established the Interdepartmental (inter-ministerial) Working Group against Corruption. The Working Group is primarily active in the prevention of corruption and has no powers to engage in administrative enquiries or criminal investigations.

The Office of the Attorney-General is responsible for criminal prosecutions in the Confederation. Its mandate is to prosecute and investigate offences against the

federal government. It is also responsible for dealing with mutual legal assistance issues.

The Money-laundering Reporting Office plays a key role in the country's efforts to combat corruption. Acting as a financial intelligence unit, it collects and analyses suspicious facts reported by financial intermediaries and, where a suspicion is well-founded, forwards such information to the criminal prosecution authorities of the Confederation.

2. Implementation of chapters III and IV

2.1 Criminalization and law enforcement (chapter III)

2.1.1 Main findings and observations

Bribery offences; trading in influence (arts. 15, 16, 18 and 21)

The Swiss Criminal Code criminalizes the offences covered by articles 15 and 16 of the Convention in terms that are broadly in line with the Convention. It is noted that the provisions on bribery aimed at inciting a national public official to perform an action that is not contrary to his or her duties do not cover all possible forms of undue advantage for a third party.

Although indirect bribery is not expressly criminalized, it is noted that the interpretation and application of the relevant domestic laws provide for the prosecution of bribery committed through intermediaries. Moreover, although Swiss law does not explicitly criminalize undue advantage granted to foreign public officials for conduct that does not constitute acts contrary to their duties, it may be considered consistent with the requirements of the Convention in 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 a party entitled to institute civil proceedings, including competitors and the State. 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, preferring to punish the acts covered by the Convention under the provisions on active and passive bribery, although these seem not to cover all cases of trading in influence. Switzerland has expressed its intention of reconsidering the possibility of criminalizing trading in influence directly and should be encouraged to do so.

Laundering of proceeds of crime; concealment (arts. 23 and 24)

Swiss law criminalizes acts “aimed at obstructing the identification of the origin, the tracing or the seizure of assets that [the perpetrator] knew or should have presumed originated from a crime”, that is, from an offence punishable with imprisonment for more than three years. Although the four offences set out in the Convention do not formally constitute part of Swiss law, all cases of money-laundering listed in the Convention are adequately covered under Swiss law and its implementation by the

courts. Under Swiss law, the perpetrator of the original offence may also be convicted of laundering the proceeds of his or her crime and money-laundering is also punishable 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 means of an offence against property and also, in some cases, under the provisions on money-laundering.

Embezzlement; abuse of functions; illicit enrichment (arts. 17, 19, 20 and 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 wider application than article 22 of the Convention, in that its scope is not restricted 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 an increase in wealth solely on the grounds that the public official concerned cannot justify it.

Obstruction of justice (art. 25)

Although it does not include specific provisions on combating corruption, Swiss law provides for the prosecution of all the punishable acts listed in article 25 (a) of the Convention. The power to prosecute for instigation to false testimony or the other offences, persons using physical force, threats or intimidation meets the requirements of the Convention. Swiss criminal law has provisions effectively covering the acts listed in article 25 (b).

Liability of legal persons (art. 26)

Swiss law provides for the criminal liability of legal persons, but also applies civil and administrative measures against legal persons participating in offences established in accordance with the Convention. A company has subsidiary criminal liability for all crimes and offences when an offence cannot be attributed to a particular individual owing to an organizational failure in the company. In addition, a company carries the primary criminal responsibility for certain serious offences, including bribery of domestic or foreign public officials 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 (art. 27)

Participation in an offence established in accordance with the Convention or the attempt to commit such offence is punishable under the general provisions of the Criminal Code. Acts preparatory for such offence are not punished under Swiss law.

Prosecution, adjudication and sanctions; cooperation with law enforcement authorities (arts. 30 and 37)

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

Parliamentarians, members of the Federal Council and judges elected by Parliament enjoy relative immunity for actions relating to their functions or activities, but such immunity may be waived by Parliament. Authorization is required from the Federal Department of Justice and Police to prosecute federal employees for offences related to their activity or their office.

The practice of criminal prosecution in Switzerland is governed by the principle of the mandatory nature of prosecution. The limited and restrictive application of the principle of discretionary prosecution is also possible but depends solely on considerations of criminal law.

Non-custodial measures that may, under Swiss law, be imposed instead of pretrial detention are consistent with the Convention. Similarly, parole for convicted persons takes into account, among other considerations, the gravity of the offence.

Under the Confederation Personnel Act, a public official accused of corruption-related offences may be suspended with or without loss of salary. If the action taken proves to be unwarranted, the official is reinstated with all his or her rights. Public officials may also be dismissed in the event of a serious dereliction of their professional duties and, if convicted of corruption in the exercise of their duties, they may be disqualified from their professional activities for a period of between six months and five years.

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

Protection of witnesses and reporting persons (arts. 32 and 33)

Swiss legislation contains such measures as the provision of anonymity for a protected person involved in criminal proceedings or the alteration of his or her voice in the witness box. These measures may be ordered by the court or the Office of the Attorney-General. In addition, the new law on protection of witnesses outside the courtroom, which comes into force on 1 January 2013, provides for protection measures beyond the confines of the court, such as personal protection, temporary accommodation in a safe house, or an assumed identity.

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

Freezing, seizure and confiscation; bank secrecy (arts. 31 and 40)

Swiss criminal law permits the seizure, by order of the Office of the Attorney-General, or the confiscation, by court decision, of property and assets, in accordance with the provisions of article 31 of the Convention. The judge may order that

property to be confiscated should be replaced by a claim for compensation lodged by the State for 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, *inter alia*, for the power to invest the seized assets with, where appropriate, the endorsement of the Office of the Attorney-General.

Specific provisions of the Criminal Code (arts. 72 and 260 ter) provide that property and assets belonging to a person who has participated in or supported a criminal organization are presumed, until proved otherwise, to be held by that organization and therefore subject to confiscation. Moreover, the Federal Act on the Restitution of Assets Illicitly obtained by Politically Exposed Persons (“the Restitution of Illicit Assets Act”), in force since 1 February 2011, permits the confiscation, under certain conditions and despite the absence of a criminal conviction, of assets presumed to be illicitly obtained belonging to the persons concerned. Furthermore, under Swiss law, confiscation of assets belonging to a specific person is permitted, also without a conviction, under certain conditions.

The provisions of Swiss law on bank secrecy have been the subject of considerable discussion at the national and the international level. The confidential relationship between a bank and a 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, where information or evidence is needed in a criminal case.

Statute of limitations; criminal record (arts. 29 and 41)

The statute of limitations under Swiss legislation of 15 years (for custodial sentences of more than three years) and seven years (or other punishments) for less serious offences is considered sufficiently long. However, Swiss legislation does not contain provisions on the extension or suspension of the statute of limitations where the alleged offender has evaded justice; the rules on the interruption and suspension of the statute of limitations were repealed because the system was deemed too complex. Instead, the statute of limitations was extended.

Jurisdiction (art. 42)

In general, the jurisdiction of Swiss courts is established in accordance 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 (arts. 34 and 35)

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

Specialized authorities and inter-agency coordination (arts. 36, 38 and 39)

In Switzerland, a number of members of the Office of the Attorney-General specialize in combating corruption. The Office administers itself and has sufficient independence, reinforced by the appointment of the Federal Attorney-General by Parliament, and its resources appear to be adequate. The Office works closely with accountants and financial analysts.

Federal employees have an obligation to report to the prosecution authorities, to their superiors or to the Swiss Federal Audit Office any offence that is liable to prosecution without the need for a prior complaint of which they have become cognizant in the course of their duties. Also, very close cooperation was noted between the law enforcement authorities, the financial intelligence unit and financial institutions.

2.1.2 Successes and good practices

- *Broad 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 this offence, even when the people concerned 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 the proceeds of crime and effectiveness of legislation.* The fact that the laundering of the 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 were the proceeds of crime should be noted as good practice. Also, the large number of prosecutions and convictions reported for the laundering of the proceeds of crime (over 1,000 convictions between 2003 and 2009) demonstrates the effectiveness of Swiss law in that regard. Similarly, the criminalization of self-laundering may also be noted as good practice.
- *Criminal liability of legal persons.* The fact that major companies are prosecuted and punished for acts of corruption demonstrates that the criminal liability of legal persons is a reality in Switzerland.
- *Measures to facilitate the confiscation and return of assets.* The confiscation of the assets of an individual without the need for a conviction is recognized in Swiss law. Moreover, the system set up by Switzerland for freezing assets diverted by politically exposed persons has resulted in considerable success as regards the seizure, confiscation and return of the proceeds of crime.
- *The law on the protection of witnesses outside the courtroom.* 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 Office of the Attorney-General and its close cooperation with anti-corruption specialists.*
- *The extent and quality of cooperation and coordination between public authorities and the private sector.*
- *The effective and efficient mechanisms that facilitate the lifting of bank secrecy.*

2.1.3 Problems and recommendations

Switzerland is encouraged to criminalize all instances of granting, soliciting or accepting undue advantages in favour of third parties in order to incite national public officials to engage in acts that are not contrary to their duties or do not depend on their discretion. As for the criminalization of the bribery of foreign public officials, although Swiss legislation is undoubtedly in conformity with the requirements of the Convention, 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 may allow some forms of corruption to go unpunished. Switzerland is encouraged to continue considering eliminating this requirement.

The criminalization of the laundering of the 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 minor forms 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 all variants thereof.

Switzerland is also encouraged to consider enacting provisions on the extension or suspension of the statute of limitations when an alleged offender has evaded justice and to consider granting immunity from prosecution, under article 37, paragraph 3, to an accused person who provides substantial cooperation in an investigation.

2.2 International cooperation (chapter IV)

2.2.1 Main findings and observations

Extradition; transfer of sentenced persons; transfer of criminal proceedings (arts. 44, 45 and 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). IMAC is fairly detailed and has been amended several times in order to respond to emerging needs. The principle of dual criminality is applied to extradition (art. 35, para. 1 (a)).

Switzerland may extradite even in the absence of an international treaty or convention. Switzerland is a party to several multilateral conventions on extradition, in particular the European Convention on Extradition of 13 December 1957 and its two Additional Protocols. It is also a party to a number of bilateral extradition treaties.

IMAC articles 32 to 38 set out the conditions for extradition. These are in line with the provisions of the Convention.

Swiss law contains several provisions to expedite extradition procedures. Among these is IMAC article 12, paragraph 2, which restricts the possibility of suspending extradition procedures. Article 17a establishes a general obligation to deal with requests promptly. The Federal Office of Justice is entitled to intervene where a delay is unjustified.

IMAC articles 85 to 87 set out the principle of *aut dedere, aut judicare*; if extradition is not granted, Switzerland may exercise its jurisdiction instead of the requesting State. Similar provisions govern extradition for the purpose of enforcing 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 judgement. IMAC article 8a 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 the 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, Peru and Thailand.

Pursuant to the general principle contained in IMAC article 85, criminal proceedings may be transferred to Switzerland. The transfer of criminal proceedings is regulated in detail in IMAC articles 86 to 93. Bilateral treaties with Austria, Germany and Italy allow the direct transfer of criminal prosecution, which, according to the Swiss authorities, has resulted in proceedings being conducted without delay.

Mutual legal assistance (art. 46)

IMAC contains a wide range of provisions on 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 the Swiss central authority for mutual legal assistance. Switzerland does not require requests to be submitted through diplomatic channels. The average time for responding to a request is estimated to be between six and 12 months.

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

The issue of fiscal offences has been of particular interest in the context of Swiss international cooperation. IMAC article 3, paragraph 3, establishes the basic limits to cooperation in this regard: "A request shall not be granted if the subject of the proceeding is an offence that appears to be aimed at reducing fiscal duties or taxes or that violates regulations concerning currency, trade or economic policy." If the facts of the case are considered acts of corruption under the Convention by the Swiss authorities, assistance may be given even if the case involves fiscal matters. This also applies, mutatis mutandis, to extradition. The use of evidence, however, is subject to the principle of speciality.

The obligation for Swiss banking institutions to make documents available to the Office of the Attorney-General upon request 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 (IMAC art. 80a), mutual legal assistance is to be executed in accordance with Swiss procedural law. However, IMAC article 65 allows for the taking of testimony in accordance with the law of the requesting State, if the latter so requests, provided that such law is compatible with Swiss law and does not cause serious damage to the participants in the proceedings.

Law enforcement cooperation; joint investigations; special investigative techniques (arts. 48, 49 and 50)

The legal basis for international law enforcement cooperation by the Swiss authorities is the Federal Act on the Central Criminal Police Bureaux of the Confederation. The Swiss Criminal Code governs collaboration with the International Criminal Police Organization (INTERPOL), with the European Police Office (Europol) and the States party to the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders ("the Schengen Agreement").

The Swiss authorities engage in international law enforcement cooperation on several levels, both globally (through INTERPOL) and within Europe (on the basis of the Schengen Agreement), and also on the basis of a large number of bilateral and multilateral treaties. The centres for police and customs cooperation in Geneva and Chiasso are useful in 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 and 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 possible establishment of working groups to undertake analysis of offences on the basis of bilateral agreements. In addition, bilateral agreements, including one with Germany, provide for joint police training.

Some agreements on international cooperation in law enforcement provide 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 postal deliveries and telecommunications may, under certain conditions, be ordered with a view to the investigation of certain offences, including corruption-related offences. Moreover, under certain conditions, the Office of the Attorney-General may use other technical means of surveillance or observation and may also monitor 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.

2.2.2 Successes and good practices

The principle of favourable treatment in international cooperation. Swiss jurisprudence has adapted to international cooperation the principle of favourable treatment, which is more widely known in connection with labour law and human rights law. Applying this principle, which has been developed on the basis of case law, Switzerland interprets the provisions of international conventions such as the United Nations Convention against Corruption 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. IMAC article 54, which is based on the provisions of the European Convention on Extradition, provides for a simplified extradition procedure, executed within only a few days or even a few hours of receipt of a 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 a little over half of extradition cases.

Return of assets. The statistics provided on assets seized in Switzerland and returned under the judicial assistance procedure demonstrate the successes achieved in this regard. In recent years alone, several hundred million United States dollars have been returned. Among the largest amounts returned recently were \$40 million to Nigeria in 2006 and \$74 million to Mexico in 2008.

Reversal of the burden of proof and the use of presumption in cases of mutual legal assistance relating to 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 Restitution of Illicit Assets Act, meanwhile, makes it possible to seize assets illicitly obtained by a politically exposed person or his or her associates. Under certain conditions, the illicit origin of assets is presumed.

Provision of technical assistance in law enforcement. Switzerland has made experts available for the provision of technical assistance abroad. It has also sent experts to developing countries in order to help them improve their investigations and formulate requests for mutual legal assistance more effectively.

2.2.3 Problems 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.

Swiss legislation appears to allow the Swiss authorities to require a requesting State to pay the costs involved in the execution of a mutual legal assistance request. Switzerland is encouraged to ensure the consent of the requesting State or to hold prior consultations with it in all cases.

3. 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 regularly supports efforts aimed at facilitating the implementation of the Convention by other countries.
