

Strasbourg, 26 March 2010

Greco RC-I/II (2009) 2E

## Joint First and Second Evaluation Rounds

### Compliance Report on Switzerland

Adopted by GRECO  
at its 46<sup>th</sup> Plenary Meeting  
(Strasbourg, 22-26 March 2010)

## I. INTRODUCTION

1. GRECO adopted the joint first and second round evaluation report at its 37<sup>th</sup> meeting (31 March - 4 April 2008). The report (Greco Eval II Rep (2007) 1F) was made public by GRECO on 2 June 2008, following authorisation from the Swiss authorities.
2. In accordance with Rule 30.2 of GRECO's Rules of Procedure, the Swiss authorities submitted their situation report on measures taken to implement the regulations on 30 October 2009. Additional information, comprising a number of appendices, was supplied on 11 February and on 12 March 2010.
3. At its 38<sup>th</sup> meeting (9-13 June 2008), in accordance with Rule 31.1 of its Rules of Procedure, GRECO asked Belgium and Monaco to appoint rapporteurs for the compliance procedure. Mr Frédéric Decruyenaere was appointed by Belgium and Mr Frédéric Cottalorda by Monaco. The GRECO secretariat has assisted the rapporteurs in drafting the compliance report.
4. The compliance report assesses the measures taken by the Swiss authorities to implement the evaluation report's recommendations.

## II. ANALYSIS

5. In its evaluation report, GRECO made 13 recommendations to Switzerland. The remainder of this report considers how fully they have been implemented.
6. According to the Swiss authorities, at its meeting on 3 September 2008, the government (the Federal Council) considered the evaluation report and agreed on a series of measures to respond to GRECO's recommendations. This was also the subject of a press release on 3 September 2008. The government saw the evaluation as an opportunity to strengthen the existing armoury of measures and expressed its commitment to implement as many of the recommendations as possible as a matter of urgency. Various authorities were instructed to transpose particular individual recommendations. Moreover, the head of the federal justice and police department wrote to all the cantonal governments on 20 August 2008 to draw their attention to the recommendations that fell within the cantons' sphere of responsibility and invite them to consider the measures proposed in the recommendations.

### **Recommendation i.**

7. *GRECO recommended 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.*
8. As noted in the report, Switzerland has had a consultative group on corruption since 2000. However, this only brings together the institutions involved in combating corruption at a federal level, and only on an informal basis. On 19 December 2008, in response to a proposal from the federal foreign affairs department, the Federal Council decided to set up an inter-departmental working group on corruption, with official terms of reference. Under these terms of reference, the foreign affairs department chairs and services the working group, which has been established under section 56 of the legislation on the organisation of government and the administration<sup>1</sup>.

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<sup>1</sup> LOGA, Classified Compilation of Federal Legislation (RS) 172.010.

The group has been established for a ten-year term, which the Federal Council can renew, and includes all the relevant federal offices and representatives of the cantons, which are closely involved in the establishment of an information and exchange of practices network, and of civil society, with a particular emphasis on awareness raising. Its terms of reference require it to draw up coherent national policies in conjunction with the relevant offices and authorities and to organise regular meetings and workshops on specific topics with a view to developing common strategies. The group must report regularly to the Federal Council and where necessary make recommendations on how to combat corruption. It is assisted by a co-ordinating committee to provide operational monitoring and strategic guidelines<sup>2</sup>. Its first meeting was on 11 June 2009 where it approved an agenda providing for two workshops in 2010 on specific themes: protecting whistleblowers and preventing corruption.

9. GRECO welcomes the strengthening of the place and role of the consultative group on corruption, as suggested in the recommendation. By giving it a ten-year term of office, which is admittedly temporary but can be renewed, and by involving the various agencies, institutions and tiers of government concerned, the Swiss authorities have issued a clear message that they are committed to fighting corruption and have established a valuable tool for framing and implementing policies on this subject.
10. GRECO concludes that recommendation i has been implemented satisfactorily.

#### **Recommendation ii.**

11. *GRECO recommended 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.*
12. The Swiss authorities state that with regard to the supervision of the prosecution service and the possible establishment of a professional judicial body – parts i. and ii. of the recommendation – the subject of the federal prosecution service and its supervision and independence received major media attention in summer 2007, a period of political tension and significant media agitation before the national elections<sup>3</sup>. A first step towards clarifying the issue came with a government report of 28 November 2007<sup>4</sup>, which pointed out firstly that it was difficult to draw a distinction between administrative supervision, which was a government responsibility, and material supervision, which devolved on the federal criminal court<sup>5</sup>. The government, the two competent parliamentary committees and the two experts consulted by the government all agreed that the

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<sup>2</sup> The committee comprises representatives of the key administrative units in the fight against corruption, namely policy division V of the federal foreign affairs department, the state secretariat for the economy, the federal justice office, the federal prosecution service, the federal personnel office and the federal financial controller. Where necessary, it may include representatives of other federal offices, the cantons and civil society.

<sup>3</sup> What was at issue though was not the prosecution service's freedom to conduct judicial proceedings as it saw fit but whether the government, in this case the then justice minister, could issue instructions on how the media should be informed about cases currently under way

<sup>4</sup> Federal Journal (FF) 2008 1889, in particular pp. 1892-1894.

<sup>5</sup> Historically, this separation dates from 1 January 2002. The idea was to strengthen the independence of the federal prosecution service by ensuring that the material supervision arrangements prevented the government from issuing instructions in specific cases (which in practice it had already long since ceased to do). Material supervisory authority is therefore assigned to a judicial body, whereas the appointing authority, the government, continues to exercise administrative supervision, including personnel management, the renewal of appointments and possible disciplinary measures.

current arrangements had to be improved by abolishing the distinction between administrative and material supervision. Following extensive deliberations, including in parliament, the organisation and oversight of the prosecution service have now been comprehensively reviewed in the newly adopted Law on the organisation of the federal criminal authorities (*LOAP*) according to which the state prosecutor is elected by parliament and subject to the supervision of a newly established committee (articles 20, 23 and following of the *LOAP*). The latter is elected by parliament and composed of one representative each of the federal court and the federal criminal court, two lawyers practising in court and three experts. The Law was adopted by both chambers after a final vote on 19 March 2010<sup>6</sup>; it will enter into force on 1 January 2011, together with the unified civil and criminal procedure codes.

13. Turning to part iii. of the recommendation, the letter of 20 August 2008 to all the cantonal governments (see paragraph 6) included an invitation to join in discussions on the supervision and independence of the prosecution service. The Swiss authorities also point out that certain cantons – Geneva, Fribourg, Ticino, Jura and, since January 2008, Neuchâtel<sup>7</sup> – already had judicial service commissions at the time of the evaluation visit. Moreover, in anticipation of the entry into force in 2011 of the 2007 unified code of criminal procedure, most of the country's 26 cantons have taken steps to modify their judicial structure. The Swiss authorities have supplied information on the preliminary results of these activities and of the response to the invitation of 20 August 2008 sent to them by ten of the cantons<sup>8</sup>.
14. GRECO notes the information supplied and welcomes the new legislation modifying the arrangements for appointing and supervising the public prosecutor of the Confederation. GRECO notes with satisfaction that the invitation to the cantons has also led to new institutional measures at their level. GRECO hopes that the activities of the interdepartmental working group established in 2008 and/or the prospect of a unified code of criminal procedure in 2011 will persuade the three or four cantons that have not deemed it necessary to introduce new safeguards to reconsider the issue of the prosecution service's independence. Finally, while it is true that the report was particularly concerned about the situation of prosecutors, GRECO hopes that the discussions both at federal level and in the cantons will also extend, as far as necessary, to the situation of all judicial personnel, including court judges. Overall, the measures taken respond to the expectations embodied in these recommendations and to the concerns expressed in the report.
15. GRECO concludes that recommendation ii has been implemented satisfactorily.

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<sup>6</sup> [http://www.parlament.ch/F/Suche/Pages/geschaefte.aspx?gesch\\_id=20080066](http://www.parlament.ch/F/Suche/Pages/geschaefte.aspx?gesch_id=20080066)

<sup>7</sup> Like the other cantons, Neuchâtel has set up a working group from the human resources, legal services and financial departments to consider the implementation of the measures proposed by GRECO.

<sup>8</sup> The canton of Nidwalden has carried out a detailed examination of various possible ways of supervising the prosecution service. The government will propose to parliament that the prosecution service be entirely integrated into the judiciary and be supervised solely by a section of the cantonal supreme court. In Glarus, discussions are currently under way, particularly on the status of the prosecution service, its election and how to protect its independence. Discussions are also under way in Schwyz. Parliament is still to debate the matter. However, in Basle Rural, Uri and Obwalden, consideration has been given to legislation on a judicial service commission to supervise the prosecution service but for various reasons such an approach has been deemed unnecessary. The same applies in Schaffhausen, which has though established a joint committee of the cantonal parliament to assess candidates for election as prosecutors. In Lucerne, the government published a proposed reform of the judicial structure, which also covered the supervision of the prosecution service, for consultation between 7 July 2009 and 15 September 2009. In Valais, the new legislation to implement the future code of criminal procedure provides that all prosecutors and deputy and extraordinary prosecutors will be appointed by the cantonal parliament. The cantonal parliament has also successfully called on the government to start discussions on the establishment of a judicial service commission. In Vaud, following a constitutional amendment of 27 September 2009 (which subsequently received 75% support in a referendum), the public prosecutor is now elected by parliament rather than being appointed, as formerly, by the council of state. The new legislation on the prosecution service limits the executive's supervisory powers to administrative and financial matters and entitles the public prosecutor to direct access to parliament if his or her independence is threatened.

### Recommendation iii.

16. *GRECO recommended 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.*
17. Regarding part i. of the recommendation, the Swiss authorities report a number of relevant initiatives: a) the federal prosecution service organised a training day on 3 April 2009 devoted entirely to the problems of corruption and the criminal liability of legal persons. The training was obligatory for all full, deputy and assistant prosecutors and for the service's financial experts. Judges of the federal criminal court and federal investigating judges were invited to the day and several representatives of each of these institutions took part. Nine federal police officers specialising in corruption also attended; b) on 5 November 2009, the federal police held the first national police congress on the fight against corruption. It was aimed at specialist members of the national and cantonal police forces and financial investigators, analysts and officials of the Swiss money laundering reporting office (financial intelligence unit). The exercise included both theoretical and practical aspects, and was illustrated by real case studies. It was also an opportunity to establish contacts and strengthen relations between practitioners at national level.
18. The Swiss authorities state that apart from these two key events, various other training sessions have taken place, either specifically on this subject or as part of more general training. There are a number of examples: a) a day organised by the ASCE (the Swiss association of experts on combating economic crime) on 14 November 2008 on the subject of corruption, which was attended by more than 200 persons, including 11 members of the federal prosecution service, 4 federal investigating judges, 8 members of the federal police and 5 members of the federal criminal court; b) several members of the federal prosecution service either undertook post-graduate training in the field of economic crime in 2008 organised by the Neuchâtel and Lucerne specialist higher education establishments or are currently doing so; in connection with these courses, there was also a conference on corruption in June 2009; c) in conjunction with these two establishments, since 2007 the federal police have organised training in financial investigation; in late 2009, nearly 90 members of the federal police took part in a training course and there is also a similar one for cantonal representatives; d) the Swiss police institute runs a course on economic crime lasting several weeks in which several members of the federal police have taken part while others have also attended training lasting several weeks that is specifically concerned with corruption and run by the German BKA (*Bundeskriminalamt*).
19. Turning to part ii. of the recommendation, the letter of 20 August 2008 to all the cantonal governments (see paragraph 6) invited them to take it into consideration. According to the Swiss authorities, cantonal representatives are regularly invited to national events, such as the first national police congress on the fight against corruption on 5 November 2009. Additionally, senior police officers, prosecutors and investigating judges in various cantons have obtained a Master of Advanced Studies (MAS) in Economic Crime Investigation, or are currently completing the course. Certain specific information has been supplied concerning three cantons<sup>9</sup>.

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<sup>9</sup> On 14 November 2008, several members of the prosecution services of Ticino and Appenzell Outer-Rhodes took part in the training day on corruption organised by the ASCE (the Swiss association of experts on combating economic crime). In Zurich, the prosecutors responsible for combating corruption regularly take part, and did so again in 2009, in the annual forum on combating corruption and fraud in the EU, organised by the academy of European law in Trier. Police officers can attend the economic crime courses run by the Swiss police institute, which include a module on combating corruption, and they can also take part in German police training.

20. GRECO notes with satisfaction that corruption is taken into account in training at national level and that all the cantonal governments have been invited to develop such training at their own level, as proposed in the recommendation. It notes that there are no reports – so far – of any significant initiatives by the cantonal authorities themselves, even though professionals in the cantons clearly benefit from training and other initiatives in the country and abroad. Switzerland should give this matter further consideration, particularly in so far as it applies to judges<sup>10</sup>. Nevertheless, overall the Swiss federal authorities have implemented this recommendation.
21. GRECO concludes that recommendation iii has been implemented satisfactorily.

#### **Recommendation iv.**

22. *GRECO recommended to extend the scope of special investigation techniques to all serious cases of corruption, accompanied by appropriate safeguards for fundamental rights.*
23. According to the Swiss authorities, a government report on the implementation of recommendations iv, vi and xii was approved by the Federal Council in June 2009. It concluded that existing Swiss law was already largely compatible with recommendation iv. The investigation techniques covered by the code of criminal procedure are, in principle, applicable to all offences, including bribery of public officials and private persons, but such particularly intrusive measures as surveillance of telecommunications and the use of under-cover agents are only applicable to the bribery of public officials. The authorities add that on 5 October 2007 (that is after the GRECO visit), parliament approved the future uniform code of criminal procedure, whose article 296.2.a includes serious cases of breach of trust (*gestion déloyale*) in the category of offences that justify surveillance of telecommunications. This is in contrast to the current federal law of 6 October 2000 on the surveillance of postal and telecommunications correspondence (RS 780.1), which does not include this offence in the list. The Swiss authorities state that as a result, the entry into force of the new code, scheduled for 1 January 2011, will enable the authorities to order the surveillance of telecommunications in cases of corruption in the private sector that also have an element of, and are prosecutable for breach of trust. Certain serious cases concerning private sector corruption will also therefore be covered, that is when, for the purposes of unlawful enrichment, the perpetrator harms the pecuniary interests of others, in breach of his or her duties of management or by abusing his or her power of representation. However, the government considers in its report that extending the application of surveillance of telecommunications and secret investigations to all cases of bribery in the private sector would be disproportionate and place too serious a restriction on certain fundamental rights.
24. GRECO notes the information supplied and points out that this recommendation mainly concerned the prosecution of corruption in the private sector. It welcomes the fact that the entry into force of the code of criminal procedure in 2011 will make it possible to use interception of telephone communications in response to private sector bribery offences where these are prosecutable also for serious cases of breach of trust (article 158 of the criminal code), which is considered to be a related offence to that of corruption in the private sector (section 4a and 23 of the unfair competition law). Nevertheless, the evaluation report had adduced several arguments in favour of this recommendation<sup>11</sup>. GRECO considers that the current approach is not really

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<sup>10</sup> Certain cantons apply the principle of non-professional or lay judges: see paragraph 38 of the evaluation report.

<sup>11</sup> The fact that article 158 of the criminal code probably does not permit proceedings to be taken against all cases of corruption in the private sector and that even when there is a conviction this does not have the same social consequences, the fact that it may sometimes be difficult to determine which law applies in the case of public-private partnerships, and the

satisfactory and that there should be authority to use, among other methods, telephone intercepts and other techniques such as controlled deliveries and undercover operations that have proved their worth in other countries, for all serious cases of corruption in the private sector (such as ones involving large sums, manipulation of markets or serious breaches of free competition or major consequences in terms of public safety or health). Finally, GRECO considers that corruption offences are no less serious than those of breach of trust.

25. GRECO concludes that recommendation iv has been partly implemented.

**Recommendation v.**

26. *GRECO recommended 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.*
27. The Swiss authorities state that authorisation to bring criminal proceedings against federal employees may only be refused for very minor cases, that is when a disciplinary measure seems appropriate even though an offence has been committed and the legal requirements for a criminal prosecution have been met, under section 15.3 of the law on responsibility of 14 March 1958. The authorisation decision is taken in certain cases by an administrative authority but this can be challenged by the public prosecutor of the canton concerned in the federal administrative court. Under the relevant legislation the federal prosecution service cannot appeal against such decisions. This is the basis of the criticism that led to recommendation v (paragraph 82 of the evaluation report). A legal amendment was passed to rectify the situation. The federal Law on the organisation of the federal criminal authorities (*LOAP*) of 19 March 2010, which will enter into force on 1<sup>st</sup> January 2011, introduces a new paragraph 5<sup>bis</sup> under section 15 of the law on responsibility to extend the right of appeal to any prosecution service that has requested such authorisation.
28. The Swiss authorities also state that in none of the six cases between 2004 and 2007 concerning federal public officials accused of corruption was authorisation to prosecute refused. Between September 2007 and August 2009, the federal prosecution service lodged seven requests with the federal department of justice and police for authorisation to prosecute under section 15 of the law on responsibility, none of which was refused. These cases did not involve corruption. Moreover, requests concerning cases that are cantonal responsibilities are dealt with by the federal prosecution service, which is a criminal prosecution authority. The cantons lodge an average of some dozen requests each year but so far none of the requests have concerned corruption cases. The Swiss authorities conclude that even though certain authorisation decisions are taken by non-judicial authorities, the prosecution of corruption cases has never been prevented by a refusal to grant authorisation. Moreover, the new section 15.5bis of the law on responsibility ensures that it will now be possible to appeal to the courts against any possible refusal by the administrative authorities.
29. GRECO notes the information supplied and welcomes the assurances that the requirement for prior authorisation for the prosecution of federal employees has not so far acted as an obstacle to proceedings in possible corruption cases, and probably never would, since no request to prosecute has ever been refused. After entering into force on 1 January 2011, the new legislation adopted in March 2010 will extend to the federal prosecution service the right to appeal against

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fact that corruption in the private sector is considered to be a relatively significant phenomenon, since it is more widespread than corruption in the public sector. See paragraphs 68 and 69 of the report.

refusals to grant authorisation, thus offering significant additional safeguards that were lacking in this type of situation.

30. GRECO concludes that recommendation v has been implemented satisfactorily.

#### **Recommendation vi.**

31. *GRECO recommended to examine the need to extend the offence of money laundering to the more serious acts of corruption in the private sector.*
32. The Swiss authorities have considered this recommendation in a special Federal Council report on recommendations iv, vi and xii. The report points out that all serious offences (*crimes*) are predicate offences of money laundering, as defined in article 305b of the criminal code<sup>12</sup>, but not the less serious categories of offence (*délits* and *contraventions*). The offences of active and passive corruption of Swiss and foreign public officials under articles 322<sup>ter</sup>, 322<sup>quater</sup> and 322<sup>septies</sup> of the criminal code are therefore predicate offences, but private corruption as defined in sections 4a and 23 of the federal unfair competition law is still a lesser offence.
33. However, forms of private corruption that harm the pecuniary interests of others also come within the scope of the offence of breach of trust (article 158 of the criminal code) when, for the purposes of unlawful enrichment, the perpetrator is in breach of his or her duties of management or has abused his or her power of representation. These forms of aggravated breach of trust are serious offences and as such are predicate offences of money laundering. According to the government, this means that the serious forms of private corruption that, at the same time, constitute aggravated breach of trust under article 158 are already considered to be predicate offences of money laundering. It therefore considers that adding a specific provision to article 305b of the criminal code concerning the other forms of private corruption, which are only lesser offences, would be incompatible with the system of rules governing Swiss legislation on money laundering and would not be justifiable under the key criterion of the seriousness of the offence. The article 305b approach whereby all serious offences are liable to be treated as predicate offences of money laundering has proved satisfactory and there is no need to incorporate into this article certain specific lesser offences relating to private corruption. The government also considers that such an addition would go beyond the scope of the GRECO recommendation, which refers to more serious acts of corruption in the private sector. The Federal Council report also examines the alternative which would consist in reviewing the criminal law provisions on private sector bribery with a view to include a series of circumstances under which such bribery offences would become serious crimes [in French: *crimes*, as opposed to less serious offences or *délits*] and therefore, predicate offences for money laundering. The government concluded, however, that three years after the introduction of private sector bribery into Swiss law, it was premature to amend again these provisions.
34. GRECO notes the information provided. It does not entirely share the Swiss authorities' reasoning<sup>13</sup> and regrets that it has reached these conclusions, given the information contained in the evaluation report (see footnote 11 of this report). It would have justified making this form of

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<sup>12</sup> Under article 10.2, these serious offences are ones punishable by more than three years' imprisonment. About 90 serious offences are specified in the criminal code and its associated criminal legislation.

<sup>13</sup> Taken to the extreme, the logic of this reasoning would suggest that almost any corruption offence can very probably be prosecuted under the provisions of one of a number of serious offences, thus making it unnecessary to establish that these offences are predicate offences of money laundering – particularly for the purposes of the relevant prevention and reporting arrangements – or that other consequences can follow, such as the right to use certain special investigation techniques that have proved their worth (see also recommendation iv).

corruption a serious offence in certain cases, without having to wait several years only because this is a new offence under Swiss law. This being said, the Swiss authorities have carried out the examination called for in this recommendation.

35. GRECO concludes that recommendation vi has been implemented satisfactorily.

#### Recommendation vii.

36. *GRECO recommended 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.*
37. With regard to part i of the recommendation, the Swiss authorities state that the federal law on transparency of 2006 established a federal data protection and transparency commissioner. He works on a day-to-day basis with administrative departments and individuals both as a mediator in disputes and as a supplier of information and awareness raiser. For example, he notes the questions and problems that most frequently arise and provides answers to them, which are then published, thus helping to standardise practices. Section 19 of the legislation requires the commissioner to report regularly to the government on the execution, effectiveness and costs of applying the transparency law. The first report was published on 25 June 2009. In the interests of objectivity, the commissioner decided to assign the task of evaluation to an external agency. In its report, the evaluation team, from the institute for advanced studies in public administration, made a number of observations and recommended certain improvements to make the federal administration more transparent. In his explanatory report to the government<sup>14</sup>, the commissioner largely agreed with the evaluation team's findings. He concluded that the introduction of the transparency principle into the federal administration had generally corresponded to the expectations of the government and parliament when the legislation was drawn up, though he also pointed to certain weaknesses in its execution and recommended a number of corrective measures.
38. Turning to part ii of the recommendation, the Swiss authorities state that since 2007 several cantons have passed or drafted new legislation establishing the transparency principle. In many cases, this was in response to the letter sent in August 2008 to all the cantonal governments<sup>15</sup>.
39. GRECO notes the information supplied, which highlights the efforts being made to secure a satisfactory level of transparency and access to information in the federal administration and to implement the federal transparency legislation. It welcomes the first evaluation of the law in 2009 and the federal commissioner's efforts to harmonise practices. GRECO also notes with satisfaction that 11 more cantons have introduced new rules or have tabled legislation on

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<sup>14</sup> The two evaluation reports referred to are published on the Internet:  
<http://www.edoeb.admin.ch/dokumentation/00652/01405/index.html?lang=fr>.

<sup>15</sup> This concerns the cantons of Uri (entry into force of the law on 1 April 2007), Neuchâtel (entered into force on 1 October 2007), Zurich (entered into force on 1 October 2008), Schwyz (entered into force on 1 November 2008), Valais (entered into force on 1 January 2010) and Fribourg (entry into force on 1 January 2011). In the cantons of Basle City and Basle Rural the governments are drafting legislation to introduce the transparency principle for consideration by their respective parliaments. The government of Ticino has decided to publish in the near future a message on the introduction of new legislation on information and transparency. In Zug, the government has started consultations on establishing the principle of transparency, following a parliamentary motion. In Obwalden, the subject of administrative transparency is being considered as part of a project on computerised file management.

transparency in response to the Confederation's invitation and this recommendation. It hopes that eventually the entire country will have appropriate rules on this subject.

40. GRECO concludes that recommendation vii has been implemented satisfactorily.

#### **Recommendation viii.**

41. *GRECO recommended to 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.*
42. The Swiss authorities state that in August 2008 the head of the federal justice and police department asked the cantons to consider the proposed measures in the evaluation report, particularly recommendation viii, which was exclusively within their jurisdiction. The point was also raised on 27 August 2008 at the annual conference of the federal financial control service and the various cantonal bodies responsible for financial control.
43. The authorities also refer to the measures actually taken by the cantons. These do not solely follow on from the GRECO proposals but often effectively transpose them. In Vaud, the newly established court of auditors came into operation on 1 January 2008<sup>16</sup>. In Graubünden, the new financial control legislation, which provides for an independent and autonomous supervisory body, also came into force on 1 January 2008. In Schwyz, financial controllers are now appointed for a fixed term to increase their independence. In Glarus the financial control service has been strengthened, particularly by the election of its head by parliament. The same applies in Lucerne where, since a May 2009 reform, the chief financial controller has been appointed by parliament rather than, as hitherto, by the government. The function has been strengthened in Obwalden, and the introduction of additional audit controls for municipalities has been considered, but was eventually judged unnecessary. In Ticino, new legislation came into force on 1 January 2009 requiring municipalities to submit their accounts to an external body for formal and substantive audit. New financial control legislation came into force in Basle Rural on 1 July 2009. Henceforth all administrative bodies and related undertakings are subject to independent audit. The extension of this requirement to municipalities will be under discussion as of autumn 2009 in the context of the revision of the local government legislation. Discussions are under way in Schaffhausen on the introduction of a system of internal audit in all the municipalities. In the canton of Zurich, new regulations came into force on 1 January 2009 which strengthened the independence requirements to which municipal audit bodies are subject. Finally, the Swiss authorities underline that in most cantons, a duty for their employees to report wrongdoings is already in place (see paragraph 65).
44. GRECO welcomes the fact that the invitation to cantons to consider the content of recommendation viii and the August 2008 conference of public financial control bodies have often led to institutional and/or legislative improvements within cantons. Although the evaluation report did not paint an exhaustive picture of the situation in all the cantons, the recent initiatives show that improvements could be made and gaps filled in several cases. GRECO hopes that these

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<sup>16</sup> It is fully independent and supervises the use of all public moneys from the standpoints of legality, accounting standards and effectiveness. It comprises five judges elected by the cantonal parliament. It audits 1. all cantonal administrative departments, 2. parliament and its departments, 3. the courts, 4. the municipalities, 5. all forms of associations of municipalities, 6. institutions receiving state financial assistance or carrying out duties in the public interest.

efforts will continue and, wherever necessary, seek to fine-tune still further the machinery for assessing the use of public money and resources, from the standpoint of both proper accounting standards and the effectiveness of the public sector. Although the invitation to implement the present recommendation was addressed to the cantons (in accordance with the wording of the recommendation), more attention will also have to be given to the interaction with the criminal authorities (second part of the recommendation, for the implementation of which, no specific new measures are reported). Supposing that members of administrative audit and control bodies can be assimilated to public employees for the purposes of applying the duty to report to the judicial authorities, the experience in other countries has shown that in practice the staff of such bodies often consider the administration to be the sole addressee of the findings of their audit and supervisory work, and it may even happen that interaction with the criminal law bodies is hampered by their statutory rules.

45. GRECO concludes that recommendation viii has been implemented satisfactorily.

#### **Recommendation ix.**

46. *GRECO recommended 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.*
47. With regard to part i of the recommendation, the Swiss authorities state that on 3 September 2008 (see paragraph 6 above), the Federal Council instructed the federal personnel office and all departments to provide more training for staff on ethics, and corruption and how to prevent it. Moreover, in accordance with the government's explicit instructions, all departments now make sure that all new staff are automatically informed of the rules governing gifts, ancillary activities and the duty to disclaim authority in certain circumstances, and on how to respond when corruption is suspected. In particular, they may refer to the Guidelines for preventing corruption, published on 3 June 2009 (see below, paragraphs 56 and 58 concerning recommendation x).
48. On 7 and 8 May 2009 the federal personnel office organised a centralised training course for senior officials of the Confederation on ethical conduct<sup>17</sup> and on 20 October 2009 there was a course for federal human resources officials on the law governing federal staff and the prevention of corruption. Starting in 2010, preventing corruption will be systematically included in management seminars for federal officials at all levels and considered in more depth in a seminar on personnel management. At a more decentralised level, individual departments and units have organised training tailored to the specific needs of their own staff, coupled with the distribution of a code of conduct and the introduction of sectoral codes of conduct. For example, the federal roads office has issued a guide to combating corruption in that department, which has been distributed to all its staff and will be part of the initial training for new arrivals. In addition, specific sessions on combating corruption form part of the roads office's public procurement training.
49. According to the authorities, other sectoral codes of conduct have been issued since the September 2007 GET visit and are accompanied by training or other explanations (see recommendation x). Finally, there have recently been other training activities, in particular a seminar organised by the secretariat of the economy on 14 September 2009 on at-risk areas in

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<sup>17</sup> One of the course modules was "preventing corruption as applied ethics". It included a presentation, practical case study exercises and a discussion.

the field of public procurement. It was attended by experts from the Basle Institute on Governance, Transparency International and the federal prosecution service.

50. Turning to part ii of the recommendation, the Federal Council has made changes to the general regulations governing confederation staff, which came into force on 1 January 2010. Under revised article 91 of these regulations, federal employees are now required to inform their employer of any ancillary paid activity, including advising or representing third parties. The federal department concerned must prohibit such an activity unless there is no risk of conflict of interest (for instance on matters relating to the employee's official duties or the functions of his or her department). A new article 94a includes at present provisions to deal with the possible consequences of migration to the private sector. For example, the first paragraph states that employees must relinquish their authority if they are required to take or participate in taking a decision concerning an employer, particularly any employer in the private sector, from whom they have received or accepted a current offer of employment. They must also stand aside if the decision concerns a party represented by a person who has worked in the same organisational unit in the previous two years. The regulations also stipulate that administrative units that take or prepare decisions in such areas as supervision, taxation or public procurement may agree with senior staff to include in the latter's contracts a ban on entering into an employment or agency contract with any enterprise that has been critically concerned by a decision taken by the staff member in question in the two years preceding the termination of his or her contract. This ban may last for up to two years after the termination of employment.
51. The Swiss authorities state that certain bodies apply still more specific rules. For example, employees of the federal financial markets supervisory authority must request their employer's permission before carrying out any activities outside the public service. Part time employees must declare the nature and scope of such activities (art. 36 of the staff regulations of the federal financial markets supervisory authority of 11 August 2008, RS 956.121).
52. Regarding part iii of the recommendation, the Swiss authorities state that the letter of 20 August 2008 drawing cantonal governments' attention to the recommendations that fall within the cantons' sphere of responsibility has led to various practical measures, in terms of training, drawing attention to existing regulations, proposed new regulations and legislation and even institutional changes<sup>18</sup>.

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<sup>18</sup> For example, in Ticino, a new rule forbidding public employees who leave the public service from acting as agents on matters that they have already dealt with as public officials will be proposed as part of a current reform of legislation. In Lucerne, the ban on gifts will now be mentioned explicitly at the information day for new employees of the cantonal administration. There is also now an ethics module in the training provided by the joint cantonal police college at Hitzkirch. In Zurich, the topics of corruption and whistleblowing were specifically dealt with in April 2008 on the cantonal administration's intranet and in July 2009 in the staff newsletter. In both cases, it was stressed that cases of corruption could be reported to the cantonal ombudsman. In Schwyz, ethics, corruption and its prevention were the subject of a presentation and discussion at one of the regular meetings of senior cantonal officials. In Valais, new staff are told about ethics, corruption and its prevention on their induction day. It is also planned to introduce specific courses in the training programme. Ethics, corruption and its prevention will now also be incorporated into the training day for new staff of Zug, where appropriate accompanied by a booklet. In Basle City, the 2009 training programme had a course on ethics for senior officials, which included the topic of accepting gifts. Moreover, officials who are regularly involved in advising the government and framing its decisions may no longer be elected to parliament. In Solothurn there is a seminar on ethics for officials for all the cantonal employees. There will also be a seminar on ethics and corruption for employees of Basle Rural as of 2010. In Appenzell Outer-Rhodes these topics are part of a training programme for candidates to the police force and internal training on these topics is also organised for the Obwalden police force. Finally in Vaud, an ethics committee was established in January 2009 for the Lausanne municipal police.

53. GRECO welcomes the steps taken by the Swiss authorities to implement this recommendation and particularly appreciates the relevance of the regulations on migration to the private sector. Finally it notes that various practical measures have been taken by the cantons following the contacts made by the federal level. Even though this is consistent with the recommendation's objectives, the cantons could draw useful inspiration from the confederation's new initiatives with regard to regulating conflicts of interest and movements of staff from the public to the private sector. These are equally sensitive issues at local level, which will certainly require some additional efforts because of the still closer social ties within, and the extensive powers of the local and regional authorities.
54. GRECO concludes that recommendation ix has been implemented satisfactorily.

#### **Recommendation x.**

55. *GRECO recommended 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.*
56. In connection with part i of the recommendation, the Swiss authorities refer firstly to the new Guidelines on the prevention of corruption of June 2009, published on-line and as a booklet, applicable to all federal employees. These state that in principle staff of the federal administration may not accept gifts or other activities in the course of their working relationships. Exceptions are possible in the case of minimal advantages that are compatible with normal social usage, but gifts in excess of a few hundred francs [CHF 1 = EUR 0.7 approximately] are in principle prohibited. The Guidelines encourage employees to make themselves aware of any specific regulations applicable to their department or service, consider each particular case and inform their superiors of any gift or advantage obtained to avoid all risks. Moreover, as part of the amendments to the confederation staff regulations that came into force on 1 January 2010 (see paragraph 51), article 93.2 has been amended to oblige the various federal departments to lay down detailed rules. These may not be less restrictive than the principle in article 93.1, whereby minimal advantages compatible with normal social usage are permissible.
57. The Swiss authorities add that since the evaluation team's visit in September 2007, numerous departments and offices have adopted additional sectoral codes of conduct, on which their employees have received relevant information and training. These codes lay down rules on the acceptance of gifts for staff working in particularly exposed areas of activity<sup>19</sup>.

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<sup>19</sup> For example, in October 2008, the head of the federal justice and police department issued a directive on the conduct to adopt in response to indiscretions and the risk of corruption for the department. Article 5 establishes the principle that gifts and other advantages of this type may not be accepted, other than ones of low value that are compatible with normal social usage (ones worth less than 100 francs [EUR 70]), which are the subject of more detailed rules. Gifts worth over 100 francs that cannot be returned for reasons of politeness must be handed over to secretary general of the department via the hierarchical superior and the person who has made the gift must be informed. Similar regulations apply to business meals. The revised directive of the federal department of foreign affairs on the acceptance of gifts or other advantages in the course of work, which came into force in December 2007, follows a similar logic, with a maximum of 200 francs [EUR 140] on the value of such gifts or advantages.

The federal auditing supervisory authority has a code of ethics which all its staff have to sign. It specifies the rules governing gifts and advantages applicable to these staff. They are also required to complete an annual internal training session at which the rules of the code of ethics are spelt out. The training also draws the attention of the authority's staff to practical problems that might arise in their everyday work.

Staff of the federal financial markets supervisory authority are forbidden to accept individual advantages offered by the establishments they oversee (Article 39 of the authority's staff regulations, 11 August 2008, RS 956.121).

58. As for raising awareness (besides the sector-specific initiatives mentioned in paragraph 48), on 3 September 2008, the government entrusted the federal finance department with overall responsibility for familiarising confederation personnel with the prevention of corruption, reviewing the then draft Guidelines on the prevention of corruption and disseminating these among all federal employees (see paragraph 6). These Guidelines, whose initial draft was amended to take account of GRECO recommendations ix and x, were published in the three official languages in June 2009 and they were distributed to departments and offices. The media have been informed in a press release and the document has also been published on the Intranet, where it can be consulted by all the employees of the federal administration. All the secretaries general of departments and directors of offices have been informed of the aims and content of the Guidelines in a letter from the director of the federal personnel office. On 3 July 2009, the personnel departments of all the federal administrative entities asked administrative units to distribute a copy of the document to each employee<sup>20</sup>.
59. In connection with part ii of the recommendation, the Swiss authorities refer to the letter of 20 August 2008 to all cantonal governments (see paragraph 6). In response to the letter, several cantons have introduced practical measures<sup>21</sup>.
60. GRECO notes with satisfaction that new Guidelines for all federal staff have been adopted, together with sector specific provisions, setting out the rules on gifts and presents in accordance with the law governing federal staff. It also notes the efforts made by cantonal authorities to draw up their own ethical standards.
61. GRECO concludes that recommendation x has been implemented satisfactorily.

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In the case of the departments of parliament, the secretary general sent his staff on 12 October 2009 a more detailed directive on how to respond to the offer of gifts and other advantages; the ceiling for the value of gifts was fixed at 200 francs [EUR 140].

Finally, the new federal roads office guide, already referred to under recommendation ix, includes a binding code of conduct and directives on the acceptance of invitations, gifts and other advantages, which replace all the previous regulations.

<sup>20</sup> These five-page Guidelines, based in part on the federal administration's code of conduct, describe the underlying principles of honest conduct and offer explanations and clarifications concerning the ban on gifts, when the duty to relinquish authority applies, the rules on additional activities and further information and documents on corruption. They advise staff on whom to contact in case of doubt and how to report suspected corruption anonymously. Under the heading, "duty to relinquish authority", the document contains practical information on migration to the private sector, and emphasises that the duty to relinquish authority is very broad in nature and extends to the appearance of partiality. The Guidelines therefore require employees to decide whether they should relinquish authority if they receive an offer of employment from a party concerned in a matter with which they have dealt or are currently dealing or if the party is represented by a former employee of their administrative unit. The document also clarifies employees' obligations in connection with ancillary activities. Such activities must not be to the detriment of the standard of service provided or be incompatible with the department's interests. If there is a risk that either of these conditions will not be met, then the employers' authorisation must be sought for the activity. Staff are explicitly advised to inform their superiors of all their ancillary activities.

<sup>21</sup> For example, Basle Rural has recently re-examined and clarified its rules on gifts. They are forbidden unless they are of low value or represent scientific or cultural distinctions. In April 2008, Schaffhausen issued staff policy guidelines that constitute a general code of conduct. Zurich has placed recommendations setting out the legal rules governing gifts on the cantonal administration's intranet site. Discussions are currently under way on how they can be incorporated into a still more precise directive. In Zug, the finance directorate has been asked to explicitly include the ban on gifts in the staff regulations, when they are next revised. Finally discussions are under way in Appenzell Outer-Rhodes on the preparation of a code of ethics and awareness-raising activities.

## Recommendation xi.

62. GRECO recommended 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.
63. In connection with part i of the recommendation, the Swiss authorities state there has already been a parliamentary motion adopted on 22 June 2007 (Gysin motion 03.3212) calling for a legal obligation for federal employees to report cases of corruption. In its "message" of 10 September 2008 on the federal legislation on the organisation of the federal criminal authorities, the government announced proposals to amend the federal personnel legislation. In response to GRECO and OECD recommendations, it plans to make it obligatory for all federal staff to report to the criminal authorities, their superiors or the federal financial controller any serious or lesser offences that are prosecuted *ex officio*, which they are aware of or have been informed of in the course of their duties (section 22a.1 of the draft federal personnel law<sup>22</sup>). The reporting duty applies once there are grounds for reasonable suspicion. The choice of whom to report to will depend on the circumstances, the facts uncovered and the way in which they were discovered. Employees will also have an explicit right to report to the federal financial controller any other irregularities of which they are aware or have been informed in the course of their duties. This legislative amendment was adopted by both chambers in the context of the final adoption on 19 March 2010 of the Law on the organisation of the federal criminal authorities (*LOAP*).
64. In connection with part ii of the recommendation, the above legislation dealing with federal employees' obligation to report suspicions also includes provisions to offer greater protection to those concerned, as various members of parliament have called for<sup>23</sup>. First of all, the employer will be obliged to reinstate any employee who is dismissed following such a report or, if that is impossible, to offer him or her alternative work that can be reasonably required of him or her<sup>24</sup>. Secondly, according to the new article 22a paragraph 5 of the law governing federal staff, no one shall be professionally disadvantaged for having, in good faith, reported an offence or uncovered an irregularity or for having provided testimony. On this basis, a person may complain or file a formal appeal against any degradation, retaliation, discrimination etc. incurred at work. Federal departments have taken a number of practical steps to facilitate anonymous reporting of suspicions, such as the federal financial controller's whistleblowing line, the Armasuisse's

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<sup>22</sup> New section 22a: obligations to report and right to report and protection.

<sup>1</sup> Federal staff are obliged to report to the criminal authorities, their superiors or the federal financial controller any serious or lesser offences that are prosecuted *ex officio*, which they are aware of or have been informed of in the course of their duties.

<sup>2</sup> Reporting obligations in other federal legislation shall remain unaffected.

<sup>3</sup> Persons who are entitled to refuse to make statements or give evidence under articles 113.1 168 and 169 of the code of criminal procedure of 5 October 2007 are not subject to the reporting obligation.

<sup>4</sup> Employees have the right to report to the federal financial controller any other irregularities which they are aware of or have been informed of in the course of their duties. The controller shall consider the facts and take any necessary measures.

<sup>5</sup> No one who, in good faith, reports an offence or irregularity or gives evidence of one as a witness shall suffer any occupational detriment.

<sup>23</sup> Gysin motion 03.3212, legal protection for persons who identify cases of corruption, and Marty parliamentary motion 03.3344, measures to protect whistleblowers.

<sup>24</sup> Section 14.1d of the new federal personnel law:

<sup>1</sup> The employer shall offer to reinstate the employee in his or her former post or, if that is impossible, offer alternative work that can be reasonably required of him or her if, within 30 days of discovering that there are possible grounds for overturning the dismissal, the employee provides the employer, in writing, with well-founded evidence that the dismissal is null and void because he or she has, in good faith, reported an offence under section 22a.1 or an irregularity under section 22a.4 or given evidence as a witness.

whistleblowing line, an on-line mailbox for staff of the federal roads office, who are already required to report suspicions, and since October 2008 the federal police whistleblowers coordination office.

65. Turning finally to part iii of the recommendation, the Swiss authorities refer to the letter of 20 August 2008 to all the cantonal governments (see paragraph 6), inviting them to consider the various recommendations, and in particular whether to make it obligatory to report suspicions of corruption and take steps to protect whistleblowers. They add that at the time of the visit, most cantons – Berne, Uri, Schwyz, Obwalden, Nidwalden, Zug, Basle City, Basle Rural, Sankt Gallen, Argau, Thurgau, Neuchâtel, Geneva, Vaud, Valais, Zurich, Ticino, Schaffhausen and Fribourg – already made such reporting obligatory and that following the federal invitation five more have launched similar initiatives<sup>25</sup>.
66. GRECO notes with satisfaction the information supplied. The newly passed amendments to the federal personnel legislation introduce a general legal obligation for federal employees to report suspicions of corruption and at least basic legal arrangements to protect whistleblowers at federal level. Protecting whistleblowers' identity is undoubtedly a valuable supplementary measure. Following the federal government's letter, the cantons appear to be gradually following suit in this area. GRECO also welcomes the steady increase in practical arrangements, including ones at cantonal level, to encourage reporting.
67. GRECO concludes that recommendation xi has been implemented satisfactorily.

#### **Recommendation xii.**

68. *GRECO recommended 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.*
69. With reference to part i of the recommendation, the Swiss authorities state that the issue of familiarising judges with the notion of legal persons' criminal liability has been included in the training activities referred to under recommendation iii, in particular the training day entirely devoted to corruption and the criminal liability of legal persons, organised on 3 April 2009 by the federal prosecution service (see paragraphs 17 ff). The criminal liability of legal persons, since its introduction into Swiss legislation, has also been included in the programme of regular training sessions available to criminal law practitioners.
70. Regarding part ii of the recommendation, the Swiss authorities state that the government considered the issue of additional penalties and the establishment of a criminal record for legal persons in the context of the Federal Council report on GRECO recommendations iv, vi and xii. It

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<sup>25</sup> In Nidwalden, additional measures are planned under the new code of criminal procedure to provide extra-judicial protection for witnesses. In Zurich the ombudsman has acted as a reporting centre for suspicions since 2007 and guarantees whistleblowers anonymity. As noted earlier, staff were informed by the cantonal administration intranet of this new role in April 2008, and in July 2009 in the staff newsletter. In Lucerne, parliament has instructed the government to draft legislation to establish an independent institution to which the public and employees can report any administrative deficiencies. The proposed bill will also include measures to protect whistleblowers. The same applies in Zug, where the government will shortly approve draft legislation to establish an ombudsman, whose responsibilities will include receiving reports of corruption, and the finance director has been given explicit instructions to protect whistleblowers when the staff regulations are next revised. The government of Geneva is currently discussing the prevention of corruption and the introduction of a telephone line for whistleblowers within the cantonal structure.

emerged that various penalties already exist in both criminal law (with fines of up to CHF 5 million [EUR 3,5 million] under article 102 of the criminal code, RS 311.0, the publication of judgments and confiscation measures) and in civil law (such as dissolution, particularly when a company's purpose is illicit or immoral, public law supervision and withdrawal of authorisations to engage in business). Generally speaking, additional criminal measures, namely banning specific activities, dissolving firms or placing them under supervision, which had already been considered in a preliminary draft in 1991, are not considered to be sufficiently justified or necessary under Switzerland's system of company criminal liability<sup>26</sup>. Nor was there any evidence to date that fines were an essentially inadequate means of appropriately sanctioning legal persons. The government concluded that the current arrangements were satisfactory and that there was no need to change the general system of criminal penalties for businesses laid down in article 102 of the criminal code.

71. With regard to the specific issue of excluding undertakings found guilty of offences from public tendering, the government noted that an alternative approach was to amend the legislation on public procurement, since the administrative sphere offered several advantages over the criminal one. This is the option proposed in the preliminary draft federal legislation on public procurement of 30 May 2008<sup>27</sup>. Section 26 provides that firms found guilty of corruption will be excluded from public tendering for three years unless the bidder can show that the situation is once more compatible with the law and that in the mean time it has taken all necessary steps that can be reasonably required to avoid such offences in the future. In addition, the federal construction and logistics office, which is the central purchasing department for all the civil departments, plans to introduce a system of declarations of integrity that all bidders will be required to submit, which will provide for contractual penalties or exclusion from public tendering.
72. The introduction of a criminal record for legal persons is on the 2007-2011 parliamentary agenda. A revision of the parts of the criminal code that deal with criminal records (articles 365ff) has therefore started, with a series of consultations in January 2009. The consultations revealed no opposition and the introduction of such a system seems to be justified and consistent with legal theory<sup>28</sup>. Draft legislation is therefore currently being drawn up.
73. GRECO notes with satisfaction the draft legislation on the exclusion of firms guilty of corruption from public tenders, even though this is an administrative rather than, as the recommendation suggested, a criminal matter, and the introduction of a criminal record for legal persons. This is clearly consistent with the recommendation and parts ii and iii have therefore been implemented. Concerning the question of training on the criminal liability of legal persons, GRECO notes that practitioners have the opportunity to familiarise themselves with this concept during specific sessions (such as, for example, the training day on 3 April 2009, organised by the federal prosecution service), as well as ordinary training programmes which also cover this topic.
74. GRECO concludes that recommendation xii has been implemented satisfactorily.

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<sup>26</sup> In the consultations on this preliminary draft, such additional penalties were considered to be too far removed from the penal system and required the criminal courts to take decisions that were essentially financial in nature or relating to company management. See the message of 21 September 1998 on modifications to the Swiss criminal code (general provisions, entry into force and application of the criminal code), the military criminal code and the federal law on the criminal status of minors (FF 1999 1787), p. 1950.

<sup>27</sup> See the explanatory report on the preliminary draft legislation, available on the Internet: <http://www.efd.admin.ch/dokumentation/gesetzgebung/00571/01239/index.html?lang=fr>.

<sup>28</sup> See, in particular, Macaluso, *La Responsabilité pénale des personnes morales et de l'entreprise*, thesis Lausanne 2004, p. 222; Niggli/Gfeller, in: *Basler Kommentar, Strafrecht II*, 2. Auflage, Basel 2007, Art. 102 N 417.

### Recommendation xiii.

75. GRECO recommended 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).
76. The Swiss authorities state that the obligations code has been amended by the addition of certain new provisions (presented in part in paragraph 125 of the evaluation report), which came into force on 1 January 2008<sup>29</sup>. There are two major aspects. Firstly, the requirement to have accounts audited has been extended to include private as well as public limited companies (art. 818 of the obligations code), limited partnerships with shares (art. 764), co-operative societies (art. 906), associations (art. 69b of the civil code) and foundations (art. 83b of the civil code). The reporting arrangements have also been changed. For example, if during a regular check the auditor identifies a serious breach of the law, which includes any criminal offence, and thus corruption, it must advise not only the board of directors but also the general meeting of shareholders (art. 728c.2 of the obligations code) – where the type of entity considered implies the existence of such governing bodies. Previously the general meeting was only informed at a later stage. The auditor's statute establishes a duty of fairness that requires him or her to notify the general meeting of any criminal offence, even if they are only uncovered by accident. Moreover, even though auditors are not obliged to report such matters to the criminal authorities, under certain circumstances<sup>30</sup> they may report such facts as they are aware of.
77. On 15 August 2008, the federal auditing supervisory authority held its annual meeting with the three main professional associations (the fiduciary chamber, the Swiss fiduciary union and the chamber of financial and management accountants SWISCO). Recommendation xiii was on the agenda and the federal authorities invited the professional associations to do more to familiarise and train their members in matters relating to corruption and the reporting of suspicions by auditors and accountants. On 3 June 2009, as part of its continuing training programme, the fiduciary association then organised a training day in Zurich entirely devoted to the various obligations of auditors when they identify breaches of the law. Another seminar on this subject is scheduled for 2010. In June 2008, the Swiss internal audit association ran a two-day course that included, among other subjects, the fight against corruption and respect for the rules, as they affect internal auditors. In addition, the steps to be taken when breaches of the law, including corruption offences, are identified are now explicit elements of auditors' and accountants' training and examinations. Moreover, edition 11/2008 of "*L'expert-comptable suisse*", the main professional journal devoted to auditing law and the supervision of auditors, included a detailed article on auditors' reporting obligations under the new article 728c of the obligations code. Another special edition, 09/2009, was devoted to corruption. Other articles that have been published to raise the profession's awareness of these issues cover such topics as how auditors should respond to fraud, economic crime in a period of crisis and protecting whistleblowers and combating corruption.
78. Finally, the subject is currently being examined in connection with the updating of the Swiss auditing standard *NAS 240: fraud and error – the auditor's responsibilities*. Checking that NAS

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<sup>29</sup> These affect articles 727ff of the obligations code (CO, RS 220).

<sup>30</sup> i.e. with the authorisation of the federal auditing supervision authority provided under article 321.2) of the criminal code or when the board of directors and the general meeting of shareholders take no action in response to an auditor's notification.

240, which corresponds to ISA 240, was correctly applied was also an important element of the inspections carried out in 2008 by the federal auditing supervisory authority.

79. GRECO acknowledges the information supplied and notes with interest the extension of the audit requirement since 1 January 2008 to a wider number of categories of legal entities and that it is at present accepted that auditors may report, under certain circumstances, criminal acts to the prosecuting authorities. GRECO also notes that the concerted training efforts aimed at auditors and accountants indisputably cover the detection of corruption (which was the aim of the present recommendation), and the fact that the current work on transposing ISA 240 may lead to further relevant developments.
80. GRECO concludes that recommendation xiii has been implemented satisfactorily.

### III. CONCLUSIONS

81. **In view of the above, GRECO concludes that Switzerland has satisfactorily implemented almost all of the recommendations contained in the Joint First and Second Round Evaluation Report.** Recommendations i to iii and v to xiii have been implemented satisfactorily. Recommendation iv has been partly implemented.
82. GRECO notes with great satisfaction the exemplary efforts accomplished by Switzerland in order to rapidly draw all the conclusions from the first evaluation report addressed to the country which was adopted in June 2008. It welcomes the fact that almost all areas covered by the recommendations to Switzerland have received a considerable amount of attention and this has been reflected in significant progress in fields such as the anti-corruption rules applicable to public officials and those relating to transparency and supervision of the functioning of government. In many cases, the invitation to cantons to contribute to the implementation of the recommendations at their level has again had significant effects. Major efforts have been made to improve awareness of and training in specific aspects of preventing and combating corruption. The recent adoption of the Law on the organisation of the federal criminal authorities (*LOAP*) has reinforced the country's anti-corruption tools in various areas; for instance, it has clarified the supervision of the Confederation's public prosecutor and introduced a legal framework on the protection of whistleblowers. Moreover, auditors are more closely associated with those efforts and may, at present, report – under certain circumstances – criminal acts to the prosecuting authorities. Nevertheless, GRECO recalls that, in its view, private sector corruption is no less serious than public sector corruption. Thus, it wishes to encourage the Swiss authorities to resume and complete its consideration of the applicability of special investigation techniques in relation to private corruption (subject-matter of the single outstanding recommendation). It also expresses the hope that this form of corruption will soon, in serious cases, become a predicate offence for money laundering.
83. GRECO therefore invites the Head of the Swiss Delegation to submit further information on the implementation of recommendation iv by 30 September 2011 at the latest.
84. Finally, GRECO invites the Swiss authorities to authorise publication of this report as soon as possible, translate it into the country's other official languages and publish these translations.