



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

DIRECTORATE GENERAL OF HUMAN RIGHTS AND LEGAL AFFAIRS
DIRECTORATE OF MONITORING



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Joint First and Second Evaluation Rounds

Evaluation Report on Switzerland

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INTRODUCTION

1. Switzerland joined the partial agreement establishing GRECO on 1 July 2006, that is after the closure of the First Evaluation Round. It therefore had to be the subject of a joint evaluation procedure covering the themes of the first and second rounds (see paragraph 3). The GRECO Evaluation Team (hereafter the GET) comprised Mr Peter De ROECK (Belgium, auditor general of finances, federal public budget department), Mr Edmond DUNGA (Albania, inspector at the department of internal administrative control and director of the anti-corruption service, reporting to the cabinet), Mr José Antonio MOURAZ LOPES (Portugal, judge at the execution of sentences court at Coimbra) and Mr Jean-Pierre ZANOTO (France, advocate general at the Lyon court of appeal). The team, accompanied by two members of the Council of Europe secretariat, Mr Michael JANSSEN and Mr Christophe SPECKBACHER, visited Switzerland from 17 to 21 September 2007. Before the visits, the GET received replies to the evaluation questionnaires (Greco Eval I-II (2007) 1F Eval I – Part 1 and Greco Eval I-II (2007) 1F Eval II – Part 2), relevant legislation and other documentation.
2. The GET met representatives of the following state institutions: federal justice office, federal department of foreign affairs, federal office of the register of commerce, departments of the federal parliament, federal finance department, federal finance administration, anti-money laundering authority, federal department of justice and police, federal banking commission, federal police office, state secretariat for the economy, federal prosecution service, federal office of investigating judges, ombudsman of the canton of Zurich, federal personnel office, federal department of defence, civil protection and sport, federal financial control office, federal criminal court, federal department of the environment, transport, energy and communications, secretariat of the parliamentary body for monitoring finances and Alpine transit. In Geneva, the GET also met representatives of the following cantonal and municipal institutions: auditor's office, state personnel office, cantonal finance inspectorate, financial inspectorate of the city of Geneva, cantonal tax department, central purchasing department, Geneva public prosecutor, investigating judges, criminal police and the court of justice. The GET was also able to meet representatives of civil society and the private sector, including journalists, the Swiss economy, the fiduciary chamber, the Swiss internal audit association, Transparency International Switzerland, Basel Institute on Governance and the Swiss institute for combating organised crime.
3. In accordance with Article 10.3 of its Statute, GRECO had decided that:
 - the First Evaluation Round would deal with the following themes:
 - ❖ **Independence, specialisation and means available to national bodies engaged in the prevention of and fight against corruption**¹: Guiding Principle 3 (hereafter “GPC 3”: authorities in charge of preventing, investigating, prosecuting and adjudicating corruption offences: legal status, powers, means for gathering evidence, independence and autonomy); Guiding Principle 7 (hereafter “GPC 7”: specialised persons or bodies dealing with corruption, means at their disposal);
 - ❖ **Extent and scope of immunities**²: Guiding Principle 6 (hereafter “GPC 6”: immunities from investigation, prosecution or adjudication of corruption); and

¹ Themes I and II of the first evaluation round

² Theme III of the first evaluation round

- the Second Evaluation Round would deal with the following themes:
 - ❖ **Proceeds of corruption**³: Guiding Principles 4 (seizure and confiscation of proceeds of corruption) and 19 (connections between corruption and money laundering/organised crime), together, for members having ratified the Criminal Law Convention on Corruption (ETS 173), with articles 19.3, 13 and 23 of the Convention;
 - ❖ **Public administration and corruption**⁴: Guiding Principles 9 (public administration) and 10 (public officials);
 - ❖ **Legal persons and corruption**⁵: Guiding Principles 5 (legal persons) and 8 (fiscal legislation), together, for members having ratified the Criminal Law Convention on Corruption (ETS 173), with articles 14, 18 and 19.2 of the Convention.

4. Switzerland ratified the Council of Europe's Criminal Law Convention on Corruption (ETS 173) and its Protocol (ETS 191) on 31 March 2006. They came into force in Switzerland on 1 July 2006.
5. This report was prepared on the basis of the replies to the questionnaire and the information provided during the on-site visit. The main objective of the report is to assess the effectiveness of measures adopted by the Swiss authorities to comply with the provisions referred to in paragraph 3. For each theme, 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.

I. OVERVIEW OF SWITZERLAND'S ANTI-CORRUPTION POLICY

a. Description of the situation

6. Switzerland is situated between Germany, Italy, Austria and France and is a relatively small country (41 000 km², 7.5 million inhabitants). It is one of the wealthiest countries in the world, with a GDP of € 293 billion and an unemployment rate of 2.6%. It is a federal state, made up of 26 cantons⁶. The Swiss franc (CHF) is worth about € 0.6.

Perception of corruption

7. The Swiss authorities are aware that the size of the Swiss financial market and the heavy dependence of Swiss firms on international trade require measures against both national and international corruption. They maintain that there are two sides to the country's small size and the close links between its political, economic and cultural spheres, which may pose a risk of

³ Theme I of the second evaluation round

⁴ Theme II of the second evaluation round

⁵ Theme III of the second evaluation round

⁶ The cantons have their own constitutions. The division of responsibilities between the confederation and the cantons is laid down in the federal constitution. The cantons vary in size from 37 to 7 105 km² and in population from 15 000 to 1 261 000 inhabitants (2004). Their autonomy is enshrined in the federal constitution. They raise taxes and enact legislation in all areas that fall outside the authority of the confederation, for example education, other than the federal universities, hospital management, other than municipal and private hospitals, most road building and maintenance, other than motorways and trunk roads, the police (though not the army), other social services and the supervision of taxation. Cantonal sovereignty is therefore limited to certain fields, as well as by the principle of the supremacy of federal law, which contrasts with the situation in, say, Belgium, where the laws carry equal weight.

Each canton has its own legislature, executive and judicial system and determines the composition and functioning of each. As a matter of principle, cantons are responsible for applying not only their own laws but also federal law.

corruption but are also an effective means of social control. Information gathered on-site suggests that the areas most affected in Switzerland are public procurement (construction and supplies), customs and police activities, and various areas concerned with issuing authorisations and permits. Certain interlocutors of the GET thought that various forms of favouritism, cronyism and nepotism, particularly at cantonal level, were of more concern than corruption *per se* and that only between 3 and 10% of such cases were uncovered and investigated. Once again, most of these cases were said to be linked to public procurement, relating to construction, motorways and so on.

8. Switzerland came seventh out of 163 in Transparency International's 2006 classification, with 9.1 points out 10 on its index of perception of corruption. The Swiss authorities have recorded 61 convictions since the new criminal law provisions on corruption came into force in 2000⁷, but the federal police office (Fedpol) acknowledge that this does not necessarily reflect the real scale of the problem, even though corruption is clearly not endemic in the country. According to a source, 97 to 99% of corruption cases in Switzerland are never reported (quoted on p. 9 of a Fedpol report on combating corruption). Fedpol's 2005 report on Swiss internal security states that corruption in the private sector remains very discrete⁸.
9. There is no evidence so far of links between corruption and organised crime, but according to the authorities several sets of proceedings currently under way involving employees of the confederation could supply further information on this subject.

Criminal law

10. Although the criminal code applies throughout Switzerland, there are currently various laws governing criminal procedure. Alongside the federal law on criminal procedure and other specifically federal legislation, for example in the military field, there are 26 cantonal codes. A unified code of criminal procedure has been approved by the Council of States and the National Council and will replace the various codes by January 2010⁹. Before it comes into force, significant organisational changes will be required, particularly in the cantons, hence the intervening period.
11. Active and passive corruption and accepting or giving favours in the public sector are governed by articles 322ter to 322octies of the criminal code. The last two are in addition to corruption offences (articles 322ter, quater and septies) because they make giving and accepting favours an offence, whether or not they can be linked to any act or omission on the part of the official concerned. They are punishable by a maximum of three years' imprisonment or a fine, whereas active or passive corruption, which presupposes the use of a discretionary power or a breach of the official's duty, is liable to up to five years' imprisonment or a fine. These offences concern the members of a judicial or other authority, civil servants, officially commissioned experts, translators or interpreters, arbitrators and – in the case of active corruption or giving favours – members of the armed forces¹⁰. In the case of persons acting on behalf of a foreign state or an international

⁷ 3 in 2001, 12 in 2002, 6 in 2003, 13 in 2004 and 11 in 2005, based on the new provisions. To this should be added the figures for convictions under the old corruption provisions, namely 7 in 2001, 1 in 2002, 5 in 2003, 2 in 2004 and 1 in 2005. The statistics for 2006 are not yet available. According to the 2005 report on Swiss internal security, two-thirds of the cases heard between May 2000 and the end of 2004 concerned convictions for corruption of Swiss public officials.

⁸ "numerous firms say that they have certainly been concerned by cases of corruption but prefer to deal with such conduct without calling on the authorities to avoid damaging their reputations".

⁹ The unified code was approved by parliament on 5 October 2007, after the GET visit.

¹⁰ Passive corruption and accepting favours by members of the armed forces are offences under arts 142 and 143 of the military criminal code.

organisation, all these offences carry a sentence of up to five years' imprisonment or a fine. Active and passive corruption in the private sector are covered by sections 4a (revised in 2006) and 23 of the law on unfair competition, which provide for up to three years' imprisonment or a fine, following a complaint¹¹. There are no specific provisions of the criminal code on influence peddling. However, according to the Swiss authorities existing provisions should cover most existing forms of influence peddling, particularly ones involving public officials. Switzerland has entered a reservation to that effect to the Criminal Law Convention on Corruption (ETS 173).

12. Under the Swiss criminal code, the organised commission of the aforementioned offences is not treated as a specific offence or as an aggravating circumstance. However, since 1994 there has been a specific offence under article 260ter, the participation or support of a criminal organisation, which is punishable by up to five years' imprisonment or a fine, which the courts are free to mitigate in the case of persons who try to prevent the commission of the organisation's criminal activity. When such organisations are involved in corruption, article 260ter of the criminal code applies in conjunction with the provisions on corruption and the sentence is then extended to up to seven and a half years' imprisonment (article 49 of the criminal code).
13. Articles 102 and 102a of the criminal code, which came into force on 1 October 2003, provide for the criminal liability of legal persons¹², either when the individual perpetrator of an offence cannot be identified because of the undertaking's organisational shortcomings or when the latter has failed to take all reasonable and necessary steps to prevent the offence. The second circumstance only applies to certain specific offences, including corruption in the public and private sectors, giving favours, money laundering and organised crime. Under the territoriality principle, an enterprise in Switzerland may be prosecuted if the violation occurred entirely or partly in Swiss territory or if the organisational shortcomings took place in Switzerland, and under the nationality principle, the enterprise may be prosecuted if it is Swiss. According to the Swiss authorities, Swiss enterprises must also be deemed liable for prosecution if violations are committed by branches abroad. The provisions on money laundering apply irrespective of where the underlying predicate offences were committed.
14. In addition to the multilateral conventions referred to in the next paragraph, Switzerland has concluded a number of bilateral treaties on mutual assistance in criminal matters and extradition. For police co-operation, Switzerland can rely on the facilities of Interpol, the Schengen Agreement and Europol¹³, and on bilateral treaties that include corruption matters. Switzerland also has had, since 1981, domestic legislation on international mutual legal assistance¹⁴ that enables it to provide assistance (legal assistance, extradition, transfer of proceedings and execution of foreign judicial decisions) to countries with which it does not have a relevant treaty. Generally speaking though, requesting states are asked to reciprocate (section 8 of the law of 1981), which means that they must be able to execute a corresponding Swiss request and state their readiness to do so. The extradition of Swiss nationals, in corruption and other cases, is subject to the written consent of the individual concerned, which can be withdrawn until the transfer is ordered. Under the nationality principle, Swiss nationals are prosecuted and judged under the criminal code (Article 7.1).

¹¹ This is a substantive law – and not a procedural - requirement

¹² This includes private law legal persons, public law legal persons other than so-called "territorial corporations", companies and single-person enterprises.

¹³ Cooperation in the framework of Schengen and Europol is based on agreements with the European Union

¹⁴ Federal law of 20 March 1981 on international mutual assistance in criminal matters.

Main initiatives

15. According to the authorities, since the 1990s fighting corruption has become one of the main priorities of Swiss policy on crime. Several cases have come to public attention and the Swiss government - the Federal Council – considers that combating corruption is essential both for maintaining and developing the integrity of the country's institutions of state, prosperity and economic stability, and for further strengthening the international attractions of the Swiss economy. Switzerland ratified the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions on 31 May 2000 and the Council of Europe Criminal Law Convention on Corruption (ETS 173) on 31 March 2006. It has also signed the United Nations Convention against Corruption and plans to ratify it in 2008. The Council of Europe civil law convention (ETS 174) has not yet been signed, even though it is generally consistent with Swiss law on civil liability¹⁵. The Swiss representatives laid great stress on the various steps taken in recent years to strengthen the country's capacity to co-operate internationally in criminal cases with a cross-border dimension, including those involving corruption. Several examples of successful co-operation have been reported and described to the evaluators.
16. Within the federal administration the emphasis has been on preventing corruption, particularly through the preparation, in 2000, of a code of conduct for confederation employees¹⁶ of whom there are about 35 000. Other awareness raising measures for staff include management and training courses and information sessions. In addition, an inter-departmental working group on corruption was established in 2000, to act as a forum for discussion and exchanges of views. In 2004, it became the consultative group on corruption. Some thirty federal offices take part and six of the seven departments are represented.
17. In 2003, the Federal Council approved a report on preventing corruption that included detailed information on the ban on accepting favours in the federal administration, the rules governing ancillary activities, internal and external monitoring procedures and more frequent use of the "four eyes" principle in decision making procedures. In April 2006, the Federal Council took note of the federal personnel office's guidelines of 27 March 2006 on ancillary activities and public responsibilities.
18. From the enforcement standpoint, in 1999 the Swiss parliament approved measures (a so-called "effectiveness project") to make criminal proceedings more effective and strengthen their legal basis. The confederation has been granted new powers and increased resources to enable it to take effective action against international crime, including corruption offences, and relieve the burden on small and medium-sized cantons. A new unit has been set up in the federal prosecution service to combat organised crime, money laundering and corruption.
19. Federal legislation prohibiting the tax deductibility of illegal commissions, which came into force early in 2001, has made it easier to identify corruption.

¹⁵ One of the main difficulties is that unlike the convention Swiss law provides for a one year interval before action can be taken to establish liability for unlawful acts. A proposal to unify civil liability, to be submitted to parliament, is intended to remedy this but there is no precise timetable at the moment.

¹⁶ Furthermore, numerous sections of the federal administration have drawn up their own rules of conduct and there are similar codes or directives at cantonal level for exposed professions, such as the police.

b. Analysis

20. The GET notes with satisfaction that Switzerland has launched an inter-institutional debate on corruption and has taken, since 2000, various steps to bring its legislation into line with the relevant Council of Europe and OECD conventions. For example, the offences of corruption have been redefined, strengthened and extended to foreign public officials, the private sector and legal persons. There have also been significant institutional reforms such as those granting the federal authorities wider criminal prosecution powers, coupled with increased human and material resources to enable the confederation to carry out this task, and the establishment of a federal criminal court. Finally, steps have been taken to increase awareness among staff of the confederation and a consultative group on corruption has been set up. The GET believes that these reforms and initiatives are to be welcomed and are evidence of growing awareness of the problem of corruption and of the Swiss authorities' determination to deal with it.
21. The GET notes the limited number of convictions for corruption and the lack of any convictions so far under sections 4a and 23 of the unfair competition law – revised in July 2006 – on corruption in the private sector. Nor have there been many prosecutions of legal persons. The on-site meetings revealed that it is difficult to bring complex corruption cases to a conclusion, particularly when they depend on legal assistance from other countries. Turning to corruption in the private sector, this kind of crime is only prosecutable if a complaint is lodged but the GET was told that the offence of dishonest management (article 158 of the criminal code) allowed the justice system to impose a conviction even in the absence of a complaint. The GET concludes that for the reforms to be effective, continued active steps will be required. From this standpoint, it seems unfortunate that for financial reasons the planned strengthening of federal judicial and police resources was not given full effect, even if those whom the GET met said that current staffing levels were not a problem. The recruitment process was programmed over eight years but in fact ceased in 2003¹⁷.
22. The GET has noted the Swiss authorities' frequent efforts in recent years to raise awareness of corruption, particularly in the federal departments of justice and police, the economy and foreign affairs, for example by means of codes of conduct. However, it also points out that there is no body responsible for assessing the different forms of corruption uncovered, with a view to framing a comprehensive approach to or strategy for the problem. This applies both at federal level and in the canton visited (Geneva, although internal supervisory machinery was introduced in 2007). The consultative group on corruption is currently no more than a forum for exchanging information and experience. It has no decision-making powers and has not carried out any systematic study on corruption. And although it collaborates regularly with the private sector, employers, NGOs and universities, it has not really involved cantons in its discussions and activities, or produced any general recommendations or guidance document. Fedpol is to be congratulated on its activities, such as its annual reports on Switzerland's internal security, which include a section on corruption, and the July 2007 study on corruption in the country. However, the GET thinks that these activities would benefit from more empirical information or information from other national institutions: it emerged from discussions that account had not yet been taken of information from the cantons, where various authorities, including administrative ones, each have some relevant knowledge of the subject, and that the overall number of investigations or prosecutions initiated in the country remains unknown. Meetings with representatives of the financial and commercial sector show that their current efforts are mainly concerned with international corruption, rather than corruption within the country.

¹⁷ To illustrate the consequences of this, 500 policemen were finally recruited compared with the 800 planned.

23. It is therefore hardly surprising perhaps, that a more comprehensive approach to combating corruption has not yet emerged in Switzerland. According to the Swiss authorities there are certain inevitable obstacles to such an approach, particularly based on the constitutional division of responsibilities between the cantons and the confederation. The GET also notes with interest that the Fedpol July 2007 report on corruption in Switzerland roundly states that the confederation prosecution authorities and the federal police should agree on a common strategy and collaborate closely with the cantons, the federal audit service and the tax authorities (p. 11).
24. The GET thinks that these various proposals deserve support. Such forms of co-operation might be established on the basis of a cooperation platform whose composition would vary according to the type of activity, such as policy formation, operational work, bringing together interdisciplinary skills and specialists, disseminating good practices and anti-corruption instruments, developing management based on integrity at federal and cantonal levels and awareness raising.
25. Therefore, **the GET recommends that the consultative group on corruption, or some other appropriate body, be given the necessary resources and powers to initiate a concerted anti-corruption strategy or policies at national level, bringing together the federation and cantons, administrative and judicial authorities, and drawing on interdisciplinary skills and specialists.**

II. INDEPENDENCE, SPECIALISATION AND MEANS AVAILABLE TO NATIONAL BODIES ENGAGED IN THE PREVENTION OF AND FIGHT AGAINST CORRUPTION

a. Description of the situation

Enforcement bodies in the confederation and the cantons

Confederation

26. Under the new division of responsibilities for the criminal prosecution of economic and financial offences¹⁸, the confederation has exclusive jurisdiction when the offences of organised crime, terrorist financing, corruption or money laundering are committed by federal officials or against the confederation, when the offences have mainly been committed abroad or when they have been committed in several cantons and not predominantly in any one of them. The confederation has concurrent and optional jurisdiction in particularly complex cases of economic crime.
27. The confederation prosecution service (MPC) is the confederation's investigation and prosecution authority. It undertakes police investigations, brings charges in the courts and executes requests for mutual assistance falling within its jurisdiction. As a result of the confederation's new criminal prosecution powers, the MPC was strengthened in 2002. A section composed of 15 teams (each composed of a prosecutor, a deputy or assistant prosecutor and a registrar) deals with international or cross-cantonal cases of organised crime, money laundering or corruption. A second section of three teams is particularly concerned with corruption cases in which federal officials are suspected or of which the confederation is a victim while a third, currently comprising three teams, specialises in the execution of requests for mutual assistance sent to Switzerland.
28. The public prosecutor, as head of the MPC, is appointed by the Federal Council for a four year term, during which only the latter can dismiss him. His functional independence is specified in section 16.4 of the federal law on criminal procedure, which states that the public prosecutor, his

¹⁸ Articles 336 and 337 of the criminal code, which came into force on 1 January 2002.

deputies and his representatives shall carry out their duties without receiving instructions from the appointing authority. Section 14 adds that in making his submissions, the prosecutor shall rely on his own judgment. His independence is further underlined by the legislation on confederation personnel. The head of the federal department of justice and police, in other words the minister of justice, has no statutory right to issue instructions to the public prosecutor. Since 2004, the federal criminal court has had jurisdiction to hear criminal cases concerning the confederation at first instance and is the MPC's supervisory authority. From an administrative and budgetary standpoint, the MPC is answerable to the federal justice department.

29. The MPC is assisted in its investigations by the federal judicial police service of Fedpol. The judicial police are supervised by and receive instructions from the public prosecutor or investigating judges. Within the police service, a state protection/specific offences inquiries division has been formed, sub-divided into various branches, one of which is responsible, *inter alia*, for combating corruption. One of the effects of concentrating complex corruption and organised crime cases in the hands of the MPC and the federal police is that it ensures close co-operation between branches specialising in different areas. In practical terms this means that multidisciplinary criminal investigation teams can be set up for specific cases and can call on specialists in the fields of corruption and of organised crime. The GET was informed during the visit that Fedpol has assigned seven persons to anti-corruption activities plus one person responsible for economic and financial analysis. Between 2003 and 2007, they conducted 51 investigations linked to corruption, including ones relating to requests for mutual assistance. Twelve inquiries are currently under way. According to those whom the GET met, the staffing of anti-corruption activities was generally satisfactory, although they pointed out that the planned increase in judicial and police staffing had not been fully implemented (500 police officers recruited instead of the 800 scheduled) and that with more staff the police could extend their investigations into corruption and co-operation with cantonal departments.
30. One of the consequences of the centralisation of responsibilities within the confederation has been the recruitment of economic and financial analysts and specialists to the MPC and the federal police. Those recruited between 2002 and 2004 underwent three months' training in such specific areas as organised and economic crime, international mutual assistance and corruption, and continue to benefit from continuing training in the form of specialist courses and lectures. Finally, the MPC has appointed two prosecutors to act as contact persons to answer questions relating to corruption at the national and federal level. The persons responsible for these areas at Fedpol receive special training in economic crime.
31. The public prosecutor carries out preliminary inquiries in conjunction with the police. If sufficient evidence emerges, the case is transferred to a federal investigating judge for a preparatory investigation¹⁹, following which the case is returned to the prosecutor, who decides whether to bring charges or suspend the investigation. If there is sufficient evidence, the prosecutor presents the charges to the federal criminal court, which has jurisdiction to hear cases under articles 336 and 337 of the criminal code.
32. The new federal criminal court, whose seat is in Bellinzona, came into operation on 1 April 2004²⁰. It is the ordinary judicial authority of the confederation for criminal cases. It operates as three independent courts:

¹⁹ Federal investigating judges are appointed by the federal court (article 13 of the federal law on criminal procedure).

²⁰ Prior to its establishment, the MPC presented charges to cantonal courts.

- the criminal court rules at first instance on cases coming within federal jurisdiction, including corruption cases covered by articles 336 and 337 of the criminal code;
 - the complaints court supervises the confederation's preliminary inquiry and investigation authorities;
 - since 1 January 2007, a third court has heard appeals relating to international mutual assistance.
33. Federal judges and their substitutes are elected by the federal parliament for a six year term (sections 1.2 and 1.5 of the federal legislation on the administration of justice).
34. Federal prosecutors and investigating judges become established civil servants after their second re-election, that is the start of their third term. There are no legal requirements for federal magistrates to have any specific qualifications or training but in-service training for newly appointed judges has existed for ten years. For French speakers, the training is provided by the University of Neuchâtel. For German speakers it takes place in Lucerne. In practice, when they are appointed judges are required to have had at least ten years' experience as cantonal judges. One quarter of them have had two years' special in-service training in economic crime.

Cantons

35. Although there is a clear distinction in all the cantons between the role of court judges, and the prosecution and investigation functions, there are differences in the way the latter two are apportioned. Several cantons, including Geneva, apply a strict division between the two whereas in others the public prosecutor combines both functions, by ordering the opening of proceedings, directing inquiries and conducting cases in the courts. In eleven cantons there is a mixed system in which the investigating judge brings charges and is answerable to the public prosecutor. Finally, in a few cantons, the public prosecutor is a party to the criminal proceedings as soon as they are opened by the investigating judge, who nevertheless retains total independence *vis-à-vis* the former.
36. In most cantons, the public prosecutor's representatives are elected by popular vote. Only five provide for their appointment by the executive. The judges of first instance are elected by the people in 20 cantons, by the parliament in three, by the cantonal court in two and in one by an electoral college of members of the government and the cantonal court. Appeal judges are elected by parliament in 16 cantons and by the people in 10. Periods of office range from three to ten years.
37. Most of the cantons lack a specific body responsible for combating corruption, but nearly all of them have a specialist body for dealing with economic crime. These may exist at both the police and judicial investigation levels, as in Geneva, only at the investigation stage or only within the police. Finally, a few cantons have established such specialist bodies at all stages of proceedings: initial inquiries, judicial investigation and trial. The GET was told during the visit that corruption cases in the canton of Geneva were dealt with by the financial brigade, comprising 17 police officers and two financial analysts, under the supervision of the public prosecutor or an investigating judge. Two corruption inquiries were under way at the time.
38. The GET was also told that certain cantons recognise the principle of lay judges, who are normally elected by the people and appointed by the political parties. They also hear criminal cases and sit alongside professional judges, for example one professional and four lay judges for offences carrying more than one year's imprisonment. It was also told that it was sometimes

possible for persons to perform more than one function, one example being that of a lawyer practising at the bar who was also a substitute prosecutor. The GET also notes that judges are not always required to have undergone a genuine judicial training. It was told that cantons required a university degree and authorisation to practise as a lawyer, plus relevant experience, such as ten years as a legal adviser/registrar (*greffier juriste*).

Consolidation of the penal procedure

39. The new unified code of criminal procedure will radically alter the current rules of procedure at confederation level and in certain cantons because it will abolish the position of investigating judge. The public prosecutor will be solely responsible for conducting inquiries, directing judicial investigations, bringing charges and conducting cases in the courts. The Swiss authorities argue that this concentration of responsibilities will make criminal proceedings more efficient. The predominant role of the public prosecutor will be counterbalanced by the introduction of a coercive measures court and a strengthening of the rights of the defence.

Other authorities

40. The main purpose of the consultative group on corruption (see previous section) is to ensure that Switzerland has a consistent policy on corruption. It meets two or three times a year, including once with representatives of the private sector and civil society. At a round table, each department or office presents its activities in the anti-corruption field. Major topics such as the work of the Council of Europe, OECD and the UN and the activities of the federal houses of parliament are regularly reviewed. Discussions are also currently under way on the group's future role and the possible development of a comprehensive strategy to set priorities for combating corruption at federal level.
41. Among the various confederation bodies concerned with anti-corruption activities are two specialist sections of the state secretariat for the economy. Two persons in the international investments and multinational companies sector are responsible for making Swiss companies active abroad more aware of these issues and for supporting their anti-corruption efforts. In addition, two persons in the secretariat's control sector are responsible for preventing corruption in the sphere of economic co-operation for development. In 2003, the state secretariat for the economy published a leaflet on "preventing corruption – advice to Swiss companies active abroad", which is also available on line. A second edition is planned for early 2008²¹. The GET was told that the state secretariat acted as a point of contact where members of the public could report conduct that was not compatible with the OECD Guidelines for Multinational Enterprises, which include a section on corruption. However, corruption rarely features among the five to ten cases reported each year (in the last six years, two reports on possible corruption were forwarded to the public prosecutor).
42. In March 2006, the development and co-operation directorate decided to establish a compliance office in its special duties and prevention of corruption unit, with a half-time post and responsibility for preventing corruption and for receiving complaints of corruption, both internal and external. Under the code of conduct, directorate officials are required to inform either their superior or the compliance office of any suspicions of corruption. Within the limits of existing law, the office must then offer protection to such "whistleblowers". It must also pass on the relevant information, anonymously if necessary, to the deputy director of the section concerned, the legal affairs

²¹ It was published as planned.

section, the systems and financial advice department and internal audit. The GET has been informed that no cases of corruption have so far been reported to the compliance office.

43. Oversight of public finances at federal level and in most of the cantons is the responsibility of a parliamentary committee. This is assisted at federal level by a financial surveillance and control body, the CDF. The latter operates independently of the executive and communicates directly with the parliament's finance committees, to which it must submit all its audit reports and correspondence exchanged with the bodies it has audited. The CDF has an annual budget of about CHF 17 million and has some hundred staff. If necessary, it may take on external specialists. Its staff receive internal training to make them aware of possible signs that offences have been committed and of circumstances that might encourage such offences.
44. The Money Laundering Reporting Office Switzerland or MROS, is the section of Fedpol that acts as the financial intelligence unit. As the national central office it receives, assesses and if necessary transmits to the prosecuting authorities well-founded declarations of suspicion from financial intermediaries concerning money laundering, terrorist financing or funds of criminal origin or emanating from criminal organisations²².
45. Persons entering the Swiss diplomatic and consular service receive specific instructions from the federal foreign affairs department on the bribing of foreign public officials. Their training programme includes a general discussion on how to respond when there are suspicions of corruption or a Swiss company considers that it is the victim of an attempt by a foreign public official to obtain bribes.

Criminal investigations

46. Currently, the discretionary prosecution principle applies in a few cantons (including Geneva) and the confederation, whereas the majority apply a system of limited discretion or even the mandatory prosecution principle. In contrast, the new code of criminal procedure (article 8) will introduce the principle of limited discretion throughout the country (criminal proceedings are not to be brought where the guilt and the consequences of the perpetrators' actions are minimal, where the offence concerned is unlikely to have a significant influence on the sentence or other measures that the accused is likely to incur because of the other offences with which he is charged etc.).
47. Under sections 4a and 23 of the unfair competition law, giving and receiving bribes in the private sector can only be prosecuted following a complaint, which can be lodged by anyone who is the victim of unfair competition, certain associations and other organisations, and the confederation, represented by the state secretariat for the economy.
48. Articles 97 to 101 of the criminal code specify the time limits for bringing criminal charges, which are fifteen years for the offences of giving or receiving bribes and seven years for giving or receiving favours and for active and passive corruption in the private sector. Under article 97.3, the time limit ceases to apply if a judgment at first instance has been handed down before it elapses.
49. The new code of criminal procedure will strengthen the collegial nature of prosecution service decisions through the application of the so-called "four-eyes" principle of internal control to such

²² In addition, the application of diligence measures for uncovering money laundering is overseen by administrative authorities and private supervisory bodies such as the federal banking commission –see below).

areas as the termination of cases, the use of special investigation techniques, the monitoring of bank accounts etc. The GET notes the proposed reforms, which are probably linked to the need to compensate for the disappearance of the investigating judge. They will probably help to reduce the risk of (undue) influence or even corruption within the prosecution service.

Special investigation techniques

50. Investigators and judges dealing with corruption cases can use various special investigation techniques: freezing and monitoring bank accounts, observation, interception of telephone conversations and communication via Internet and postal mail (since 2002, when the federal law on the surveillance of correspondence by post and telecommunication came into force), undercover operations and infiltration (since 2005, when the federal law on secret investigations came into force) from the time criminal proceedings are launched by the public prosecutor²³.
51. The freezing and monitoring of bank accounts, as well as surveillance are applicable to all serious and intermediate offences, and thus notably to corruption of domestic and foreign public officials. However, telephone surveillance and secret investigations can only be used for the most serious category of offences, which precludes their use for the offences of giving or accepting favours (article 322 quinquies and sexies of the criminal code) and corruption in the private sector (sections 4a and 23 of the unfair competition law).

Confidentiality and banking secrecy

52. Banking secrecy is protected by section 47 of the federal banks and savings bank law (the banking law), but this does not prevent the criminal prosecution authorities and federal banking commission, as the supervisory authority for financial markets, from conducting inquiries. Section 47.4 of the banking law makes it an obligation to provide information to the judicial authorities and give evidence to the courts. According to the Swiss authorities, there are no exceptions to this obligation. The requirement to provide information to the banking commission is also specified in the legislation governing financial markets (section 47.4 and section 23bis paragraph 1 of the banking law; section 35.2 of the federal law on securities markets and trading; section 139 of the federal law on joint capital investments, which came into force on 1 January 2007). Finally, articles 283 ff of the draft code of criminal procedure are concerned with the supervision of banking relationships. Under article 283, at the request of the public prosecutor and for the purposes of uncovering offences, the coercive measures court may authorise the surveillance of relationships between a bank or similar establishment and an accused person.
53. The communication and seizure of banking, financial and commercial files is authorised in corruption investigations, subject to the same conditions as apply to other criminal offences. According to the Swiss authorities, no problems have been reported in this context.

Protection of whistleblowers, witnesses and other vulnerable persons

54. According to the Swiss authorities, under article 336 of the Swiss obligations code (applicable to employees of the confederation under section 6.2 of the confederation personnel law) dismissing an official who has reported corruption now constitutes unfair dismissal if the official contacted first the employer, then the authorities and finally the media. Under section 14.3 of the personnel

²³ Before this stage, during the preliminary investigations, the police can only work with informers who come forward of their own volition.

law, officials who suffer such unfair dismissal must be reinstated in their post or, if this is impossible, in another equivalent one.

55. The financial control service (CDF) has established arrangements whereby whistleblowers and others can contact it by telephone or internet. All reports receive automatic attention. Under this system, those concerned can remain anonymous if they so wish. The GET was told that despite several attempts by the CDF to publicise this facility, there is generally no more than one case reported per month. If there appear to be serious grounds for suspicion, cases are forwarded to the prosecution service but so far none have been the subject of criminal proceedings. This CDF reporting facility, like the other reporting arrangements described earlier such as those of the state secretariat for the economy and the compliance office, have been set up without the need for formal legal authorisation.
56. The Swiss section of Transparency International operates an independent office that persons, particularly ones from the private sector, can contact via a hotline. They are given advice on how to proceed when they have evidence of unlawful dealings. Corruption cases can be forwarded to the authorities without naming the person who made the report.
57. Witnesses and other vulnerable persons currently receive very limited protection, based on the provisions of the criminal code that make intimidation an offence when it takes the form of threats, coercion or blackmail and certain similar procedural regulations in a few cantons. However, articles 146-153 of the draft unified code of criminal procedure specify new forms of witness protection²⁴.
58. The Swiss authorities state that apart from the case of criminal organisations, where article 260ter of the criminal code expressly provides for reduced sentences in such circumstances, the judge may, under article 47, impose a lighter sentence than the one normally carried by the offence if the offender has co-operated with the inquiries (for example by helping to identify other participants or throwing further light on what actually happened). Reductions of sentence are determined by the courts and cannot be the subject of promises at the preliminary investigation stage, from either the police or the judge leading the inquiries. Under the new unified code of criminal procedure it will be possible to provide accused persons with the same forms of anonymity and protection as those that apply to witnesses and experts. However, judicial plea bargaining and the so-called "crown witness" system will not be introduced.
59. Finally, the National Council and the Council of States have approved a motion on legal protection for persons reporting corruption cases²⁵, which instructs the government to lay before parliament draft legislation that among other things would authorise, where necessary, heavier penalties for dismissing persons who have reported corruption in their firm or department.

²⁴ These may extend to experts, and the families of witnesses and experts, when their life or physical integrity are exposed to serious risk or serious inconvenience because of the proceedings. Appropriate means may be used to maintain their anonymity, subject to the approval of a judge other than the one responsible for the case. If appropriate, the confederation and the cantons may continue to provide or arrange protection after the proceedings have ended. Pending this new legislation, the federal court has ruled that evidence may be given anonymously under certain circumstances. Finally, as regards protective measures outside proceedings, the Swiss authorities have acknowledged, in a report dated 9 June 2006, that new provisions are needed, notably in the context of international co-operation.

²⁵ On 22 March 2006 and 22 June 2007 respectively.

b. Analysis

Independence, specialisation, resources of the bodies and institutions responsible for combating corruption

60. Under existing provisions, acts of corruption other than ones committed by federal officials or abroad or in several cantons are prosecuted in the cantonal courts. During the visit, there was considerable discussion concerning the independence of judges, on which there was not always agreement. Some maintained that the appointment system in certain cantons made it essential to be a member of a political party in order to be elected, which might threaten the principle of objective impartiality²⁶. On the other hand, the judges of the Geneva prosecution service thought that, even though they had to have party sponsorship, the fact of being elected by the people offered them protection from outside political interference and preserved their independence.
61. Judicial independence is enshrined in legislation and the constitution itself, article 191 of which states that in the exercise of their judicial functions the judicial authorities are independent and answerable only to the law. Although the principle applies fully to court judges, it is somewhat curtailed in the case of prosecutors, who are organised hierarchically. Nevertheless, internal decision making within the service must remain transparent and instructions from the hierarchy must be accompanied by safeguards. For example they should be in writing and placed on the case file, and prosecutors receiving instructions should be able to discuss them and add their own comments to the file or appeal against them if they consider them unlawful.
62. If several official reports and recent press articles are to be believed, the principle of the independence of the federal prosecution service is currently being questioned. The resignation of the previous public prosecutor of the confederation in July 2006 brought the issue of how far the prosecution service really is independent into the open and has raised concerns not only among judges but also at the highest levels of state. For example, in a report of 5 September 2007, the management committee of the National Council thought that the minister of justice had breached the independence of the federal prosecution service by giving it instructions on information to the public. It said that the confederation public prosecutor had resigned not of his own free will but as a result of the minister's wish to terminate his employment contract. It therefore recommended that the Federal Council give this matter its immediate attention and take steps to guarantee the independence of the confederation prosecution service and of the judges who formed it²⁷.
63. As part of the reorganisation of the authorities of the confederation, the government is currently considering transferring all responsibility for supervising the federal prosecution service to the Federal Council. What makes the issue of the federal prosecution service's independence all the more important is the fact that there is no judicial service commission or equivalent at federal level (or in certain cantons) and that the institution of investigating judge will disappear on 1 January 2010. Thereafter, prosecutions will be entirely the responsibility of the public prosecutor and the new unified criminal procedure code will provide for the possibility to lodge an appeal against all decisions of a prosecutor, including the filing of a case. Therefore, the GET considers that the independence of the prosecution authorities remains an important issue. The establishment, as in other countries, of a judicial service commission or equivalent, with

²⁶ The impartiality shown to / perceived in general by the public

²⁷ See also the concerns expressed by the finance delegation (joint committee) of the finance committees of the National Council and Council of State in a report of 27 February 2007. The issue received wide press coverage during the GET's visit, sometimes with connotations of a scandal (*Le Monde* of 8/9/2007, *Le Temps* of 18/9/2007, 19/9/2007, 21/9/2007 and 25/9/2007).

involvement in judicial appointments and careers, or even full responsibility in this area, could help to resolve the matter.

64. Therefore, the GET recommends **i) to speedily clarify the current situation concerning the supervision of the prosecution service, in order to ensure its independence in both law and practice; ii) that consultations be undertaken on whether it is appropriate to establish a professional judicial body such as a judicial service commission or equivalent, to which responsibility for maintaining the independence of all the members of the federal judiciary could be delegated; iii) that the cantons be invited to discuss these matters.**
65. The visit showed the GET just how far the public prosecutors of the confederation and Geneva had become aware of the need to combat corruption, including various forms of corruption emanating from abroad. The federal investigating judges and prosecutors, and their colleagues from the canton of Geneva, have all undergone training in laundering, corruption and the Swiss banking system. They are also assisted by experts in economics and data processing. The court judiciary are the only ones not to benefit from this level of specialisation. However, in-service training still needs to be improved. Since 2006, the Geneva police have been running an in-service training programme specifically for the financial brigade, though it is not obligatory, and a seminar on corruption is scheduled for 2008. During the visit, the federal police also spoke of their need for continuing training. In the light of the needs expressed, **the GET recommends that i) more extensive specialist training on how to combat corruption be organised for all members of the judiciary – court judges, investigating judges and prosecutors – and for members of police branches specialising in this area; ii) the cantons be invited to do the same.**

Criminal investigations into corruption

66. According to members of the Geneva judiciary and police, intercantonal co-operation posed no problems. Investigating judges are free to carry out inquiries or searches in other cantons. It is significant that the confederation has appointed two prosecutors with responsibility for co-ordination and a judicial mutual assistance agreement exists between the different cantons. In any case, corruption cases involving several cantons come within the jurisdiction of the federal judicial authorities.
67. As previously noted, acts of corruption other than ones committed by federal officials or mainly abroad or in several cantons are prosecuted in the cantonal courts. This applies whatever the professional or elective responsibilities of the individual concerned. Cantonal politicians or business leaders involved in criminal cases must be judged by local courts, which may place the judges in a difficult position, given their possible professional or other links with those persons. However, the unified code of criminal procedure – to come into force in 2010 – will generalise the possibility of transferring a case upon the public prosecutor's initiative (articles 38 and 56), which the GET welcomes.
68. Under section 23 of the unfair competition law, corruption offences in the private sector can only be prosecuted following a complaint, which prevents the prosecution service from initiating action, even if it is informed of these offences. In the case of corruption, such complaints are rare. Moreover, the absence to date of prosecutions for private sector corruption tends to confirm the limitations of this provision, given that, according to several persons met, corruption in the private sector is not a negligible factor in Switzerland. The GET further observes that although the confederation is one of the bodies that can lodge complaints, this right is hedged around with

major restrictions, since it can only do so to protect Switzerland's reputation abroad and when the persons who are entitled to lodge complaints reside abroad. This being said, certain – criminal – offences such as forged "titles" - *faux dans les titres* – in article 251 and dishonest management in article 158 of the Criminal Code allow the prosecution service to act directly and initiate criminal proceedings. Although such offences can sometimes be used, they do not constitute a sufficient basis to prosecute the various forms of private sector corruption and, in addition, a conviction based on such provisions does not have the same moral connotation. The GET notes that, for the time being, the practitioners met on-site have indicated no particular difficulty when prosecuting corruption in the private sector without a private complaint. In any event, these issues will need to be looked at in more detail in the context of the Third Evaluation Round which deals i.a. with incriminations of corruption.

69. The GET notes that the federal laws on the surveillance of correspondence by post and telecommunication and on secret investigations authorise new special investigation techniques, but these cannot be used for certain forms of corruption, namely giving or accepting favours and private sector corruption. Many of those whom the GET met, particularly civil society representatives, thought that corruption was more widespread in the private than in the public sector. According to the previously mentioned Fedpol report on corruption in Switzerland, there are practically no reliable studies of the incidence of private corruption, but 9% of the companies questioned in a 2005 survey "were aware of at least one case of corruption" (page 8). Yet, so far there have been no convictions for private sector corruption under the new sections 4a and 23 of the unfair competition law. The on-site discussions showed that public-private partnerships could also raise problems because it was difficult to determine which corruption offence applied. The GET recognises that the lack of convictions might be explained, at least in part, by the fact that this is a relatively recent offence in Switzerland. Nevertheless it believes that the inapplicability of certain special investigation techniques to private corruption cases could be an obstacle to their successful prosecution. It is aware that techniques such as telephone intercepts represent a particular infringement of citizens' fundamental rights, but it thinks that this infringement is not out of proportion to the seriousness of the offence and what it represents, even when committed in the private sector. The use of such investigative methods would facilitate the prosecution of serious private corruption cases, which at the moment seem to remain untouched. **The GET therefore recommends to extend the scope of special investigation techniques to all serious cases of corruption, accompanied by appropriate safeguards for fundamental rights.**
70. The procedural law currently applicable in the confederation – as in the canton of Geneva – makes no provision for protecting persons acting as witnesses in criminal proceedings. However, such measures do appear in the new unified code of criminal procedure to come into force on 1 January 2010. The GET believes that this could make a significant contribution towards uncovering acts of corruption.

III. EXTENT AND SCOPE OF IMMUNITIES FROM PROSECUTION

a. Description of the situation

Confederation

71. Members of parliament enjoy total immunity (non liability) with regard to any statements made in either house or their bodies, and relative immunity (inviolability) for offences relating to their parliamentary duties or activities, which can be waived by the Federal Assembly (Sections 16 and

20 of the parliament law). In addition, to ensure that they are able to participate in sessions, they cannot be prosecuted during those sessions for any offences unrelated to their duties and activities without their consent or the approval of the house of which they are a member (Section 20 of the parliament law). The waiving of immunity requires the agreement of both houses of parliament. According to information gathered on the spot there have not been any known requests to waive parliamentary immunity on grounds of corruption or accepting a gift or another advantage. The only recorded instances of such requests, about one every two years over the last five years, concern other offences, such as defamation.

72. The members of the government and the chancellor of the confederation have absolute immunity with regard to any statements made to either house or their bodies (Article 162 of the federal constitution) and relative immunity for offences committed outside this context. In the case of offences committed in connection with their official duties, criminal proceedings require the authorisation of the Federal Assembly. If such approval is given, the two houses may also decide to suspend the individual concerned and appoint a special prosecutor. It is possible to prosecute members of the Federal Council or the chancellor during their term of office for offences that have no bearing on their duties if they give their written consent or the Federal Council authorises it²⁸. This requirement does not apply in case of *flagrante delicto* or preventive arrests to avoid flight or when the case involves a serious offence. If criminal proceedings against a member of the Federal Council or the chancellor are denied, the prosecuting authority can appeal against the decision to the Federal Assembly within ten days. The GET was told during the visit that there was about one request to waive immunity every ten years. Persons who are the subject of proceedings when starting their term of office are entitled to ask the Federal Council to order the end of their detention and any summons to appear in court. Such a request does not have suspensive effect. Immunity cannot be invoked against a judgment already in force imposing a custodial sentence whose application was ordered before the start of the term of office.
73. The immunity of federal judges and its waiving are governed by section 11 of the federal law on the federal court. This stipulates that prosecution for serious or intermediate offences unrelated to judicial duties is only possible with the agreement of the judge in question or following a decision of the court. If the waiving of immunity is refused, the prosecuting authorities can appeal to the Federal Assembly within ten days.
74. In the case of federal employees, section 15 of the federal law on the responsibility of the confederation and its members stipulates that the authorisation of the federal justice and police department is necessary to bring criminal proceedings against civil servants for offences related to their official activities and situation, with the exception of road traffic offences. Appeals against refusals may be lodged with the federal administrative court. Under the law, authorisation can only be refused for offences that are not serious and where disciplinary measures against those concerned appear to be sufficient²⁹. In the case of cantonal proceedings, the power to authorise criminal charges against federal employees is delegated to the federal public prosecutor (article 7 of the order on responsibility).
75. Under section 14 of the federal law on the responsibility of the confederation, if justified by the circumstances of the case the federal criminal court can be required to hear cases against the aforementioned persons rather than the cantonal court that would normally have jurisdiction.

²⁸ Section 61a of the federal organisation of government law

²⁹ Section 15.3 of the personnel law. The public prosecutor has authorised the waiving of immunity in the six actions against federal public officials since 2004 for corruption.

Cantons

76. There is no overview of the immunity arrangements of cantons, which they themselves can determine under article 347 of the criminal code³⁰. Paragraph 2.b also authorises cantons to introduce exemption from jurisdiction.
77. According to information gathered by the GET during the discussions held in the canton of Geneva, members of the council of state and judges enjoy relative immunity for offences committed in or in connection with the exercise of their duties but have no immunity for serious and intermediate offences unrelated to their professional activities. Members of the grand council, the cantonal parliament, have absolute immunity for statements made in the council but no immunity whatever for any other offences they might commit. Officials of the canton do not benefit from any immunity, other than the court of auditors' members under the law on the responsibility of the state and municipalities of 24 February 1989. All decisions concerning the waiving of immunity are taken by the grand council. There are no exemptions from jurisdiction.

b. Analysis

78. The issue of immunities has been a major subject of debate in the past because the relevant provisions and their scope have not always been properly understood. In 1991 this led the federal parliament to approve a series of directives on the subject³¹. Generally speaking, it appears to be recognised that immunities cannot be taken to cover acts of corruption, even though the notions of actions and activities linked to duties leave room for interpretation. The GET therefore welcomes the discussions in the federal parliament's legal affairs committee on whether the rules should be clarified to deal with uncertainties concerning the concepts of actions and activities linked to duties. It hopes that this will inspire similar debates at other levels, in particular the cantons for which it is difficult to form any judgment because little overall information is available. Those whom the GET met in Geneva had no information on the frequency with which immunities requests were made, apart from a current case involving a senior member of the executive, accused of destroying tickets for road traffic offences. The GET welcomes the fact that in Geneva, immunity can only be claimed against judicial investigation or prosecution. Prior authorisation (from the Grand Council, which always meets behind closed doors for such matters) is not required for preliminary inquiries.
79. The GET considers that the scope of the immunity granted to members of parliament is limited to what is strictly necessary to protect their function and ensure that parliament operates properly. The law does not specify the period within which parliament should rule but it appears from some ten cases examined by the GET that the decision is normally taken about eight to nine months after the request to waive immunity.

³⁰ Article 347: 1 The provisions of the law of 14 March 1958 on responsibility and those of the law of 26 March 1934 on political safeguards are retained.

The cantons shall retain the right to enact provisions:

a. abolishing or restricting the criminal liability of the members of cantonal legislative authorities for opinions expressed in these authorities' debates;

b. making the criminal prosecution of members of higher, executive and judicial authorities for serious and intermediate offences committed in the exercise of their duties subject to the prior authorisation of a non-judicial authority and conferring the power to hear such cases on a special authority.

³¹ Directives on the interpretation and application of section 14.1 of the federal law on responsibility (section 17.1 of the parliament law of 1 December 2003).

80. The immunity enjoyed by members of the government and the chancellor of the confederation is particularly broad in scope because it covers offences that are linked to the government's activities and ones that are unrelated to them. Nevertheless, the only immunity that is absolute concerns statements made before parliament or its committees; otherwise it can be waived by the Federal Council and disappears if the member of the government concerned agrees to be prosecuted. Furthermore, refusal decisions of the Federal Council may be appealed against to the federal parliament within a very short deadline (10 days). Immunity also ends once the person concerned leaves the government. Given these circumstances, the GET considers that immunity arrangements applicable to the President of the confederation and members of the government appear reasonably balanced.
81. As in the case of members of the government, the judiciary appear to enjoy very wide immunity that includes all the offences that a federal judge might commit. Nevertheless, the immunity can always be waived, and in the event of refusal to waive immunity an appeal may be lodged, again within the very short period of ten days.
82. After considering the situation in theory and practice, the GET has noted a number of aspects of the immunity enjoyed by federal employees for offences committed in the exercise of their duties that could be problematic. Firstly, in the case of actions that come within the jurisdiction of the confederation prosecution authorities it should not be for executive to decide whether or not an offence has been committed and if so whether the individual should be prosecuted, since these are prosecution matters, even though the law does restrict the right to refuse to relatively minor cases. Pending the authorisation decision, the prosecution can take all necessary steps, particularly to preserve evidence. Finally, the GET notes that in a case concerning a violation of the duty of confidentiality, the federal court refused the confederation public prosecutor permission to appeal against a refusal to waive immunity on the grounds that section 15 of the legislation refers to cantonal prosecution authorities and not to the public prosecutor of the confederation. Under current legislation, therefore, the latter is deprived of any right to appeal against a refusal decision of the executive. For all these reasons, **the GET recommends to ensure that the requirement for prosecuting authorities to request authorisation to bring criminal proceedings against federal employees does not constitute an obstacle to the effective prosecution of corruption.**

IV. PROCEEDS OF CORRUPTION

a. Description of the situation

Confiscation and other forms of deprivation of the instruments and proceeds of crime

83. Confiscation is governed by articles 69 ff of the Swiss criminal code. It is obligatory for all criminal offences and is deemed to be a supplementary measure and not a penalty. It is normally consequential on a conviction but in certain cases independent confiscation proceedings may be opened, for example, when the perpetrator of the offence cannot be identified or has fled abroad and has not been extradited. Confiscation *in rem* (in the absence of a conviction) of the proceeds of an offence is possible.
84. Under article 69 of the criminal code, the courts order the confiscation of objects that are used in the commission of an offence or are the proceeds of one, or if these objects pose a threat to persons, public morals or public order. Under article 70, they order the confiscation of assets that are the results of an offence or are intended to persuade or reward the perpetrator of an offence,

if they do not have to be restored to the aggrieved party in the re-establishment of his or her rights. The notion of assets under this article is a broad one and includes restricted rights *in rem*, claims, intangible rights and other economic benefits susceptible to calculation or quantification, including indirect benefits, in particular income from assets. If the value of the assets subject to confiscation cannot be determined with precision or if such determination requires disproportionate means, the court may make an estimate.

85. Article 70.2 of the criminal code authorises the confiscation of assets held by third parties if the latter cannot establish their good faith. If the proceeds of an offence are no longer available, for example because they have been spent, the court may order their replacement by a compensatory claim on the state of an equivalent value, and to ensure the latter's recovery it may seize lawful assets belonging to the person against whom the order is made (Article 71 of the criminal code).
86. Under article 73 of the criminal code, confiscated objects and assets or the proceeds of their sale (after deduction of expenses) and compensatory claims may be used to compensate aggrieved parties if the damage is not covered by any insurance and there are reasons to fear that the perpetrator will not repair any pecuniary or non-pecuniary damage.
87. Under article 260ter of the criminal code, the only circumstances in which the burden of proof for confiscation purposes may be reversed concerns criminal organisations. Assets belonging to persons who have participated in or given support to a criminal organisation are presumed, until shown to the contrary, to be subject to the organisation's power of disposal and as such to confiscation.
88. Swiss law of obligations allows the victims of corruption to seek reparation for damage suffered. In the case of public tenders, the contract may be revoked if it was awarded under the influence of a corruption offence, and the same applies to contracts awarded outside this context. According to the Swiss authorities, in connection with the reform of the legislation on public contracts at federal level, consideration is being given to the systematic introduction of a penalty or integrity clause requiring tenderers to pay compensation.
89. Under the unfair competition law, corruption committed in the private sector may lead to civil law measures prohibiting an imminent violation, terminating a current violation and finding that the action in question is unlawful. Publication of a rectification or the court decision may also be requested, together with reparation for any pecuniary and non-pecuniary damage. The criminal provisions on seizure/confiscation are applicable whatever the criminal offence, and this also applies to private sector corruption.
90. According to the federal public prosecutor, there have been six court confiscation orders in the last three years, two of which concerned corruption cases. This does not include confiscation decisions handed down independently by the federal prosecution service and sometimes quite substantial compensatory claims ordered by the cantonal authorities at the former's request, particularly in the "oil for food" case. The cantons do not keep statistics in this area but it would appear that there have been numerous confiscations in the last three years in certain of them.

Provisional measures: seizure of material evidence and preventive attachment of assets

91. In Switzerland, the rules governing seizure are laid down in the federal (see article 65 ff of the federal procedural code on attachment) and cantonal (the draft Swiss code of criminal procedure

will harmonise the relevant provisions – see articles 263-268) procedural codes. Power to order such measures lies initially with the judicial investigating authorities, the federal prosecutor and cantonal prosecutors or investigating judges, but the courts may also order them.

92. Before seizure of moveable or immoveable property can be ordered, there must be serious circumstantial evidence of a direct or indirect link between the assets for seizure and an offence. In principle, the courts seize anything that might have served or been intended for use in the commission of the offence or have been the proceeds, or that might help to reveal the truth. Seizure and confiscation may also be applied to moveable or immoveable property purchased with money derived from corruption, even if part of the purchase was made with money of lawful origin. Seizure is also possible to guarantee payment of any compensatory claim.
93. In principle, provisional measures applied to perpetrators or third parties must remain in place until the final decision is taken, so long as all the legal conditions are still met. Currently, there is no specific legislation in Switzerland on management of criminal assets seized. These matters shall be governed in detail by the future unified code of criminal procedure, which also state that the Federal Council shall settle by order the matter of assets subject to attachment measures.

Money laundering

94. Under article 305bis of the criminal code, persons who take steps to impede the identification of the origin, the discovery or the confiscation of assets that they knew or should have known derived from an offence are liable to up to three years' imprisonment or a fine. Under Swiss legislation, all serious offences – about 90 in total – constitute predicate offences of money laundering. They are defined in article 10.2 of the code as all offences punishable by more than three years' imprisonment. In serious money laundering cases, for example when the perpetrator is a member of a criminal organisation, the sentence will be up to five years' imprisonment. The offences of active or passive corruption of national or foreign public officials may be predicate offences of money laundering, whether committed in Switzerland or abroad³², but not the lesser offences of private sector corruption or accepting or giving favours.
95. Switzerland has arrangements for preventing money laundering laid down in legislation in 1997. This introduced the Money Laundering Reporting Office or MROS, which acts as the financial intelligence unit for Switzerland, and the obligation to report suspicious transactions to it. Section 9 of the money laundering law requires financial intermediaries who know or presume, on the basis of well-founded suspicions, that assets or securities involved in a business relationship have a connection with an offence within the meaning of article 305bis of the criminal code or are the proceeds of an offence, or that a criminal organisation has power to dispose of these assets, must immediately inform the MROS, which shall decide on the basis of its own additional inquiries whether to transmit the file to the relevant criminal prosecution authority. At the same time and for a maximum period of five working days, the intermediaries must freeze the assets concerned to enable the authorities to conduct preliminary inquiries and rule on whether they should continue to be frozen. The GET was informed that the MROS has eight staff to deal with approximately 800 reports each year, about 75% of which are forwarded to the prosecuting authorities. In 2007 there appears to have been significant increase in reports in general and in the field of corruption in particular³³.

³² On condition that they are offences in the country concerned.

³³ Up to 31 August 2007, 14.84% of cases reported included a corruption element, compared with about 7% in the previous three years. 144 convictions for money laundering were reported in 2003, 137 in 2004 and 120 in 2005.

96. The money laundering law and orders and regulations relating to specific sectors establish a duty of care that requires financial intermediaries, *inter alia*, to check the identity of other contracting parties, identify the financial rights holder, be clear about the purpose of any business transaction and establish and retain appropriate documentation to meet any requests for information or attachment submitted by the prosecuting authorities³⁴. Under article 305ter of the criminal code, failure to satisfy this obligation is a criminal offence.

Mutual assistance: provisional measures and confiscation

97. International mutual assistance in criminal matters is covered by federal legislation of 20 March 1981³⁵ and the relevant conventions. Switzerland ratified the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS 141) in 1993.
98. Section 18 of the international mutual assistance law authorises the relevant Swiss authorities - the cantonal criminal prosecution authorities as well as certain federal authorities such as the public prosecutor of the confederation or the federal office of justice – to order provisional measures, including ones to preserve evidence, freeze and seize assets and freeze bank accounts. In urgent cases, these measures can be imposed on the order of the federal office of justice as soon as the request for assistance is received and before it has been referred to the criminal authorities. Switzerland may also seize assets or objects with a view to their confiscation abroad or itself confiscate the assets or objects, based on a confiscation decision, at the request of a foreign authority in accordance with the international mutual assistance law³⁶ or with a treaty or convention (generally, in practice, ETS 141).
99. Appeals against provisional measures do not have suspensive effect. With specific regard to heads of state, the federal court has ruled that accounts containing funds that might derive from corruption could be seized, even if the holder was a foreign state or dignitary of that state, so long as the funds were not used for acts performed *jure imperii*, that is in accordance with states' sovereign power. Immunity therefore does not apply if a state's actions concern a commercial transaction. This has enabled Switzerland to freeze and restore significant funds to foreign countries that have suffered corruption.

b. Analysis

100. Switzerland has been the subject of a FATF anti-laundering evaluation as part of its third evaluation round. The report has been published. The GET notes that MROS, the Swiss anti-laundering unit, has only eight staff, despite the importance of the country's financial sector. The system for supervising compliance with anti-laundering requirements - client identification, reporting, internal policies, retaining customer files and information, and so on – is mainly externalised to independent auditors acting on behalf of financial and other supervisory bodies, who do not therefore have a direct view of any inadequacies. However the GET has been told – and this is to be welcomed – that Switzerland has classified politically exposed persons among the high-risk categories of customer, which is important from the standpoint of combating corruption. The MROS receives reports of suspicions of laundering linked to corruption, 90% of which in fact concern corruption offences committed abroad.

³⁴ Financial intermediaries are also all subject to a money laundering order of their relevant supervisory authority, such as the order issued by the federal banking commission.

³⁵ See paragraph 15.

³⁶ Sections 94-99, and 103-108 for the procedure.

101. The GET considers that the arrangements for seizure and confiscation under Swiss legislation are well thought out and raise no particular problems of application. They also appear to have contributed effectively to international co-operation in the sphere of enforcement³⁷.
102. In practice, the GET found that there was considerable variation in the attention paid to the proceeds of crime. Statistics on frozen accounts, amounts seized and so on generally exist for cases with an international dimension in connection with which foreign states have submitted requests to Switzerland. However, even though the prosecutors whom the GET met argued otherwise, from what it heard from certain persons it was not convinced that detailed financial inquiries were automatically carried out in corruption cases or that provisional measures, with regard to both accounts and other assets, were applied as often as they should have been to ensure that any confiscation orders following convictions could be successfully enforced. The federal police said that they were aware of these shortcomings and that discussions on the subject were currently under way.
103. The GET notes that the definition of laundering in article 305bis of the criminal code does not repeat, word for word, all the elements of article 6 of Convention 141, which Switzerland has ratified. The wording of the offence is fairly succinct, though it is broad in application – any action likely to impede the identification of the origin, the discovery or the confiscation of assets. The Swiss courts also appear to interpret the national provision broadly, in the light of international definitions. The intentional element of the offence - knew or must be presumed to have known – is flexible, which makes it possible to infer intention from factual and objective circumstances and to cover laundering resulting from rash or reckless behaviour. The case-law confirms that self-laundering is covered, which is important from the standpoint of combating corruption. Switzerland has jurisdiction to hear laundering cases concerning the proceeds of crimes committed abroad, subject to the dual incrimination principle.
104. The GET notes in connection with a reservation concerning article 12 of the Criminal Law Convention that influence peddling is not an offence in Switzerland and is therefore not a predicate offence of laundering. It also notes that under article 305bis of the criminal code, only serious offences are predicate offences. This excludes giving and accepting favours and above all corruption in the private sector, which in principle should constitute a predicate offence under article 13 of the Convention unless the state makes a reservation or – as in the Swiss case – considers that it is not a serious offence for the purpose of its money laundering legislation. As indicated earlier, certain offences (dishonest management and forged “titles”) may be used to sanction a criminal act that would also be subject to the provisions on private sector corruption. These other offences do constitute serious offences and thus money laundering predicate offences. Although Switzerland complies with article 13 of the Criminal Law Convention, the importance of the Swiss financial market internationally and, above all and according to several accounts, the scale of private corruption would appear to justify classifying corruption in the private sector as a serious offence where the criminal act is of a certain gravity. This would also be a strong signal from the authorities of their commitment to combating corruption in all its forms. In view of the above, **the GET recommends to examine the need to extend the offence of money laundering to the more serious acts of corruption in the private sector.**

³⁷ Swiss banking secrecy is not an obstacle in any way to prosecuting criminal offences, dual criminality is no longer a problem for corruption, appeals against temporary seizures ordered by the courts have considerably declined (only 5-10% of mutual assistance measures are appealed against), accounts are frozen in principle within a matter of hours, a federal deadline of 30 days has been set to respond to requests for mutual assistance and Switzerland states that as a matter of principle it now practices the repatriation of securities in full.

V. PUBLIC ADMINISTRATION AND CORRUPTION

a. Description of the situation

Definitions and law

105. The public administration is governed by the following general principles: the principle of legality (article 5.1 of the federal constitution and section 3.1 of the federal organisation of government law), the principle that administrative activity must be in the public interest and the need to abide by the principles of proportionality and good faith (article 5.2 and 3 of the federal constitution). In addition, reference should also be made to the independent supervision of public finances, according to the criteria of lawfulness, regularity and value for money (sections 1 and 5 of the legislation on financial control).
106. Swiss legislation does not define public administration as such. Under article 110.2 of the criminal code, the category of public officials includes established and other employees of a public or judicial authority and persons occupying a public position on a temporary basis, or who are employed temporarily by a public or judicial authority or who exercise a temporary public duty. What is critical under Swiss law is that the persons in question are carrying out duties that are the responsibility of the state, irrespective of their formal status and their legal contractual relationship to the state. Undertakings that come under state control and supervision are included in the definition of persons exercising public duties. This substantive definition of public official also appears with specific reference to corruption in article 322octies sub-paragraph 3 of the criminal code, which states that individuals carrying out public duties shall be deemed to be public officials.

Anti-corruption policy

107. As noted in the first part of the report, in recent years Switzerland has taken various steps to strengthen its anti-corruption machinery, in terms of both prevention and enforcement. This includes tightening up criminal law, by granting the confederation new powers and increased resources, drawing up a code of conduct for federal employees and establishing a consultative group on corruption.

Transparency

108. Under the federal law on the principle of transparency in government, anyone can ask a federal authority for access to official documents without having to demonstrate a particular interest (section 6). In principle, a charge is made for processing such requests unless the cost is below CHF 100 (about € 61). However, such access may be limited or refused if this is justified by major public or private interests. Examples of the former are internal and external security, foreign policy and the freedom of an authority to develop its policy. Examples of the latter include professional confidentiality and protection of the private sphere. When authorities refuse access to documents, requesters may ask the federal data protection and transparency Office to mediate. If no agreement results from this procedure, the Office issues a recommendation which is published and the requested authority hands down a decision that can be appealed against. According to the Swiss authorities, the transparency principle and the right of access to official documents also apply in certain cantons, including Geneva, whereas 13 cantons have no legislation on the subject.

Oversight of public administration and other measures

109. Article 29a of the federal constitution, in force since 1 January 2007, offers guaranteed access to an independent judicial authority for all legal disputes, which particularly applies to administrative proceedings. It means that questions of fact and law can be thoroughly examined by at least one court in the course of proceedings. As part of the complete revision of federal legal procedure, which entered into force on 1 January 2007, a federal administrative court has been established with jurisdiction to hear appeals against decisions of the federal authorities. The cantons must establish their own judicial appeal bodies to give final rulings on administrative decisions. Subject to certain exceptions, judgments of the federal administrative court and the final cantonal appeal bodies can be brought before the federal court.
110. Under the confederation finance law there has to be a legal basis for all expenditure, detailed accounts must be kept and the "dual examination principle" applies. Regular external controls are carried out at federal level and in most of the cantons by independent parliamentary committees, which are themselves subject to parliamentary, and thus non-governmental, scrutiny. At federal level, these are based on the activities of the financial surveillance and control body, the FDS. The legislature is responsible for approving the budget and accounts. In the cantons and municipalities, there are more extensive rights of popular participation, via financial referendums.
111. The rules on transparency and equality in public procurement procedures are set out in the federal public procurement law of 16 December 1994, which provides for open and selective procedures. The same applies to cantons under the intercantonal agreement on public procurement of 15 March 2001. It is only possible to award contracts directly if they are below defined limits and other strict conditions are met. Contracts awarded must be published, showing what procedure was used. The published information must include the name of the tenderer selected, the value of the tender or those of the highest and lowest tenders, and the main characteristics and decisive advantages of the tender chosen. Unsuccessful bidders must be informed in a decision against which they can appeal and which must indicate the main reasons for the rejection of their tender. The award of the contract, interruption of the procedure, the invitation to tender, the choice of participants in the selection procedure and exclusion can all be appealed against to the federal administrative or cantonal court, whose decision is then open to appeal to the federal court. At federal level, those awarding contracts are subject to oversight by the internal control office of the federal buildings and logistics department (OFCL) and by the CDF, an independent financial scrutiny body. Various preventive measures mean that decisions can never be taken individually but must be agreed collectively, or in the most important cases by a committee of the OFCL.
112. Unlike the confederation, a number of cantons, such as Zurich, Zug and Basle Rural, and cities such as Zurich, Basle and St Gallen have established posts of mediator or ombudsman. Within the limits of their powers, these can supply written or oral information and take all necessary steps to examine cases. Such institutions have a part to play in uncovering cases of corruption. The Swiss authorities cited the example of the Zurich ombudsman, who is appointed by the cantonal parliament for a four-year term and submits an annual report on his activities. He can receive requests for assistance and his services are free, but he can also take up cases on his own initiative. The authorities concerned are obliged to supply him with the necessary information and grant him access to documents. Based on his findings, the ombudsman can advise individual citizens, discuss their cases with the relevant authorities and if necessary make written recommendations to the authority under investigation. These are also forwarded for information to the superior authority, the applicant and, if the ombudsman deems it necessary, other parties.

The Zurich cantonal ombudsman has been appointed as the person to whom corruption cases in the canton should be reported. So far, four would-be corruption cases have been reported, two of which led to criminal proceedings.

Recruitment, careers and preventive measures

113. Normal practice is to open vacancies in the federal administration to public competition, under section 7 of the federal personnel law. Section 22 of the federal personnel order provides for certain exceptions, for example for the purposes of job rotation. Section 23 of the order restricts certain posts to Swiss nationals. In addition, under section 24 of the order, if the duties require the competent authority can impose other conditions, such as age, prior qualifications or the exercise of civic rights.
114. Aside from cases where security checks are necessary, there is no systematic requirement for information on criminal records. The Federal Council has issued an order specifying the security checks required prior to appointment for certain categories of federal official, members of the armed forces and others occupying certain posts. The checks consist in collecting relevant data for security purposes on the life styles of the individuals concerned, particularly any close personal or family relationships, their financial situation, relationships with other countries and illegal activities posing a threat to internal and external security.
115. The cantons and municipalities also apply the principle of public competitions, as well as the requirement for information on criminal records for the most exposed occupations, such as the police.
116. Neither the confederation nor the cantons operate a systematic policy of regular rotation for persons occupying public service posts considered vulnerable to corruption. According to the Swiss authorities, this would be too difficult to implement, given the size of the services and departments concerned. In its report on preventing corruption, the Federal Council stated that the loss of knowledge associated with rotation argued against its general introduction.

Training

117. When they are appointed, federal employees are given a copy of the current personnel law, including the code of conduct, and are informed of their obligations. There are also special forms of training, for example those given by the financial control service and various decentralised bodies. Fedpol officers must sign their police code of conduct. The courses run in connection with public procurement are also concerned with corruption issues. They are open to all the federal employees concerned in any way with tendering procedures. About 50 persons take part each year.
118. Newly recruited staff of cantons are also, as a matter of principle, informed of their legal duties, in introductory courses and continuing training. Reference might also be made to management seminars and various documents offering guidance to staff or dealing with personnel management policy, some of which have to be signed by employees. Finally, all this information is published on the intranet or internet.

Conflicts of interest

119. Under section 10 of the federal administrative procedure legislation, persons required to make or prepare decisions must disqualify themselves if they have a personal interest in the case, are married to, a registered partner of or live as a couple with a party, are related to a party by blood or marriage in direct line or to the third degree in collateral line, represent a party or have acted in the same case for a party, or for other reasons could have a preconceived opinion in the matter.
120. Section 20 of the personnel law also requires employees to exercise care in carrying out their duties and defend the legitimate interests of the confederation and their employer. Under paragraph 2, during their period of contract they can only be employed by a third party if this is compatible with their duty of loyalty. Under section 91 of the federal personnel order, employees of the confederation require the latter's approval to hold public office or perform some other ancillary activity if it is paid and is likely to compromise those employees' ability to carry out their duties on behalf of the confederation, or if, by its nature, the office or other activity might lead to a conflict with the interests of the service. Cases where authorisation is refused are also specified.
121. According to the Swiss authorities, cantons and municipalities have similar rules governing self-disqualification, the duty of loyalty and the ban on ancillary activities.
122. Elected members and officials and public employees are not required to declare their assets and income, but section 11 of the parliament law of 13 December 2002 requires federal members of parliament to report when they first take their seats and at the start of each civil year their interests, their professional activities/paid occupations, any positions they hold in management, supervisory, advisory or other bodies in Swiss or foreign private or public law companies, establishments or foundations, advisory or expert functions performed on the confederation's behalf, permanent management or advisory functions performed for Swiss or foreign interest groups and functions performed in committees or other bodies of the confederation. All this information is available to the public, even on the internet. Many cantons have the same requirements. Section 14 of the federal assembly law also specifies the activities that are incompatible with that of member of parliament.
123. Article 144.2 of the federal constitution forbids members of the Federal Council and full-time judges of the federal court from filling any other position in the confederation or a canton or from taking any other paid employment.
124. There are other incompatibility rules, depending on position. For example, members of the public procurement committee, which monitors compliance with the rules on public procurement and tendering procedures, may not represent a party before the committee or express opinions on current or past public tenders or even matters of principle considered by the committee. Similarly, investigating judges may not exercise any activity that might interfere with their duties or the independence and dignity of their office. They may not represent parties in federal criminal proceedings or in proceedings in the federal court hearing a criminal case.
125. The Swiss authorities have not introduced any specific measures concerning migration to the private sector but they stress that under section 94.2 of the personnel order, the duty of confidentiality remains in force even after public employment has ceased, and that breaches are punishable under article 320 of the criminal code. This applies to all public employees: confederation, cantons and municipalities.

Codes of conduct and gifts

126. As noted in the first part of the report, there are codes of conduct in both the confederation and certain cantons. The former introduced a code for all its employees on 19 April 2000. Its main purpose is to draw their attention to the general obligations imposed on them by the federal personnel legislation and order, breach of which may lead to disciplinary proceedings. Many of the confederation's administrative units have also drawn up their own rules of conduct linked to their specific activity.
127. Under section 21.3 of the personnel law, employees may not accept, solicit or seek promises of gifts or other favours for themselves or other persons in the performance of activities arising from their employment contract. This rule is further clarified in section 93.1 of the federal personnel order, which states that minor favours compatible with normal social usage do not constitute gifts or other favours within the meaning of section 21.3 of the personnel law. Departments may lay down detailed regulations on or forbid the acceptance of such favours. In the event of doubt, employees must discuss with their superior whether or not the favour can be accepted.
128. In general, such departmental regulations ban the acceptance of gifts, invitations to events, visits to firms and journeys, while recognising certain exceptions, so that, for example, employees may be authorised by their heads of division to attend certain conferences organised by businesses. Some services, such as the justice and police department, have very detailed instructions on how to respond to the risk of indiscretion and corruption, which deal with gifts and other favours, official meals, events organised by suppliers or aimed at users, sponsorship, discounts and rebates.
129. Where there are suspicions that ethical rules on accepting gifts have been breached, the appointing authority opens disciplinary proceedings, possibly preceded by an administrative inquiry.

Reporting corruption

130. There is currently no legal obligation for confederation employees to report offences that they identify in the course of their duties³⁸. However, according to the Swiss authorities, their duty of loyalty does require them to report such facts to their superiors. As a matter of course, confederation employees are encouraged to report offences, particularly in sensitive areas, such as the directorate for development and co-operation or among embassy staff. Public officials also have a duty to co-operate with the financial controller's staff. Finally, according to the Swiss authorities in the great majority of cantons, including Geneva, public officials have a general obligation to report offences of which they have become aware in the course of their duties to the prosecution authorities, and sometimes, as in Geneva, if possible their hierarchical superiors.

Sanctions and disciplinary procedures

131. Under section 25 of the personnel law, breach of ethical rules, particularly regarding gifts, constitutes a violation of professional obligations and may lead to disciplinary proceedings. Section 99 of the personnel order provides for a range of disciplinary measures, including warning, reprimand, change of area of activity, up to 10% reduction in salary for one year, a fine

³⁸ When it drafts the legislation on the protection of whistleblowers, in accordance with parliament's instructions of 2007, the government must also consider the question of an obligation for confederation employees to report to their competent authority any well-founded suspicions that have come to light in the course of their duties that a criminal offence has been committed.

of up to CHF 3 000, change of working hours and change of place of work. Under section 12.7 of the order, serious violations may be punishable by dismissal.

132. Federal departments are responsible for their own disciplinary procedures, other than in the case of senior officials, for whom the Federal Council is responsible (section 2 of the order). In other circumstances, departments decide which body shall be empowered to open disciplinary hearings and who shall appoint the person in charge. This may involve an individual or committee outside the federal administration. In all cases, under section 98 of the order, the law on administrative procedure is applicable. Decisions that cannot be reviewed by a department's internal appeals body and decisions handed down on appeal by such bodies may then be referred to the federal administrative court. As of 1 January 2007, under section 36.2 of the personnel law, appeals may be lodged against federal administrative court decisions to the federal court.
133. The Swiss authorities state that as a rule similar regulations on disciplinary measures, the powers of the appointing authority and rights of appeal, including appeals to the administrative courts, exist in the cantons and municipalities.
134. Section 98.4 of the personnel order provides that when the same facts give rise to disciplinary and criminal proceedings, for example for misuse of authority, dishonest management or breach of professional confidentiality, other than in exceptional circumstances no disciplinary decisions are taken until the criminal proceedings are completed. The public prosecutor of the confederation and the federal criminal court have jurisdiction to deal with cases of corruption concerning federal staff. Appeals against the criminal court's judgments may be lodged with the federal court.

b. Analysis

Definitions and anti-corruption policy

135. As noted in the first part of the report, the consultative group on corruption, which was set up in 2000, is a focus for anti-corruption activities and brings together some thirty federal departments. The cantons are not involved and apart from consultation, the group's mandate and powers remain undefined and there is no clear long-term vision or programme. The GET has identified a real need for a more comprehensive approach to preventing corruption. Certain departments, such as the various tax authorities³⁹, appear to lag behind as far as internal prevention is concerned. In the case of the cantons, Geneva at any rate has no overall anti-corruption policy or strategy. A concerted approach such as the one proposed in the first recommendation (see paragraph 25) should help to strengthen existing administrative arrangements and encourage exchanges of knowledge and experience.

Transparency and access to information

136. The transparency requirement does not appear in the federal constitution but there is federal legislation on the subject – applicable to the federal authorities – that also covers citizens' access to information held by the authorities. A federal transparency official has been appointed. The GET notes that these arrangements are still underdeveloped. There have been few requests and

³⁹ Lack of specific training at federal level on the identification of internal and external corruption and no studies of the risks of links between tax inspections and corruption, while only one or two cantons appear to have ethical codes etc. However, two circulars on the non-tax deductibility of bribes have been drafted and circulated to all federal and cantonal tax authorities. They form an integral part of tax officials' training.

the transparency official has no power to issue orders. It also regrets that half the cantons still lack explicit rules on transparency and access to information, even though in some cases transparency is provided for in their constitutions.

137. Generally speaking, the meetings suggest that contacts between citizens and both federal and cantonal authorities pose problems sometimes⁴⁰ and that transparency could still be improved⁴¹. Admittedly, at the federal level, the transparency legislation only came into force in July 2006 and has probably not yet had its full impact. The GET believes that opacity may be a contributory factor to arbitrary or unfair decisions and the development or perpetuation of unethical conduct. Greater transparency can act as a disincentive and offers the general public more opportunities to exercise oversight, which is particularly important in areas vulnerable to corruption, where different interests are at stake. For these reasons, **the GET recommends that the Swiss authorities i) initiate consultations on ways of ensuring that the federal legislation on the transparency principle is fully implemented and subject to an assessment; ii) invite the 13 cantons that do not yet have a body of regulations on transparency and access to public information to consider their adoption.**

Oversight of public authorities

138. The on-site visit offered a clearer picture of the general approach to administrative oversight. Internal audit is currently the responsibility of the federal financial control service (CDF) and financial inspectorates in 15 federal departments. The inspectorates employ about 60 persons. The CDF is empowered to issue directives on the work of the inspectorates. The CDF has no power of compulsion but is entitled to audit the various areas subject to its supervision, and this cannot be refused on grounds of confidentiality (except postal secret). The GET notes with interest that since its 2003 report, the CDF has been empowered to receive reports from whistleblowers and others via a telephone line. These may be made anonymously. The results so far have been very modest, with about ten calls a year, though the trend is upward. The CDF considers that it has a duty to pass on to the public prosecutor reports that appear to show that an offence has been committed.
139. Cantons often – though not automatically it appears – have their own cantonal financial inspectorates (ICFs), as is the case with Geneva. The Geneva ICF scrutinises the finances and management of the various cantonal authorities and bodies attached to or subsidised by the canton, but not those of the municipalities. The latter have their own system of financial control, as in Geneva city, where the relevant body carries out internal audit and recommends as appropriate that the political authorities certify the municipal accounts. It has also contributed to the modernisation of the local authority's working methods and the general application of "four eyes" supervision in its departments. The ICF has complete freedom to plan its audit programme, the results of which are submitted to the cantonal government, the Council of State, and two committees of the cantonal parliament⁴². With 25 auditors, the ICF appears to be well staffed. However, the CDF told the GET that certain cantonal inspectorates were overwhelmed with work and did not always appear to have the necessary resources to cover the risks appropriately.

⁴⁰ Independent institutions and NGOs often receive complaints or requests concerning access to administrative documents.

⁴¹ Private sector representatives and independent institutions reported a lack of transparency in the canton of Zurich with regard to permits, authorisations, licences, building projects, public procurement and the medical and pharmaceutical sector. As yet, there is no legislation in Zurich on transparency and access to administrative documents in accordance with the constitutional principle.

⁴² In the last five years, the ICF has dealt with three cases of corruption.

140. Some cantons have a court of auditors, including Geneva since 2006. This has three judges, plus three substitutes, who are assisted by 13 staff. It exercises independent oversight of the canton and its municipalities. It has complete freedom to decide what areas to look at. It produces regular reports that are published. Those concerned cannot refuse to co-operate on grounds of professional confidentiality. Its recommendations are sent to the audited institutions and the executive and legislative authorities. The court of auditors does not have any direct power of compulsion, but it does have an obligation to report any offences to the criminal authorities, an obligation that applies to all Geneva's public officials under article 11 of the cantonal code of criminal procedure.
141. Ombudsmen also provide a certain measure of oversight of public authorities, as was revealed in the on-site discussions with the Zurich cantonal ombudsman (who is also authorised to receive complaints of corruption). The limited number of current and past cases concern lack of transparency, difficulties of securing access to public documents and favouritism in the cantonal administration or the award of public contracts. It might in due course be worth considering the introduction of a similar institution at federal level.
142. Public procurement was described on a number of occasions as a vulnerable sector and legislation is currently being drawn up at federal level to reform procedures and centralise public procurement, with the exception of service provision. The GET has identified various inadequacies at both federal level and in Geneva.⁴³
143. The GET therefore believes that improvements are needed. The example of the Geneva court of auditors seems to indicate that this type of oversight is particularly suitable for preventing and identifying corruption. Above all, the reports are published, the court has unlimited access to information and offences must, as a matter of principle, be reported to the prosecution authorities. At the same time, financial control systems of the CDF/ICF variety seem to suffer, as they themselves acknowledge, from the fact that they are based on a collective/political rather than an individual/institutional system of discipline, with no power of compulsion. Even the Geneva court of auditors only partially fills this gap since it also lacks a power of compulsion.
144. In the light of the foregoing, **the GET recommends that the Swiss authorities invite the cantons to consider i) making all municipal and cantonal authorities subject to audit bodies/forms of financial control that are sufficiently independent and have adequate means at their disposal in terms of both powers and human and material resources; ii) encouraging audit/financial control bodies to report possible cases of corruption to the judicial authorities.**

⁴³ At federal level, the model contracts include integrity clauses but their application is not always obligatory. There are no administrative or criminal penalties for breaches or misuse of procedures. Moreover, the relevant monitoring reports are not published and are only available to parliament. There are several grey areas, exceptions or special arrangements to which the normal legal arrangements do not fully apply. For example, subsidies, such as aids to development, humanitarian aid, agricultural and food subsidies, and export promotion; free customs zones with special tax status; tax relief; the granting of concessions; the sale and letting of property and so on are exempt from the normal federal arrangements and such principles as competitive tendering and competition and are characterised by a lack of transparency. In the canton of Geneva, two departments – supplies and construction – are concerned with public procurement and are subject to two separate sets of regulations. Law L 6 05.0, which was approved in 2006 but has not yet come into force, introduces penalties for failure to observe the relevant rules and provides for contracts to be terminated or tenders to be rejected if there are suspicions of corruption. There are also stages in the procedure that are less transparent and therefore more open to risks such as corruption. This applies, for example, to the assessment of needs, the management of contracts and special circumstances such as urgency and contracts of low value that permit the selection of suppliers by mutual agreement. However, bodies such as the cantonal financial inspectorate and the court of auditors do review the practices of those awarding contracts

Employment in public administration, conflicts of interest/incompatibilities, training

145. The rules governing federal public officials resembles the private law of obligations, which applies by analogy where the federal personnel law does not specify to the contrary. Proposals are currently being drafted that would bring the two closer together, in particular by abolishing the requirement to find alternative employment for federal employees. The aim of the current policy is to introduce a certain flexibility into the management of careers. On the other hand most municipal and cantonal employees, as in Geneva, are established public officials.
146. The GET notes that public recruitment systems use published vacancy notices and a system of open competitions. At federal level there is no particular requirement to check criminal records, other than for posts that require security checks, and candidates who are excluded from selection procedures have no right of appeal, other than in the context of the federal legislation on equality between women and men. Some of those whom the GET met stressed that, in general, salaries of public employees are satisfactory.
147. The issue of conflicts of interest and incompatibilities is a complex one in Switzerland and there are few rules on the subject. In the case of federal members of parliament, the Swiss system relies on the individuals themselves to withdraw. Under section 11.3 of the federal assembly law members whose personal interests are directly concerned by a matter under discussion must report this when speaking on the subject, whether in full session or committee. The civil society representatives told the GET that this was a constant source of controversy in Switzerland. Proposed legislation on members' declarations of their financial interests launched in 2006 has been rejected⁴⁴. They are already required to make a written declaration of business links, but this does not include a declaration of wealth, since taxable income is sometimes in the public domain, according to canton. Section 13 of the federal assembly law authorises the bureau of the assembly to reprimand members who breach these rules, or even exclude them for up to six months from committees of which they are members. Under sections 91 and 92 of the personnel order, confederation employees require authorisation to exercise an ancillary activity, particularly if the latter could lead to a conflict of interest. Such requests are submitted to employees' immediate hierarchical superior, who forwards them, with a recommendation on whether or not to agree, to the authority empowered to make the decision. The decision must give reasons and is subject to appeal. In Geneva, staff must also submit requests to perform ancillary activities to the executive (the council of state), which can refuse them if they are incompatible with the relevant staff members' duties or could prevent those concerned from carrying out their responsibilities (sections 9 and 10 of the Geneva personnel law). Various interlocutors met by the GET were unable to confirm whether authorisation is always required for ancillary activities and which categories of officials are covered on this matter by regulatory provisions. The GET believes that these uncertainties need to be clarified.
148. Certain forms of conflict of interest do not seem to have been given much consideration, even though they could create a climate of corruption. This applies to cantonal officials or federal employees who from one day to the next can be recruited by a private business operating in an economic sector, such as roads, transport or finance, supervised by their employing authority, or to a businessperson who enters into a contract with a municipality of which he or she is the mayor.

⁴⁴ On the other hand, a new section 14 of the federal assembly law came into force on 3 December 2007 and establishes much stricter rules on incompatibilities.

149. The GET notes that the requirements for initial and continuing training are fairly limited. There is no organised system of initial training at federal level⁴⁵ and continuing training is, in principle, voluntary, though it may be the subject of end-of-year discussions and form part of the objectives for the coming year. On the other hand, the Swiss authorities underlined that the range of courses available is wide and of a high standard, and concerns both technical fields and personal development. There are no specific courses on ethical issues or corruption outside of sectors considered to be at risk. In Geneva canton, there is a training centre offering some dozen continuing training modules. There is compulsory initial training for fifteen days. Since November 2007, information sessions have been held for new staff (but only new staff) on staff rights and obligations, including the problem of corruption. At-risk sectors have long organised special induction sessions and offer special training (particularly in the cantonal tax department).
150. In the light of the aforementioned considerations, the GET recommends **i) that training for federal staff on issues relating to ethics, corruption and its prevention be strengthened; ii) to improve the management of conflicts of interest and to regulate migration of public officials to the private sector; iii) to invite the cantons to support these various efforts at their level.**

Codes of conduct and gifts

151. In addition to the general code for federal staff of 2000, there are sectional codes of conduct in most of the departments with which the GET had contact. In Geneva canton, several departments have ethical charters. Examples include the finance department, which requires each employee to sign its code, and the public procurement sector. The GET has the impression that in general public officials have not been involved in drawing up professional rules and standards and that the latter have not always been formulated or planned with any real commitment to applying them. Existing codes of conduct do not normally include an obligation to report offences, or even corruption. However, all cantonal authorities, officials and other employees are informed that if they become aware of a serious or lesser offence, such as active or passive corruption, in the course of their duties they are required by law to inform the cantonal prosecutor at once, or face penalties for failure to comply with their professional duties. In certain circumstances, they may also be guilty of interference with the administration of justice, under article 305 of the criminal code.
152. As noted in the first part, there are regulations on gifts, which in principle are banned. The limits on the size of gifts for federal staff are laid down in section 93 of the personnel order and articles 322sexies and octies of the criminal code, which specify that gifts are forbidden, other than minor favours compatible with normal social usage. Most of the federal authorities acknowledge that the order does not specify a fixed maximum. In practice, however, in every case, including that of elected members, the maximum for the application of these provisions has been set at a few hundred francs (see the letter from the bureaux of the federal assembly to members of parliament, point 4). Section 93 of the personnel order authorises departments, depending on function and type of activity, to reduce this limit still further or even ban gifts completely, by means of directives or their codes of conduct. Persons whom the GET met agreed that as a rule any gift in excess of CHF 350 ought to be refused⁴⁶. However, in the absence of detailed and

⁴⁵ The federal customs service provides one year's training for new employees and the federal department of foreign affairs does the same for young diplomats.

⁴⁶ To take an example of the specific rules applying to certain departments, the federal police apply a three-point scale: complete freedom to accept gifts worth up to CHF 20, the need for authorisation for gifts of up to CHF 100 and the requirement to refuse any gifts in excess of this value. The foreign service allows gifts of up to CHF 40 to be accepted with

standardised regulations, the GET considers that the current rules are still too vague and leave considerable scope for interpretation and latitude in their application. In the case of the specific regulations governing federal staff, this was confirmed on-site. In Geneva canton, the authorisation of the hierarchical superior must be sought before any gift or other favour is accepted. If the value exceeds CHF 100, this must be in writing.

153. In the light of the aforementioned considerations, **the GET recommends that i) the rules on gifts and presents be clarified for all federal employees and steps be taken to make staff more aware of the relevant codes of conduct and their importance in practice; ii) cantonal authorities be invited to consider the introduction of such measures.**

Reporting corruption

154. As noted earlier, there is no general legal obligation in Switzerland for federal employees to report offences that have come to their notice. This is an important anti-corruption tool that apparently already exists in many cantons.
155. With regard to whistleblowers, the GET was told that although public officials who had been wrongfully dismissed could ask to be reinstated, this rarely happened in practice (it is planned to abolish this right in the reform of the personnel law). Certain initiatives launched by specific federal departments to protect whistleblowers, such as the reporting arrangements established by the CDF, appear to be little known and have not yet been much used. As noted in part II of the report, the state secretariat for the economy receives between five and ten external reports each year, in connection with the OECD Guidelines for Multinational Enterprises, few or none of which concern allegations of corruption. It is also interesting that those whom the GET met largely agreed that there was a tendency in Switzerland, particularly in the private sector, to resolve problems internally. According to a parliamentary motion and persons whom the GET met, the absence of legal obligations or protection appear to result in 90% of whistleblowers suffering dismissal, downgrading or discrimination.
156. The GET notes that discussions to introduce legislation on the protection of whistleblowers date back to 2003 (when the initial proposal for a motion was made by a parliamentarian). The draft which is now being prepared is intended to clarify the protection to be afforded to whistleblowers, by establishing severer penalties, if necessary, for dismissals following such reports, providing the same protection for employees of the private and public sectors and, possibly, establishing an obligation for federal employees to report well-founded suspicions of criminal offences to the competent authorities. The GET has been told that the draft legislation will probably be tabled in 2008 but that the precise content and the likelihood of its enactment are still not known. It considers that such legislation could contribute to a higher rate of detection of corruption in Switzerland, in both the public and private sectors. According to information supplied by the Swiss authorities during the visit, the part of the reform concerned with protection against dismissal would take the form of changes to the code of obligations and would only apply to public officials of cantons if the latter's legislation referred to the code. Ideally, the new legislation should offer more than just protection against dismissal by improving protection against other forms of reprisal. **The GET therefore recommends that legislation be enacted that would i) require federal employees to report suspicions of corruption; ii) offer proper protection to persons reporting such suspicions; and that iii) cantons that have not yet enacted such measures be invited to consider their adoption.**

no further action. In the case of those valued at between CHF 30 and 2000, the head of department must be advised. Beyond CHF 200, gifts must be registered with the departmental inventory.

Disciplinary procedures

157. The GET notes with satisfaction that there are various disciplinary arrangements at the different administrative levels in Switzerland and that these lay down penalties for breaches of the relevant rules concerning corruption. It regrets that there is no central register of disciplinary proceedings at central level and that, according to the information it has received, there are no statistics at all on the subject. Relevant data would undoubtedly offer the authorities a better oversight of the situation, and are an essential ingredient of an effective anti-corruption policy.

VI. LEGAL PERSONS AND CORRUPTION

a. Description of the situation

General definition

158. Swiss law provides for the following types of legal person: foundations, associations, commercial partnerships, ordinary limited partnerships, limited partnerships with shares, public limited companies, private limited companies and co-operative societies. All these legal persons have full legal personality except commercial and ordinary limited partnerships, though under their business names the latter may also acquire rights, enter into commitments and take action in and be brought before the courts. The assets of these two types of partnership are owned not by the partnership but jointly by the partners.

Formation – registration - transparency

159. The subject is regulated in detail by the commercial register order of 7 June 1937, with its successive amendments⁴⁷. Registration on the commercial register is obligatory for all the aforementioned legal persons, other than associations if they are not involved in a commercial activity. Such registration is an integral part of the formation of the company, other than for commercial and ordinary limited partnerships, which are established by a company contract. Associations are formed by the adoption of statutes setting down the necessary information on their aims, resources and form of organisation.

160. In late 2006, 484 222 undertakings were registered on the Swiss commercial register. With 175 459 registrations, public limited companies were the most numerous. This was a slight increase over 2005. The number of private limited companies continues to rise significantly, from 84 291 in late 2005 to 92 448 in late 2006, while co-operative societies decreased slightly, from 11 860 to 11 609.

161. The commercial register is public and can be consulted free of charge via the internet in half the cantons. By 1 January 2008, it should have become possible in every canton. The register is maintained at cantonal (or cantonal district⁴⁸) level, but the information is then centralised and checked at federal level by the federal commercial register office⁴⁹. If the information supplied is incorrect, the register staff order the company concerned to correct it, failing which it may be dissolved. The commercial register contains the most important information about each undertaking, including trade name, registered office, purpose and names, address and nationality

⁴⁷ Amending law of 17 October 2007 (entered into force on 1 January 2008)

⁴⁸ Valais is the only canton where the register is not centralised but divided into three distinct parts.

⁴⁹ The federal site permits horizontal searches based on various criteria and key words, including the names of persons.

of its constituent bodies and the person authorised to sign on its behalf. More detailed information is required for public limited companies, private limited companies and limited partnerships with shares, such as the share capital and contributions made, the number, nominal value and type of shares, restrictions on their transmission and privileges attached to certain categories, the purpose of contributions in kind and shares issued in exchange, the purpose of the take-up of assets and the services supplied by the company in exchange, the nature and value of specific benefits and the number of participation certificates⁵⁰, with an indication of the nature of the rights attached to them. In the case of private limited companies and commercial and ordinary limited partnerships, the register also includes the names of the members or partners. Transfers of the shares of private limited companies must also be reported to the commercial register and the information is available to third parties. All companies are required to report any changes to the relevant information.

162. Under the 1937 order, as amended, the cantonal supervisory authorities are responsible for enforcing compliance with the legislation, subject to fines, under the overall supervision of the federal department of justice and police.

Restrictions on the performance of duties in legal persons

163. Under articles 67 and 67a of the new criminal code that came into force in 2007, persons who have committed offences in the course of their professional, industrial or commercial activities for which they have been sentenced to more than six months' imprisonment, whether or not suspended, or to a fine of more than 180 fine-days, may be totally or partially prohibited by the courts from exercising this or a similar activity for a period of six months to five years, if there is reason to suspect that further breaches might occur. This additional penalty enables the courts to impose a temporary ban on any professional activity, including that of company director or manager of a legal person. It applies to all criminal offences, including ones relating to corruption. Judges have the possibility to inform the commercial register of any professional disqualifications pronounced and the probation authority is responsible for ensuring that also this kind of sanctions are effectively applied. In any event, non compliance with professional disqualifications constitutes in itself a sanction punishable under Section 294 of the criminal code and the probation authority is obliged to inform the penal judge of such cases.
164. In addition, the supervisory authorities for the financial market can exclude from senior posts in companies they oversee, persons convicted of offences connected with their activities in the financial sector.

Legislation on the liability of legal persons, penalties and other measures

165. On 1 October 2003, the new articles 102 and 102a of the criminal code came into force and introduced the notion of criminal liability for legal persons. Under article 102 paragraph 1, an undertaking may be held criminally liable when the individual perpetrator of an offence cannot be identified because of the undertaking's organisational shortcomings. Paragraph 2 lists a number of specific offences for which the undertaking may also be criminally liable if it failed to take all reasonable and necessary steps to prevent the offence. The criminal liability of legal persons does not exclude the possibility of prosecuting individuals. Under the unity of proceedings principle and if articles 102 and 102a do not explicitly provide otherwise, the guilt of any

⁵⁰ Securities described in article 657 of the obligations code, which only grant entitlement to a share of the profits or of the liquidation proceeds or a preferential right to subscribe for new shares

individuals concerned and the criminal liability of their employer will be determined in the same proceedings.

166. Article 102 paragraph 1 applies to all serious and intermediate offences, whereas paragraph 2 only concerns the active corruption of Swiss or foreign public officials, giving favours, money laundering, private sector corruption, criminal organisations and terrorist financing. Article 102 simply requires the act of corruption to have been committed within an undertaking, even by an ordinary employee. In other words, it is not necessary for a senior manager to have been involved or even for the undertaking to have benefited from the offence.
167. Article 102 of the criminal code provides for fines of up to CHF 5 million. In determining the level of the fine, the court must take account of the gravity of the offence, the organisational shortcomings attributable to the undertaking, the damage caused and the company's financial capacity. Accessory measures to the main penalty may be applied to legal persons, such as confiscation and publication of the court judgment. Legal persons may also be liable to civil penalties⁵¹ and administrative ones (where a state supervision mechanism applies).
168. Changes to their legal structure do not allow firms to avoid proceedings or penalties. However, companies that are dissolved, liquidated or struck off the register cease to exist in the eyes of the law and can no longer be prosecuted. However, during proceedings, it is possible to order a freezing of the commercial register to prevent a company facing prosecution from avoiding its responsibilities.
169. Under current Swiss legislation on criminal records, there is no way of recording offences committed by legal persons. Nor are such convictions recorded on the commercial register.

Tax relief

170. The federal law of 22 December 1999, which came into force on 1 January 2001, forbids companies from deducting any illicit payments from their taxable profits. The federal authorities have drawn attention to this ban in two circulars, dated 22 June 2005 and 13 July 2007. The new provisions have also been introduced into all cantonal legislation. The tax assessment authorities carry out checks on accounts and ask for supporting documentation, either systematically or with regard to certain income or expenditure heads on the credit or debit sides. The authorities responsible for collecting taxes can order audits, carry out inspections and examine accounts and supporting documents on the spot.

Tax authorities

171. The tax law does not require the tax authorities to report offences that they discover in the course of their tax inspections. However, the general obligation in most cantons for public officials to report serious offences also includes tax officials. Other cantonal and federal officials who are not subject to this legal obligation and who find strong evidence of corruption in the course of taxation procedures may report this to the prosecution authorities without being bound by tax confidentiality.

Accounting rules

⁵¹ See articles 52 and 57 of the Swiss Civil Code.

172. In Switzerland, all persons who are required to appear on the commercial register must also maintain accounts (article 957 of the obligations code) and preserve accounting documents for ten years (article 962).
173. Associations with a turnover of less than CHF 100 000 are not required to appear on the commercial register but must still keep accounts, under a legal reform that was due to come into force in January 2008 (article 69a of the Civil Code).
174. Under article 325 of the criminal code, anyone who deliberately or negligently breaches the legal obligation to maintain accounts is liable to a fine. In addition, under article 251 (forged "titles" - *faux dans les titres*⁵²), the falsification of accounts or supporting documentation is punishable by up to five years' imprisonment or a fine. This offence also applies to incomplete accounts. If forged titles are a means of committing or concealing another offence that does not already encompass forgery then article 251 of the criminal code must be applied in addition. Article 254 stipulates the same penalties for the destruction of titles, whether these are accounts or supporting documents. If the falsified documents are intended to mislead then other offences may have been committed, such as fraud (article 146 of the criminal code) or falsified information on commercial undertakings (article 152). The use of false invoices to conceal offences committed by third parties may also be covered by article 305 (impeding criminal proceedings) or constitute complicity to corrupt (art. 322ter/25 of the criminal code)

Role of auditors and other professionals

175. Most legal persons other than non-profit making associations, commercial and ordinary limited partnerships and private limited companies are required to have their accounts audited. Draft legislation scheduled to come into force in January 2008 would extend this obligation to private limited companies and establish several levels of scrutiny according to companies' type and size. For example, companies that draw up consolidated accounts, ones open to the public, particularly those quoted on the stock exchange, and those that exceed certain thresholds in two consecutive financial years (CHF 10 million total balance sheet, CHF 20 million turnover, annual average of 50 or more full-time employees) will be required to submit their annual accounts for detailed or so-called "ordinary" scrutiny by an audit body that is quite separate from the company and/or whoever drew up the accounts. Other companies will be subject to a so-called restricted scrutiny that may be carried out by the audit company that prepared the accounts, so long as a different individual is responsible.
176. The new audit legislation that came into force on 1 September 2007 specifies the arrangements for approving and supervising persons and undertakings that provide audit services. It establishes a supervisory authority with powers to authorise, scrutinise and sanction auditors. The supervisory authority and the prosecution authorities have to exchange all information and documentation necessary to enforce the law. The new law does not introduce any general requirement for auditors to report offences identified in the course of their official activities to the prosecution authorities. However, under article 728b of the obligations code, auditors who identify breaches of the law while performing their duties must inform the board of directors in writing, and in serious cases also the company general meeting.

⁵² Determining whether a supporting document constitutes a "title", simply on the grounds that it influences the commercial accounts, is a matter of some debate. According to the Swiss authorities, such a document, particularly a bill, can be described as a title if it appears in the accounts as documentary support and the originator sought to use it to falsify the accounts or recognised that this might be the result.

b. Analysis

177. The organisation of the commercial register does not require any comment from the GET. The information it contains is easily accessible by outsiders. Although public companies are not required to publish lists of their shareholders, the disadvantage of this exception is balanced to some extent by the requirement for them to publish as an appendix to their annual accounts the identities of shareholders who own more than 5% of the capital. Finally, Swiss law does not appear to recognise so-called "opaque [non transparent] companies". Nevertheless, there is always the possibility that such legal persons in other countries might own assets in Switzerland.
178. The legislation on the criminal liability of legal persons does not appear to pose any particular problems of application and the judges and prosecutors whom the GET met had no particular comments on this. Legal persons can be convicted quite independently of the individuals that have made them liable. The fines that can be imposed seem proportionate and dissuasive, as specified in article 19 of the Criminal Law Convention on Corruption. Although legal persons are currently being prosecuted (including 2 prosecutions for corruption at federal level; figures for the cantons are not available), the GET notes that there has so far only been one such conviction, for breach of the road traffic legislation. This low tally of convictions is undoubtedly explained by the fact that this is a very recent legal concept in Swiss legislation. However, information received on the spot suggests that it might also reflect a lack of judicial training concerning this new legal notion, at least outside the federal authorities (several members of the confederation prosecution service have received training about the criminal liability of legal persons).
179. Additional penalties are applicable to legal persons by the penal judge (publication of the court decision), or – as a consequence of a criminal conviction – by the civil judge (dissolution of a company) or an administrative authority (withdrawal of a permit). On the other side, there is no additional penalty of exclusion from public tendering procedures for a specified period nor a register of criminal convictions of legal persons. The absence of such a register will make it difficult in practice, if not impossible, to apply the rules on repeat offending or to monitor the application of professional disqualifications, such as exclusions of companies from public tendering.
180. The GET is therefore convinced that the introduction of criminal liability for legal persons could be strengthened by additional measures that would increase the effectiveness of the new arrangements. **The GET recommends i) that training sessions be organised for judges and prosecutors to familiarise them with the notion of legal persons' criminal liability, ii) that consideration be given to the introduction of additional penalties – such as exclusion from public tendering – and to the establishment of a criminal record for legal persons found guilty of offences.**
181. The additional penalty provided for in article 67 of the criminal code for convicted individuals to be disqualified from exercising their profession (see paragraph 163) has not so far been applied in a corruption case. This too, can be explained by the recent introduction of the mechanism. Nevertheless, one may wonder about how far the judiciary are aware of this possibility.
182. The GET considers that under the audit arrangements provided for in Swiss legislation, the lower limits for determining which companies are liable for detailed scrutiny - companies that draw up consolidated accounts and ones that exceed two of the following values in two consecutive financial years: CHF 10 million total balance sheet, CHF 20 million turnover and annual average of 50 or more full-time employees – are high. The result is that companies that are already fairly

substantial are subject to restricted scrutiny. The GET believes – contrary to the Swiss authorities – that the way restricted scrutiny operates offers limited chances that offences will be uncovered since the auditor may belong to the same company as the accountant who prepared the accounts. The current thresholds could exclude too many companies from the type of scrutiny that offers maximum safeguards. The GET wondered whether the existing threshold should be lowered and the Swiss authorities could bear this issue in mind when designing new measures to strengthen the country's anti-corruption mechanisms.

183. According to the interviews with the federal tax authorities, the latter have so far reported very few serious offences, if any at all. The GET sees this firstly as stemming from the fact that at the federal level and in a minority of cantons there is no explicit obligation in their regulations to make such reports (see paragraph 171 above). The Swiss authorities maintain that this is more a consequence of the difficulties the tax authorities face in identifying illicit payments, because of their hidden nature. Moreover, under current legislation, accountants and auditors have no obligation to report to the prosecution authorities any suspicions arising from their professional activities in commercial companies. Admittedly, one effect of passing on information on serious breaches to the general meeting of shareholders of public companies is to make the public aware of auditors' findings, thus enabling the prosecution service to initiate proceedings. However, in the case of companies not open to public subscription, information supplied by the auditor will remain the property of the shareholders, who may have an interest in keeping it confidential. The GET doubts whether, in response to information from the auditors, the managing bodies of commercial companies will wish to advise the prosecution authorities of corruption for which they might then be blamed. In contrast, auditors in the financial sector are required to inform the federal banking commission immediately of any criminal offence or serious irregularities (section 21 of the banking law, section 19.5 of the law on securities markets, section 128.4 of the law on joint capital investments). **The GET therefore recommends to examine, in consultation with the auditors' professional associations, how to improve the arrangements for reporting suspicions of serious offences, including corruption, to the authorities (for example directives and training on the identification and reporting of corruption).**

CONCLUSIONS

184. The major efforts made by Switzerland since 2000 must be continued in order to increase its ability to prevent, detect and punish corruption in its various domestic forms, for example in connection with public procurement and tendering, and the issuing of permits, authorisations and licences, which are among the sectors at risk.
185. The country's highly decentralised structure requires a strengthening of dialogue between institutions in order to determine – in the light of research – the challenges to be faced, the resources available and the objectives to be attained. There is already a cross-departmental body at federal level in the form of the consultative group on corruption, which is to be welcomed. The group now needs to be strengthened to enable it to initiate measures and establish guidelines for the future. The GET has observed that the status and independence of the federal prosecution service are still a subject of debate, sometimes quite public. The judicial authorities would also benefit from more training on the multifaceted nature and technical aspects of corruption inquiries. They generally have the necessary resources, although the nature of the offence of private sector corruption under section 4a of the unfair competition law, which can only be prosecuted following a complaint, deprives them of certain legal possibilities (such as applying certain special investigative techniques, initiating criminal proceedings in the absence of a complaint, application of the anti-money laundering measures). The immunity arrangements do

not appear to be an obstacle to the prosecution of corruption offences committed by senior officials and members.

186. The measures available to combat the proceeds of corruption are generally satisfactory. Similarly, the basic machinery is in place for preventing corruption in government. Nevertheless, further efforts are needed to improve transparency and access to information, strengthen financial audits and other forms of scrutiny at local level, develop training on ethics and establish clearer rules on conflicts of interest and ancillary activities of public officials. At federal level, general legislation on officials' duty to report offences and offering them protection against any reprisals would help to combat corruption.
187. In 2003, Switzerland introduced the notion of legal persons' criminal liability, which includes corruption. This is a particularly important means of dealing with the difficulties arising from complex decision-making arrangements in companies. A number of steps still need to be taken to facilitate its application, such as familiarising practitioners with the new rules and establishing a system of criminal records for legal persons that have been convicted. There are certain other shortcomings with regard to legal persons. For example, those concerned with the scrutiny of company accounts, particularly the tax authorities and auditors, should play a greater part in reporting serious offences, including corruption, that come to their attention in the course of their work.
188. In the light of the foregoing, the GET makes the following recommendations to Switzerland:
 - i. that the consultative group on corruption, or some other appropriate body, be given the necessary resources and powers to initiate a concerted anti-corruption strategy or policies at national level, bringing together the federation and cantons, administrative and judicial authorities, and drawing on interdisciplinary skills and specialists (paragraph 25) ;
 - ii. i) to speedily clarify the current situation concerning the supervision of the prosecution service, in order to ensure its independence in both law and practice; ii) that consultations be undertaken on whether it is appropriate to establish a professional judicial body such as a judicial service commission or equivalent, to which responsibility for maintaining the independence of all the members of the federal judiciary could be delegated; iii) that the cantons be invited to discuss these matters (paragraph 64) ;
 - iii. that i) more extensive specialist training on how to combat corruption be organised for all members of the judiciary – court judges, investigating judges and prosecutors – and for members of police branches specialising in this area; ii) the cantons be invited to do the same (paragraph 65) ;
 - iv. to extend the scope of special investigation techniques to all serious cases of corruption, accompanied by appropriate safeguards for fundamental rights (paragraph 69) ;
 - v. to ensure that the requirement for prosecuting authorities to request authorisation to bring criminal proceedings against federal employees does not constitute an obstacle to the effective prosecution of corruption (paragraph 82) ;

- vi. to examine the need to extend the offence of money laundering to the more serious acts of corruption in the private sector (paragraph 104) ;
 - vii. that the Swiss authorities i) initiate consultations on ways of ensuring that the federal legislation on the transparency principle is fully implemented and subject to an assessment; ii) invite the 13 cantons that do not yet have a body of regulations on transparency and access to public information to consider their adoption (paragraph 137) ;
 - viii. invite the cantons to consider i) making all municipal and cantonal authorities subject to audit bodies/forms of financial control that are sufficiently independent and have adequate means at their disposal in terms of both powers and human and material resources; ii) encouraging audit/financial control bodies to report possible cases of corruption to the judicial authorities (paragraph 144) ;
 - ix. i) that training for federal staff on issues relating to ethics, corruption and its prevention be strengthened; ii) to improve the management of conflicts of interest and to regulate migration of public officials to the private sector; iii) to invite the cantons to support these various efforts at their level (paragraph 150) ;
 - x. that i) the rules on gifts and presents be clarified for all federal employees and steps be taken to make staff more aware of the relevant codes of conduct and their importance in practice; ii) cantonal authorities be invited to consider the introduction of such measures (paragraph 153) ;
 - xi. that legislation be enacted that would i) require federal employees to report suspicions of corruption; ii) offer proper protection to persons reporting such suspicions; and that iii) cantons that have not yet enacted such measures be invited to consider their adoption (paragraph 156) ;
 - xii. i) that training sessions be organised for judges and prosecutors to familiarise them with the notion of legal persons' criminal liability, ii) that consideration be given to the introduction of additional penalties – such as exclusion from public tendering – and to the establishment of a criminal record for legal persons found guilty of offences (paragraph 180) ;
 - xiii. to examine, in consultation with the auditors' professional associations, how to improve the arrangements for reporting suspicions of serious offences, including corruption, to the authorities (for example directives and training on the identification and reporting of corruption) (paragraph 183).
189. 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 31 October 2009.
190. Finally, GRECO invites the Swiss authorities to authorise publication of this report as soon as possible, translate it into the (other) national languages and publish these translations.