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# OECD Phase 2 Review – On-Site Visit Switzerland

## Presentation by
## Transparency International – Swiss Chapter
## Bern, 14 May, 2004

On behalf of Transparency International Switzerland I would like to express our sincere appreciation for this opportunity to meet with the Review Group and to share our views and assessments with you.

I would like to introduce my colleagues who have kindly agreed to participate in this discussion and share their opinion with you based on their special expertise:

Mr. Hugo Bruggmann, Member of the Board of Transparency International Switzerland and Managing Director of the Seco Technovation

Ms. Anne Schwöbel, Managing Director of Transparency International Switzerland and

I am Christoph Stückelberger, Former Vice President of Transparency International Switzerland.

You have asked for a brief presentation of “what we do to fight corruption”. Transparency International Switzerland (TI-Switzerland) is very active on a wide range of topics:

- support for the OECD Convention; seeking more transparency and corruption-prevention
- fighting for whistleblower protection

- working with the private sector to help introducing effective corruption-prevention structures and systems

- fighting for an centre of competence against corruption within the Swiss federal administration

- working with the administrations at the federal-, state- and municipal level with the goal to improve corruption prevention

- lobbying to tighten legislation at federal level in particular for the Federal Export Credit Guarantee Law („Bundesgesetz über die Exportrisikoversicherung“) and the procurement field (Bundesgesetz für öffentliches Beschaffungswesen) in order to prevent corruption

  and

- offering services for presentations on various topics.

The basic principles of our work are to inform the civil society, the administration on the federal-, state- and municipal level and the private sector to create coalition-building platforms. This strategy helped strengthening our public recognition over the last years. It is also important to mention that TI-Switzerland's goals are not to investigate or to pursuit individual cases, but are solely based on preventative work.

We will address the issues accordingly to the program we received from the SECO for the second phase and will not directly answer the official questionnaire.

## 1. General Observations and Awareness of the Civil Society Concerning Bribery of Foreign Public Officials in International Business Transactions

Concerning this matter, Switzerland has fared well in the TI Corruption Perceptions Index. From Rank 12 (among 91countries) with a score of 8.4 (on a scale of 0-10) in 2001 and the same rank in 2002 (score 8.5), in 2003 Switzerland slipped to Rank 8 (among 133) with a score of 8.8.

The TI Bribe Payers Index (BPI) shows Switzerland on position number 5 in 1999 (out of 21 countries). The actual score shows a marginal improvement from 7.7 in 1999 to 8.4 in 2002. Only Australia ranked better with a score of 8.5.

This ranking is misleading as the general awareness given to corruption in Switzerland is still very moderate. A recent survey (April 2004) done by economiesuisse and TI-Switzerland concludes that a considerable number of Swiss companies pay almost no attention to the issue of corruption. The results of the study illustrate how 123 companies perceive and handle the subject of corruption. Some major findings of the study are:

- 30% of the companies consider corruption a topic in their every day business
- 77% of these companies are confronted with corruption when dealing in foreign markets
- but only 52% of the companies know the prohibition of corruption of foreign public officers
- the other 48% are not aware of the prohibition of corruption of foreign public officers, thereof 28% are active in foreign markets
- 48% of the companies, who are affected by corruption, have not adapted their company terms to the new Swiss legislation since it entered in force.

The survey may be looked at with some caution but is certainly a good reflection on some tendencies in Switzerland concerning the level and the awareness of corruption. Only 52% of the companies are familiar with the criminalization of cross-border bribery. It is a fact that the knowledge about the criminalization of cross-border bribery in 2004 is still surprisingly limited considering the fact that it has been integrated into the national law since 2000 as a serious indictable offence and can be punished with up to five years of imprisonment (Art. 322 octies Criminal Code).

**It is our opinion that the Swiss government could do much more to propagate the Convention and its national law. The next paragraph describes the efforts made by Swiss authorities in the field of corruption.**

## 2. Efforts of the Swiss Authorities

### a. Do the Swiss Authorities Have Enough Human and Financial Resources for the Effective Prosecution of Bribery?

Since the beginning of 2002, the competency for prosecuting complex and international bribery cases has been shifted form county level to federal (national) level. The reason of this change is to avoid smaller Kantone (States) to be overwhelmed by the investigation of complex cases. This project is called “Effizienzvorlage”. Unfortunately until now this opportunity

has not been used by the States. In our knowledge there is not a single State which has delegated its competency to the Confederation for a corruption case. It is our strong opinion that this is a matter of competence and communication.

Another goal of the “Effizienzvorlage” was to increase human resources. It was planned to boost the federal prosecution department to 80 employees in 2004. Today the department has only a headcount of 40 people who constantly have to fight for any additional human and financial resources. To quote the speaker of the National Prosecutor: “In the National Prosecution department today exist more complex corruption cases then ever before. Nonetheless, as a result we are prohibited to hire more employees to deal with the increase of complexity.” In our view the Effizienzvorlage has not been implemented at all. Unfortunately, the opposite has happened. Instead of an increase of financial and personal resources to guarantee an efficient prosecution for complex corruption cases, the government continuously cuts the budget for these types of cases.

**TI-Switzerland demands that the government implements the Effizienzvorlage in accordance to its initial goals.**

### b. Do the Swiss Authorities have a Structure within the Federal Administration against Corruption?

Within the Swiss federal administration, many ministries, departments and offices deal with one or several aspects of corruption. Some institutions have taken effective measures in order to prevent and fight corruption, but *there is no entity with the capacity to coordinate and supervise all these different activities*. Therefore, there is a danger that they do not achieve optimum results and that they are not sustainable in the long term. TI- Switzerland considers this situation as unsatisfactory and as hampering the effectiveness of the administration’s efforts to fight corruption.

In 2002, TI- Switzerland made an appeal to the Federal Council (Bundesrat) to close this gap by establishing a special entity to deal specifically with the prevention of corruption. Last year, the Federal Council rejected the appeal, arguing that the Swiss federal audit office already partly fulfills these tasks. While we appreciate the excellent work done by this office, the prevention of corruption and especially the coordination of anti-corruption measures is not its primary role. Hence, we still consider it necessary to have one small, but targeted entity dedicated exclusively to preventing and combating corruption, capable of following up on the initiatives and measures already undertaken in the past, as well as collecting and disseminating new ones. This entity should not only act as a coordinator, it should also inform, motivate and train employees in seminars and workshops.

**TI- Switzerland therefore renews its appeal to the Federal Council to establish a centre of competence against corruption within the federal administration. Thereby, it would**

**also fulfil Art. 6. /1. of the Convention of the United Nations against corruption which explicitly asks the parties provide such an entity.**

## 3. New Laws Implementing the Convention

### a. The Liability of Legal Persons

Switzerland has strengthened its measures of prevention and repression of bribery, punishing in particular the active corruption of foreign public officials. The revised criminal law on corruption entered into force on 1 June 2000 (Art. 322ter-322octies).

Company liability was introduced in the Swiss Criminal Code last year with the new articles 100quater and 100quinquies which entered into force on 1 October 2003. This regulation concerns failure within the organization of the company in two ways:

- First of all, the rule imposes subsidiary criminal liability on the enterprise. Therefore the enterprise is only liable, where no individual can be identified because of a failure in its organization.
- Secondly, the rule contains a primary liability for the enterprise with scope limited to certain offences, including bribery of Swiss and foreign public officials. That means the liability of the company is invoked independently of the liability of any individual. Where acts of bribery can be imputed to an individual, such individual is liable, in addition to the enterprise. There may be then multiple liability. The Swiss law provides a maximum fine for legal person of five million Swiss francs.

At the moment any application of the Swiss law concerning company liability according to articles 100quater and 100quinquies of Swiss Criminal Code does not exist.

Concerning the relationship of liability between the legal person and the natural person, information about identity of administrators are public and can be obtained from the Public Companies Registry. There are different proceeding ways: per post (a Certificate of Incorporation is available within 2-3 days), per e-mail (1-2 day/s) or by personal enquire to the competent Companies Registry.

The problem of obtaining information about shareholders and beneficial owners is that these data are not collected in one single register. Legal entities have the obligation to keep a register (*share register* or *register of members*) in which ownership of shares in that company is entered, together with the full names, addresses, extent of holding and class of shares for each shareholder. To access this register and the entered information, it is necessary to enquire with the company itself.

Formally there is no obligation to keep a register about ownership of bearer shares (proof of ownership is possession of the share certificate). Nevertheless, small and medium legal entities often keep a register of ownership. On the other hand is not possible for companies whose shares are quoted at the Stock Exchange to keep such a register for practical reasons. In these cases bearer shares are usually kept under lock and key, often deposited in a bank. In Switzerland the bank has to check the identity of the person according to the Anti-Money Laundering Act (MLA, RS 955.0).

According to the Swiss Law the beneficial owner of a legal entity is usually the company itself, due to the fact that the company has legal personality. In case of “shell-companies”, however, the beneficial owner is not the same person as the legal owner. If a financial intermediary is involved, the MLA requires the determination of the beneficial ownership.

This kind of information might be obtained from the company itself or from a bank, if the company holds a bank account. Only in the scope of a penal enquiry the competent penal authority has the power to enquire the existence of accounts with banks.

There are no differences on the subject of an investigation for offences/crimes concerning companies or individuals. The competent authorities in those matters are the competent penal cantonal authority according to the different cantonal procedural codes.

**TI-Switzerland appreciates the implementation of the provision that holds companies responsible for their liability. The fact that Switzerland has adapted the legislation to international standard in that matter is also a promising sign to counter bribery effectively.**

### b. Money Laundering

**The Legal System**

The Anti-Money Laundering Act entered into force on 1 April 1998 (MLA, RS 955.0) and applies to the whole financial sector. The notion of financial intermediary concerns the following persons:

- The financial intermediaries subjected to supervision according to special laws (bevor entering in force of MLA), such as banks, insurances institutions, traders in securities and managers of funds
- Lawyers, notaries
- Post services
- Precious Metals Brokers
- Change Offices

The MLA imposes on the financial intermediaries some obligations concerning the organization, e.g. training and internal audit but also obligations concerning their operations, such as

ascertaining the identity of the contracting party and beneficial owners, clarification of the financial background and the purpose of a transaction or of a business relationship if it appears unusual and its legal validity is not clear or if there are indications that funds stem from criminal activities or are subject to the power of disposal of a criminal organisation, and the obligation of preserving the documentation.

From the bank's point of view, these due diligence obligations were already imposed by the Agreement on the Swiss Bank's Code of Conduct with regard to the exercise of due diligence (CDB) and by the Directives on money laundering. The current CDB was revised and entered in force on July 2003, whereas the money laundering directives were replaced by the Ordinance of the Swiss Federal Banking Commission (SFBC) on money laundering from 18.12.2002, RS 955.022.

According to Art. 4 of the SFBC money laundering Ordinance, financial intermediaries are not permitted to accept assets that, they know, or are expected to know, are the proceeds of criminal activities, even if committed outside Switzerland. The proceeds of criminal activities include in particular any assets obtained trough corruption, embezzlement of public funds, abuse of an official function, or dishonest dealings by a public officer.

Officers or employees of financial intermediaries render themselves liable to prosecution for money laundering if they help to accept, deposit, invest or transfer assets which they know or can assume stem from crime. Negligent acceptance of assets of a criminal origin does not render liable to prosecution for money laundering. However it may conflict with the provisions regarding the fitness to operate a bank according to the Swiss Banking Code. Banks are also forbidden to accept funds which they know or must assume stem from *corruption or the misuse of public funds*. They therefore have to be particularly careful in checking whether they are directly or indirectly entering into business relationships with persons who carry out important public functions for a foreign state or with persons or companies who or which are recognisably *closely connected* which such holders of office, and whether they wish to accept and deposit funds from such persons. Since 1 May 2000 the intentional acceptance of funds which belong to foreign holders of office and which stem from corruption also renders liable to prosecution for money laundering.

**Sanctions applied in Switzerland**

In the two inquires about corruption which involved the former Head of Secret Service of Peru, Vladimiro Montesinos and the former President of Nigeria, Sani Abacha, the following sanctions have been ordered:

- freeze of suspicious assets
- confiscation of funds
- extradition

The banks are sanctioned with:

- administrative procedures
- special audit (to be paid by the banks involved in the two issues)

- pecuniary sanctions (violation of the due diligence obligations such identification of the contracting partner and the beneficial owner)

**One Example of Application of Money Laundering Offence**
In November 2001, the SFBC concluded its investigation in the case of the former Head of Secret Service of Peru, Vladimiro Montesinos. In its final decision it ordered the removal of Bank L. Ltd General Manager. The SFBC discovered significant shortcomings with Bank L. Ltd. In opening banking relationships with politically exposed people (PEP). In its August 28, 2001 decision the SFBC ruled that the bank did not exercise due diligence with regard to Montesinos and had fallen short of clarifying the source of funds in cases of unusual transactions. Despite significant amounts deposited and indication of activities in arms dealing, it did not investigate any further. In establishing the banking relation it based itself solely on information provided by an important customer of its mother company. The bank failed to recognize Montesinos' PEP quality even though publicly accessible information would have enabled to do so with reasonable efforts.

**Additional Conditions**
When the main infraction has been committed abroad, the Swiss courts require the **double incrimination**. In terms of confiscation, the Swiss jurisprudence considers that, with exception of a special norm, the **Swiss jurisdiction** has to be competent according to the Art. 3 and 7 of the Swiss Criminal Code to further investigate about the infraction which is at the origin of the assets confiscated or whose assets are the result or the instrument (Decision of the Supreme Court 117 IV 233 consid. 4 p. 238 ; 115 Ib 517 consid. 7g/aa p. 538 and 13c p. 553 ; decision 1P. 229/1993 of 08.11.1993, translate in SJ 1994 p. 110). Cfr. 6s.82/2002/ROD

**No Different Application of Money Laundering Offence if the Predicate Offence has been the Bribery of a Domestic or Foreign Public Official**
The main offence which money laundering according to Art. 305bis Swiss Criminal Code has to base on, is a crime. A crime is an offence punished with imprisonment (Art. 9 Swiss Criminal Code). According to Art. 322ter Swiss Criminal Code, the corruption of a Swiss public officer is sanctioned with at most five years imprisonment or with detention. That is the same sanction as for the corruption of a foreign public official (Art. 322septies CP).

Therefore, according to Swiss law, there is no difference between the application of the money laundering offence if the predicate offence is the corruption of a Swiss or a foreign public officer.

**No Concrete Cases for Cooperation from the Bribery of Foreign Public Officials**
The 1 August 1990. The corruption of foreign public officers is sanctioned by Art. 322septies Swiss Criminal Code and entered into force on 1 May 2000.

We do not know any cases yet, where Switzerland has applied the new amendments on money laundering to employees or members of middle management who helped or cooperated to launder money of illegal gains "earned" by corrupt foreign public officers.

**Reporting System**

The Art. 9 of the Anti-Money Laundering Act of 1997, RS 955.0 defines the manner and the terms of reporting to the Financial Intelligence Unit.
A financial intermediary who knows or presumes, on the basis of founded suspicion, that assets involved in the business relationship are related to an offence under Article 305bis of the Swiss Criminal Code, that they are the proceeds of a crime, or that a criminal organization has a right of disposal over them shall without delay notify the FIU, which is the Money Laundering Reporting Office Switzerland in Berne.

According to the report of the Swiss Federal Banking Commission of 30.08.2000 concerning "Abacha funds at Swiss banks", the 19 investigated banks complied with the reporting requirement provided for under the Anti-Money Laundering Act as soon as there were indications of the possible criminal origins of the funds, and the funds in question were frozen within the bank.

In the case of the former Head of Secret Service of Peru, Montesinos, even though the Bank C. Ltd did not discover the PEP quality of Montesinos in time, reacted immediately to the subsequent press coverage and reported to the Federal money laundering reporting agency. This report entailed the opening of penal proceedings by the Public Attorney of the Canton of Zurich against Montesinos for alleged money laundering, as was reported by the Federal Department of Justice and Police on 3 November 2000. This again induced Bank F. Ltd. to report its Montesinos funds to the Federal money laundering reporting agency.

**TI-Switzerland demands the actual legislation to go one step further including the provision on bribery of private persons according to the Criminal Convention of the European Council. TI-Switzerland proposes bribery on private persons to be qualified as a serious indictable offence (crime), punishable by imprisonment. If bribery on private persons was considered as an indictable offence, it would count as a crime in which situation the provision of money laundering would apply.**

### c. ERG (Export Credit Guarantee)

The Federal Export Credit Guarantee Law ("Bundesgesetz über die Exportrisikoversicherung"), which is in force since 1958, shall be replaced by a new federal law, the so-called Federal Swiss Export Credit Guarantee Laws ("Bundesgesetz über die Schweizerische Exportrisikoversicherung, SERVG"). At present interested parties are invited to make statements on the draft of this new law, which is not in force yet. In its statement Transparency International - Switzerland took the opportunity to draw the attention to various documents of the OECD Working Party on Export Credits and Credit Guarantees (ECG), especially the "Ac-

tion Statement on Bribery and Officially Supported Export Credits." Transparency International - Switzerland requested that the conditions and information requirements according to these ECG-documents should be reflected in the new law, i.e.:

- to invite applicants to provide a declaration that neither they, nor anyone acting on their behalf, have been engaged or will engage in bribery in the transaction. Already now Swiss exporters applying for cover have to certify in writing that the particular contract to be covered is not tainted by corruption. However ,Transparency International - Switzerland requests the explicit stipulation of this anti-bribery clause in the new law
- to inform, in writing at the time of application, applicants requesting support about the legal consequences of bribery in international business transactions under the Swiss law
- to require applicants to disclose information on agents commissions
- to require applicants to advise whether they have ever been debarred by the World Bank or any other multilateral or bilateral financial institutions as a result of having been involved in bribery or found guilty in a national court of having been engaged in bribery
- to refuse payments in case of evidence of bribery
- to invite the executive bodies of SERVG to publicize information on monthly coverage awarded.

**TI-Switzerland strongly believes that a restrictive anti-bribery clause is key for an effective way to counter bribery in the export industry.**

## 4. Protection of Whistleblowers

People who disclose information about malpractice in a company or in an organisation, in an institution or in a public function, are not protected by Swiss law. There is no protection whatsoever against dismissal at work or other reprisals. The employee is bound by law to the obligation of secrecy and the employee's duty of good faith towards the company. Employees are prohibited by law to disclose information which could harm the company, even if the information is true to its nature and/or is based on malpractice or punishable offence by the employer.

Unfortunately, up to this point, the Swiss government has shown no interest in this matter and vehemently opposes a change of the Swiss law. Nor does the Swiss government take any action to sensitize companies on the subject of whistleblowers. Remo Gysin, a member of the Swiss National Council, in cooperation with TI-Switzerland, has submitted a Motion to the Swiss National Council to change that particular law. We hope that the motion is being dealt with during the next Council Session which is being held in summer 2004.

There is, however, the opportunity to report respective evidences of malpractice on the homepage of the Swiss Department of Finance Control. Unfortunately, the platform is rarely used as it is literally unknown. TI-Switzerland strongly believes that this is by far not enough to protect whistleblowers. The public authorities at least must develop a detection system for whistleblowers which guarantees their anonymity.

An analysis of the private sector is similarly discouraging. Only a few large Swiss multinational companies have initiated internal processes to report such incidents. Swiss companies of average size, the so called KMU's, do not protect whistleblowers in any way.

**The subject of whistleblowing in Switzerland is closely connected to the loss of a job, what we deeply regret. The situation is a pity as whistleblowing very often is the only opportunity to uncover corruption cases. TI-Switzerland heavily favors a change of the law to protect whistleblowers.**

## 5. Organizational Efforts from the Private Sector to Prevent Corruption in Swiss Companies

In Switzerland, there is a strong need for action in terms of educating, institutionalizing and supporting the fight against corruption. As the study conducted by economiesuisse and TI-Switzerland has shown, 48% of companies who participated (123), do not know the ban on bribery of foreign officials. Only slightly more known are the new law ascribing the liability of legal persons (55%) and the ban on tax deductibility of bribery money (63%). These topics should be promoted by the government in form of brochures and marketing campaigns.

76% of companies have not implemented institutionalized channels to protect whistleblowers. Furthermore, only 24 % of the companies have reacted to a changed legal environment. Only 12% of the companies (10) have implemented a Compliance Officer or an internal control system to help establishing and strengthening institutions.

Finally, more than 50% of the companies expect the Swiss government to get more involved in the fight against corruption. Particularly the wish has been expressed to intensify international coalition building against corruption which should prevent distortion of competition. Multinational companies want bigger support from diplomatic services when doing business abroad.

**Whereas multinationals are well aware of the subject of bribery and take respective counter actions, small and medium companies need to raise the awareness and take the necessary steps to fight corruption.**

## Conclusion

Regarding the topic of bribery and its awareness, a number of actions should be taken to guarantee a better enforcement of the Convention and the national law:

- assurance of adequate long-term funding, including follow-up reviews after the completion of the phase II
- strengthening mutual legal assistance
- better financial and personal resources for specialized prosecutorial offices
- improving awareness of the Convention and the national law trough informational programs by the government
- publication of annual scorecards rating government enforcement efforts and monitoring of governments by NGO