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Second Interim report

Third Evaluation Round

Second *Interim* Compliance Report on Switzerland

"Incriminations (ETS 173 and 191, GPC 2)"

"Transparency of Party Funding"

Adopted by GRECO
at its 68th Plenary Meeting
(Strasbourg, 15-19 June 2015)

I. INTRODUCTION

1. The Third Round Evaluation Report on Switzerland was adopted at GRECO's 52nd Plenary Meeting (21 October 2011) and was made public on 2 December 2011, following authorisation by Switzerland (Greco Eval III Rep (2011) 4E, [Theme I](#) and [Theme II](#)).
2. As required by GRECO's Rules of Procedure, the Swiss authorities submitted a Situation Report on measures taken to implement the recommendations.
3. In the Compliance Report adopted at its 61st plenary meeting (Strasbourg, 14-18 October 2013), GRECO concluded that Switzerland had satisfactorily implemented three of the eleven recommendations contained in the Third Round Evaluation Report. In view of this outcome, it qualified the very low level of compliance with the recommendations so far as "globally unsatisfactory" within the meaning of Rule 31, paragraph 8.3 of its Rules of Procedure. GRECO therefore decided to apply Rule 32 concerning members found not to be in compliance with the recommendations contained in the mutual evaluation report, and asked the head of the Swiss delegation to provide a report on progress made in implementing the pending recommendations (i.e. recommendations i and iii regarding Theme I, and recommendations i to vi regarding Theme II) at the latest by 30 April 2014, pursuant to paragraph 2(i) of that rule.
4. In the Interim Compliance Report adopted at its 64th plenary meeting (Strasbourg, 15-19 June 2014), GRECO again qualified Switzerland's level of compliance with the recommendations as "globally unsatisfactory" since the total number of recommendations outstanding remained unchanged. GRECO also asked the head of the Swiss delegation to provide a report on the progress made in implementing the pending recommendations (i.e. recommendations i and iii under Theme I and recommendations i to vi under Theme II) by 31 March 2015, pursuant to paragraph 2(i) of the same rule. This report, which was submitted on 9 April 2015, served as a basis for the Second Interim Compliance Report.
5. GRECO selected the Republic of Moldova and France to appoint rapporteurs for the compliance procedure. The rapporteurs appointed were Ms Cornelia VICLEANSCHI, prosecutor, Head of General Section, Office of the General Prosecutor of Moldova, on behalf of the Republic of Moldova, and Ms Agnès MAITREPIERRE, *Chargée de mission* to the Director of Legal Affairs, Ministry of Foreign Affairs, on behalf of France. They were assisted by GRECO's secretariat in drawing up the Compliance Report.

II. ANALYSIS

Theme I: Incriminations

6. It can be noted that, in its Evaluation Report, GRECO addressed 5 recommendations to Switzerland concerning Theme I. The Compliance Report showed that three of these recommendations – recommendations ii, iv and v – had been implemented satisfactorily. The Interim Compliance Report concluded that recommendations i and iii remained partly implemented. Compliance with these recommendations is dealt with below.

Recommendations i et iii.

7. *GRECO recommended:*

- to ensure that the offences of granting and receiving advantages in articles 322^{quinquies} and 322^{sexies} of the criminal code cover, unambiguously, cases in which the advantage is intended for a third party (recommendation i) and

- to abolish the requirement for a prior complaint before prosecutions are brought for bribery in the private sector (recommendation iii).

8. GRECO recalls that it considered these two recommendations as partly implemented in the Interim Compliance Report. On 30 April 2014 the Swiss government had adopted a draft law and the accompanying message, for submission to Parliament. GRECO considered that the wording of the draft legislation took appropriate account of recommendations i and iii, removing the ambiguity in respect of cases where the advantage is intended to benefit a third party and abolishing the requirement that a complaint must be laid before a prosecution can be brought for bribery in the private sector.

9. The Swiss authorities state that Parliament has begun its deliberations on the draft law and that the matter has been referred to the Legal Affairs Committee of the Council of States. After an initial general discussion, that committee decided, on 16 January 2015, to hold a hearing of external parties. This took place on 26 and 27 March 2015. At its 23 April 2015 session the committee acknowledged the need to legislate and globally approved the draft law. However, the majority of the committee wished, contrary to the government's proposal, that private sector bribery not be prosecuted *ex officio* when no public interest is affected or threatened. The Council of States examined the draft law on 3 June 2015. Like its committee, it recognised the need to legislate and generally approved the draft law. It accepted, in particular, the principle that bribery in the private sector be prosecuted *ex officio*. However, it approved by a slim majority of 23 votes to 22 the exception proposed by the committee – against the opinion of the government. Finally, the amendments to articles 322^{quinquies} and 322^{sexies} of the criminal code were approved as proposed by the government. The draft law has now been passed to the National Council and the relevant commission will express its opinion shortly.

10. GRECO takes note of the continuation of the legislative work. It welcomes the Council of States' global approval of the government's draft law and also the amendment to articles 322^{quinquies} and 322^{sexies} of the criminal code, as required by recommendation i. As regards recommendation iii, while the recognition that bribery in the private sector can in principle be prosecuted *ex officio* is positive, GRECO regrets that the requirement of a prior complaint has been replaced by a requirement that a public interest be at stake, as this notion is open to interpretation and may be as restrictive as the former requirement. GRECO recalls that the Criminal Law Convention (ETS No. 173) neither subjects prosecution of private bribery to a prior complaint, nor to the condition that a public interest be affected. On the contrary, the Explanatory Report to the Convention calls for limiting the differences between the rules applicable to public and private sector bribery. GRECO also notes that other offences with a private sector element such as dishonest management, for example, are prosecuted *ex officio* in Switzerland and it takes the view that bribery in the private sector ought to be dealt with on the same basis. It hopes, therefore, that the public interest limitation, which was approved by the slimmest of majorities at the Council of States, will be removed as the legislative procedure continues.

11. GRECO concludes that recommendations i and iii remain partly implemented.

Theme II: Transparency of party funding

12. It can be noted that, in its Evaluation Report, GRECO addressed 6 recommendations to Switzerland concerning Theme II. In the Compliance Report and the Interim Compliance Report GRECO considered that none of these recommendations, discussed below, had been implemented.

Recommendations i to vi.

13. *GRECO recommended:*

- (i) to introduce accounting rules for political parties and election campaigns that provide for full and appropriate accounts to be kept; (ii) to ensure that income, expenditure and the various elements of assets and liabilities are accounted for in detail and in full and presented in a coherent format; (iii) to explore ways of consolidating accounts to include parties' cantonal and local branches and bodies directly or indirectly linked to them or otherwise under their control; (iv) to ensure that adequate financial information is readily available to the public in good time; (v) where appropriate, to invite the cantons to adapt their own regulations in line with this recommendation (recommendation i);

- (i) to introduce a general obligation for political parties and candidates to elections to provide information on all donations received, including donations in kind, above a certain size together with the identity of the donors; (ii) to introduce a general ban on donations from persons or bodies that fail to reveal their identity to the political party or candidate concerned; (iii) to invite cantons that do not yet have such measures to adopt them (recommendation ii);

- (i) to seek ways of increasing the transparency of the financing of political parties and election campaigns by third parties; (ii) to invite also the cantonal authorities to consider these matters ((recommendation iii);

- (i) to ensure that, as far as possible, independent audits are carried out on political parties subject to the obligation to maintain accounts and on election campaigns accounts; and (ii) to invite cantons to do the same ((recommendation iv);

- (i) to ensure the effective and independent supervision of the financing of political parties, and election campaigns, in accordance with Article 14 of Council of Europe Recommendation Rec(2003)4 on common rules against corruption in the funding of political parties and election campaigns; and (ii) to invite cantons to do the same ((recommendation v);

- that the future rules on the financing of political parties and election campaigns be accompanied by effective, proportionate and dissuasive sanctions ((recommendation vi).

14. As in the case of the Compliance Report and the Interim Compliance Report, the information provided by the Swiss authorities is general in nature and does not specifically concern the individual recommendations. The authorities describe the new developments since the Interim Compliance Report at different levels of the Swiss confederation.

15. At the level of the federal government, on 29 August 2014 a delegation of the Swiss government had a meeting with the leaders of the government parties and the Chairs of the parliamentary groups at which it presented two models for introducing greater transparency into party funding. The first model provided for an obligation to publish party accounts, for example on a new website, while the second provided for voluntary publication in the federal register of political parties. The government wished to obtain the reactions of the governing parties' leaders before taking a decision. All the parties, apart from the Socialist Party (PS), came out in favour of maintaining the status quo, with no transparency requirement, since they regard the current system as having proven its usefulness in the case of Switzerland. Conversely, the PS would like to see the introduction of even stricter measures than those proposed under the two models envisaged by the Federal Council.
16. On 12 November 2014 the Swiss government decided not to legislate in this field. It considers that the particularities of the Swiss political system are scarcely reconcilable with a law on party funding, although the cantons of Ticino, Geneva and Neuchâtel have implemented their own regulations. The system of direct democracy, with its frequent popular votes, means that the parties are far from being the only political players in Switzerland. At the same time, the cantons enjoy a broad degree of autonomy. It would therefore go against the principles of federalism to impose uniform national legislation on them in respect of party funding. In addition, in Switzerland politics and party funding are perceived as a largely private matter, rather than being a State responsibility. Because of the system of part-time politicians, the parties' financial needs are far smaller in Switzerland than abroad.
17. At the level of the federal parliament, as mentioned in the Interim Compliance Report, the Legal Affairs Committee of the National Council (CAJ-N) had to decide whether to pursue its initiative 14.400 "Limited companies listed on the stock exchange and companies controlled by public authorities. Publication of donations to politicians" following the Council of States' rejection, on 10 June 2014, of Mr Minder's initiative 12.499. This committee initiative took up the second part of the Minder parliamentary initiative, which consisted in developing the necessary legal basis to oblige companies in which the Confederation or another public authority held a majority share to make public, in their annual financial statements, all donations to politicians, parties and political organisations, along with the names of the beneficiaries and the amounts concerned.
18. At its meeting on 14 August 2014, the CAJ-N confirmed its support for initiative 14.400, which was therefore submitted to the National Council. However, on 10 December 2014, the National Council finally refused, by 92 votes to 86, to follow up initiative 14.400; it has therefore been definitively abandoned.
19. Lastly, at cantonal level, the Swiss authorities indicate that, in the canton of Neuchâtel, the law amending the law on political rights (transparency of funding of political parties, election campaigns and referenda), which was passed by the cantonal parliament on 1 October 2013, entered into force on 1 January 2015. A decree of the Neuchâtel State Chancellery dated 3 December 2014 established a uniform chart of accounts, applicable as from the financial year 2015, as provided for in Art. 133a para. 3 of the law. In this canton anonymous donations are prohibited and donors' identities must be disclosed for sums in excess of CHF 5 000 (approximately EUR 4 850). However, political parties are not required to disclose the exact amount paid by each donor, but merely the total donations received and a list of donors.
20. GRECO notes with regret that the federal government has decided not to legislate on transparency of the funding of political parties and election campaigns for the time being. GRECO also notes the

discontinuation of initiative 14.400 at the level of the federal parliament, as a result of which the parliamentary work on the subject is currently suspended. Following Sweden's adoption of legislation in these matters in 2014, Switzerland is therefore the only GRECO member State in which there is currently no legislation on the transparency of political funding. GRECO is aware that this situation reflects the fact that there is no political majority in favour of transparency of party funding. It can only hope that the situation will evolve, possibly through the emergence of new majorities, the outcome of public debate on this theme - which remains very lively in Switzerland – or the positive examples set by certain cantons, including Neuchâtel, which show that a solution can be found to reconcile the particularities of the Swiss political system and the recommendations of Committee of Ministers Recommendation Rec(2003)4.

21. GRECO concludes that recommendations i-vi have still not been implemented.

III. CONCLUSIONS

22. **In view of the above, GRECO again concludes that Switzerland has made little tangible progress regarding the overall implementation of the recommendations considered not to have been acted upon in the Third Round Compliance Report. The total number of recommendations implemented or addressed satisfactorily – three out of eleven – remains unchanged as compared with the Compliance Report and the Interim Compliance Report.**
23. In respect of Theme I – Incriminations, recommendations i and iii remain partly implemented. In respect of Theme II – Transparency of Party Funding, all the recommendations (i to vi) have still not been implemented.
24. With regard to incriminations, GRECO takes note of the continuing legislative work so as to criminalise explicitly all cases where an undue advantage intended for a third party is granted or received and to eliminate the requirement that a complaint must be lodged before a prosecution can be brought for bribery in the private sector. Regarding the latter issue, it regrets that the Council of States recently decided to replace the requirement for a prior complaint with that of an interference with public interest, which is a notion open to interpretation that could be as limitative as the previous requirement. It hopes that this restriction will be lifted as the legislative procedure continues. Pending the conclusion of this work, the level of implementation of the recommendations remains unchanged.
25. With regard to transparency of party funding, GRECO regrets the federal government's decision of 12 November 2014 not to legislate on the transparency of funding of political parties and election campaigns. It recalls that a GRECO delegation was received by the Federal Council in April 2013, but without this meeting resulting in any positive developments. Following Sweden's adoption of legislation in these matters in 2014, Switzerland is therefore the only GRECO member State in which there is currently no legislation on the transparency of political funding, and GRECO's recommendations accordingly remain unimplemented. The federal parliament initiative 14.400 has also been definitively abandoned. Conversely, like the examples to be found in the cantons of Ticino and Geneva, the entry into force in the canton of Neuchâtel of a law on transparency of funding of political parties, election campaigns and referenda shows that, where the political will exists, solutions can be found to reconcile the particularities of the Swiss political system and the recommendations of Committee of Ministers Recommendation Rec(2003)4.

26. In view of the above, GRECO concludes that the present very low level of compliance with the recommendations is still "globally unsatisfactory" within the meaning of Rule 31, paragraph 8.3, of the Rules of Procedure.
27. Pursuant to paragraph 2(i) of Rule 32 of the Rules of Procedure, GRECO asks the head of the Swiss delegation to provide a report on the progress made in implementing the pending recommendations (i.e. recommendations i and iii under Theme I and recommendations i to vi under Theme II) by 31 March 2016.
28. In addition, in accordance with Rule 32, paragraph 2, sub-paragraph (i), GRECO invites the President of the Statutory Committee to send a letter to the Permanent Representative of Switzerland to the Council of Europe, drawing his attention to the non-compliance with the relevant recommendations, and the need to take determined action with a view to achieving tangible progress as soon as possible.
29. Lastly, GRECO invites the Swiss authorities to authorise, as soon as possible, the publication of this report, to translate it into the other official languages and to make these translations public.