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Message concerning the Federal Act on Private Security Services Provided Abroad

of January 23, 2013

Madame President of the National Council, Mr President of the Council of States, Ladies and Gentleman,

With this message, we submit to you a draft proposal for the Federal Act on Private Security Services Provided Abroad, with the recommendation that it be adopted.

Together therewith, we recommend that the following parliamentary motions be set aside:

2011	M	10.3639	licensing and oversight system for security companies working in crisis or combat areas (S 23.9.2010, Defence Committee CS; N 2.3.2011)
2011	M	10.3808	Banning of private armies in Switzerland (N 17.12.2010, Lang; S 7.6.2011).

Respectfully,

On behalf of the Swiss Federal Council

The President of the Swiss Confederation:
Ueli Maurer
Federal Chancellor: Corina Casanova

Overview

The draft law that is the subject of this Message regulates the providing of private security services abroad from Switzerland. The proposed Act is intended to contribute to the safeguarding of the internal and external security of Switzerland, to the realisation of its foreign policy objectives, to the preservation of Swiss neutrality, and to the assurance of respect of international law. To this end, a system of prohibitions will be introduced, which is to be connected with a procedure for prophylactic declaration. The draft proposal also regulates the contracting of security companies by Federal authorities for the performance abroad of tasks of protection.

International developments in recent years bear witness to the growing importance of the role played by private service providers in the military and security domains. With several thousand individuals deployed worldwide, there is today a large market potential. In the coming ten years, the volume of the market for private security services in war zones will reach an estimated 100 billion dollars worldwide.

At the national level, the issue of security companies operating out of Switzerland in other countries has taken on growing significance in recent years. As of the end of 2010, some twenty security companies, based in eight cantons, could be identified as being effectively or potentially active in crisis or conflict zones. It may be assumed that the market for private security services will continue to grow in the future.

The existing legal regime applicable to private security companies suffers from a number of gaps. The majority of the regulations are cantonal, and do not apply to security companies operating abroad. As a result, these companies conduct their activities without being subject to any system of oversight. The present draft proposal is aimed at filling this gap. The intent is neither to legitimise nor to encourage the use of private security companies, nor to ban them entirely. The draft also represents an additional step forward in pursuing the initiative launched, notably, by Switzerland for the adoption of the Montreux Document of 17 September 2008 and for the drafting of the International Code of Conduct for Private Security Service Providers of 9 November 2010. By adopting legislation in this domain, Switzerland, in its capacity as initiator and promoter of the procedure for accession to these instruments, will take its place at the vanguard of this initiative, leading the way for other countries.

The proposed Act will apply to individuals and companies that provide, from Switzerland, private security services abroad, or who provide in Switzerland services in connection with private security services provided abroad. The draft proposal also covers companies based in Switzerland that exercise control over security companies operating abroad. It prohibits by law certain activities connected with direct participation in hostilities or with serious violations of human rights, and provides for a system of prohibitions that can be issued ad hoc by the competent authority in specific cases. For the oversight of activities conducted abroad, the draft proposal foresees a duty on the part of companies to file a

declaration with the competent authority. Activities in conflict with the purposes of the Act, will be prohibited by the authority. In exceptional cases, however, special authorisation may be granted by the Federal Council. On the other hand, companies are permitted to provide services abroad, as long as these are not problematic in nature. Infringements of the Act will be subject to punishment.

The draft Act also governs the contracting of security companies by Federal authorities for the performance of certain tasks of protection abroad. It regulates the conditions for contracting with the companies. Specifically, the contracting authority must make certain that the security company meets certain requirements and that the security personnel has received adequate training for the performance of the protection tasks. As a rule, such personnel is to be unarmed, except in cases where it must be in a position to respond in self-defence or emergency situations. Subject to special authorisation, to be granted in exceptional cases by the Federal Council, the use of force is also not permitted.

The Act will also apply to activities already being conducted at the time of the Act's entry into force.

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1 Principal features of the proposal

1.1 Background

1.1.1 Existing situation with regard to security companies operating abroad

International developments in recent years bear witness to the growing importance of the role played by private service providers in the military and security domains. With several thousand individuals deployed worldwide, there is today a large market potential. The case of Iraq provides particularly clear evidence of this development. The volume of the worldwide market for private security services in crisis and conflict zones will reach an estimated 100 billion dollars in the coming ten years.

Private companies operating internationally in the military and security industry furnish their clients not only with logistical support, personnel, and infrastructure, but occasionally also with heavy military equipment including combat aircraft, tanks, and artillery. The rise in the international importance of private military and security service providers is largely a consequence of the power vacuums that arose in many regions following the end of the Cold War, which precipitated the full or partial collapse of a number of politically unstable countries. In addition, there is an undisputed need to provide special protection for official representations of states and the staffs of international organisations and non-governmental organisations (NGOs), at risk when working in regions where government structures for maintaining order function only badly or not at all. Such protection is offered by private security companies.[1]

At the national level, the Report by the Federal Office of Justice of 30 December 2010[2] on a possible system for regulating private security companies operating from Switzerland in crisis and conflict zones (hereinafter, FOJ Report of 30 December 2010) has shown that this issue has also taken on a growing importance in Switzerland in recent years. The registration of the AEGIS Group Holdings AG in the commercial register of Basel-City in 2010 has served to illustrate that security companies from other countries – including very large international corporations – could have an interest in establishing subsidiaries or holding companies in Switzerland, in order to profit from the substantial advantages offered by our country in terms of stability, infrastructure and financial centres. While it is not possible to furnish a complete overview of the market, the Report did show that, as of the end of 2010, some twenty private security companies operating or capable of operating in crisis and conflict zones were domiciled in the cantons of Basel-Landschaft, Basel-City, Geneva, Lucerne, Schaffhausen, Ticino, the Valais, and Zug.

1 See the Report of the Federal Council on Private Security and Military Companies (in response to the Postulate by Stähelin, no. 04.3267, of 1 June 2004, "Private Security Companies") of 2 December 2005, BBl 2006 623, sect. 3.2).

2 www.bj.admin.ch > Topics > Security > Legislation > Private security companies

Private security companies operating abroad from Switzerland are a reality, and the problems entailed therein are likely to become even more pronounced in the future. The existing legal regime applicable to companies that provide private security services, moreover, suffers from a number of gaps. The majority of the regulations are cantonal, and do not apply to security companies operating abroad (see section 1.3 below). As a result, these companies conduct their activities without being subject to any system of oversight. The present draft proposal is aimed at filling this gap. This is not intended as a means of legitimising or encouraging the use of private security companies. But neither is their use to be entirely banned. The draft also represents an additional step forward in pursuing the initiative launched, notably, by Switzerland for the adoption of the Montreux Document of 17 September 2008,[3] and for the drafting of the International Code of Conduct for Private Security Service Providers of 9 November 2010[4] (see sections 1.9.1 and 1.9.2, below). By adopting legislation in this domain, Switzerland, in its capacity as initiator and promoter of the procedure for accession to these instruments, will take its place at the vanguard of this initiative, leading the way for other countries.

1.1.2 Preparatory stages

On 2 December 2005, the Federal Council adopted a first report on private security and military companies, which was prepared in response to the postulate by Stähelin dated 1 June 2004.[5] Based on the conclusions of that report, the Federal Council issued a mandate to the Federal Department of Justice and Police (FDJP) to examine the question of whether it might be advisable to make military or security service providers who, operating out of Switzerland, conduct activities in crisis or conflict zones, subject to an authorisation requirement or a licensing system.

In fulfilment of the mandate from the Federal Council, the Federal Office of Justice (FOJ) published on 21 May 2008 a report on its study of a system for the compulsory registration of private security companies that operate in conflict and crisis zones.[6] Based on the conclusions of that report, the Federal Council resolved on 21 May 2008 to refrain from regulation at that time. In grounding its decision, it named the minimal attraction of the Swiss market for such companies and the disproportionately high expense of effective oversight as compared to the minor importance of the phenomenon. The Federal Council also wished to await further developments in international law and in the legislation of other countries.

In the spring of 2010, interest in the issue was revived following the registration of the AEGIS Group Holdings AG in the Basel-City commercial register. A number of

3 www.eda.admin.ch > Topics > International law > International humanitarian law > Private military and security companies> The Montreux Document
4 www.icoc-psp.org
5 BBl **2006** 623
6 www.bj.admin.ch > Topics > Security > Legislation > Private security companies.

different motions were subsequently submitted before parliament.[7] These signalled the existence of a political will to institute a Federal regulatory regime. On 6 September 2010, the Defence Committee of the Council of States (DefC-S) put forward the motion "Licensing and oversight system for securities companies working in crisis or combat zones" (hereinafter, DefC-S motion 10.3639). The motion was adopted by the two chambers of the Federal Assembly on 23 September 2010, and 2 March 2011, respectively. The Federal Council was thereby mandated to prepare a law to serve as a basis for a licensing and oversight system for security companies operating out of Switzerland in crisis or combat zones. Pursuant to the motion, the law was to contain, in particular, a designation of permitted activities and a prohibition of those activities that run counter to Switzerland's foreign, security, and neutrality policy interests. The intended addressees are both holding and operating companies that are domiciled in Switzerland and which organise their operations from Switzerland or conduct related activities inside Switzerland (recruiting, training, etc.). On October 1, 2010, National Council member Josef Lang put forward the motion "Banning of private armies in Switzerland" (hereinafter, Lang motion 10.3808). The motion was adopted by the two chambers of the Federal Assembly on 17 December 2010, and 7 June 2011, respectively. The Federal Council was thereby mandated to propose a law to serve as a basis for the introduction of a requirement for the filing of a declaration by, and the licensing of private security companies and, in particular, for a prohibition on the stationing in Switzerland of private armies deployed in conflict and crisis zones.

On 25 August 2010, the Federal Council issued a mandate to the FDJP to examine the need for such regulation.

On 16 February 2011, the Federal Council took note of the conclusions of the FOJ Report of 30 December 2010 on a possible system for regulating private security companies operating from Switzerland in crisis and conflict zones, and voted to issue a mandate to the FDJP, in cooperation with the Federal Department of Economic Affairs (FDEA), the Federal Department of Foreign Affairs (FDFA), the Federal Department of Defence, Civil Protection and Sport (DDPS), and the cantons, to prepare a preliminary draft bill.

On 30 March 2011, the Federal Council decided to suspend preparation of a draft bill on the police tasks of the Confederation. It subsequently issued a mandate to the FDJP to examine whether certain provisions of the Ordinance of 31 October 2007 on the Contracting of Private Security Companies (OCSC)[8] could be taken over in the draft proposal for regulating Swiss security companies operating in crisis and conflict zones.

From 12 October 2011 through 31 January 2012, a consultation procedure was conducted concerning the preliminary draft of the Act.

On 29 August 2012, the Federal Council took note of the results of the consultation procedure and issued a mandate to the FDJP to prepare a draft law proposal.

7 On 22 December 2011, the Federal Council rejected the following motions by the Defence Committee of the National Council dated 22 February 2011: Motion 11.3008 "No private armies on Swiss territory"; motion 11.3009 "Regulation of private security companies on Swiss territory"; motion 11.3010 "Licensing system for private security and military companies with registered office in Switzerland"; motion 11.3011 "Systematic oversight of private military companies in Switzerland"; motion 11.3012 "Private armies in Switzerland".

8 SR **124**

.2 Federal laws applicable to security companies

1.2.1 War material legislation

The War Material Act of 13 December 1996 (WMA)[9] regulates the manufacture and transfer of war material and related technologies. It provides for a system of dual licensing. First, any person who wishes to manufacture or conduct trade in war materials must obtain an initial licence. Second, for certain activities, such as brokering, importing, exporting, transiting, transferring intellectual property, or conducting trade in war materials, an additional special licence is required for each respective activity. The authority competent for the issuing of licences is the SECO.

1.2.2 Control of goods legislation

The Control of Goods Act of 13 December 1996 (CGA)[10] furnishes a statutory basis for the institution of a system for the oversight of goods usable for both civil and military purposes and, in particular, of military goods that are subject to international conventions. In conformity with that Act, the Federal Council may order the introduction of a licensing and registration requirement for the implementation of international conventions. Article 4 of the Control of Goods Ordinance of 25 July 1997 (CGO)[11] institutes a declaration requirement for the export of goods not subject to licensing, where such goods could have a connection with the development of nuclear, biological, or chemical weapons (para. 1). The SECO prohibits their export where it has reason to assume, or has knowledge, that the goods intended for export are to be employed in the development, manufacture, or use of such weapons (para. 3). It renders a decision within no more than fourteen days following the filing for export declaration. Where circumstances demand, this time limit can be extended. Until such time as the SECO has rendered a decision, export is prohibited (para. 4). Infringement of the declaration requirement or of the export prohibition pursuant to paragraphs 3 and 4 is subject to punishment.

1.2.3 Weapons legislation

The Arms Act of 20 June 1997[12] regulates, in particular, the purchase, export, carriage, manufacture, and conduct of trade in weapons. It provides, among other things, that the export, transiting, brokering to clients abroad, and the conduct of trade abroad from Switzerland, in weapons, weapon parts, or ammunition, be subject to the legislation on war material, in those cases where the goods in question are also covered by that legislation. Where this is not the case, the activities in question are subject to the legislation on the control of goods. Licences for the purchase or

9 SR **514.51**
10 SR **946.202**
11 SR **946.202.1**
12 SR **514.54**

conduct of trade in arms are issued by the competent cantonal authorities. Any person who wishes to export arms to a Schengen state must file for registration with the Central Weapons Registration Office.

1.2.4 Embargo legislation

The Embargo Act of 22 March 2002 (EmbA)[13] authorises the Confederation to enact coercive measures for the enforcement of sanctions designed to ensure respect of international law and, in particular, the respect of human rights. Such coercive measures may be imposed, for example, in order to restrict commerce in goods and services. Also possible, however, are prohibitions, and licensing and registration requirements. The Federal Council is authorised to enact such measures in the form of ordinances. The Ordinance of 30 March 2011 instituting measures against Libya,[14] for example, prohibits the delivery and procurement of military equipment and of goods to be used for internal repression, including the providing of armed mercenaries. The SECO, as the competent oversight authority, monitors compliance with bans on the supplying of military equipment or other related goods.

1.2.5 Legislation on measures for the safeguarding of internal security

The legislation on measures for the safeguarding of the internal security includes a series of provisions governing the contracting of security companies by Federal agencies for the performance of tasks of protection. Article 22, paragraph 2, of the Federal Act of 21 March 1997 on Measures to Safeguard Internal Security (ISA)[15] authorises Federal authorities to delegate the task of protecting Federal authorities, personnel, and buildings to private security service providers.

The Ordinance of 27 June 2001 on Security Services under Federal Responsibility (OSFR)[16] regulates the tasks of the public agencies assigned in ISA articles 22–24 with providing protection of personnel and buildings (OSFR art. 1). Pursuant to article 3 of that Ordinance, the competent authorities may call upon “private security services” for the guarding of the Federal buildings “where its own staff must be reinforced” (art. 1). Private security services may also be called in “for Federal events, where police reinforcements are required” (art. 2).

The OCSC sets out the minimum requirements for the awarding of assignments to private security companies by the Confederation where it is legally authorised to delegate the performance of security tasks to private entities. The ordinance is applicable to all Federal authorities that delegate performance of a protection task in Switzerland or abroad to a security company. It fixes, in particular, the conditions for the contracting of a private company and lays out certain training requirements

13 SR **946.231**
14 SR **946.231.149.82**
15 SR **120**
16 SR **120.72**

for security personnel. It also includes provisions governing the contracting of security companies for the performance of protection tasks abroad.

1.2.6 Criminal law

The Swiss Criminal Code (SCC)[17] renders punishable individual offences that could be related to the activities of security companies:

- *SCC article 264ff. (Genocide, crimes against humanity, and war crimes)*: Under these provisions, Swiss and foreign nationals, who in the course of an armed conflict commit a crime against humanity or a war crime, are subject to punishment by imprisonment, for up to a life term.
- *SCC article 271 (1) (Unlawful act on behalf of foreign state):* Under this provision, Swiss and foreign nationals who, without official authorisation, carry out on behalf of a foreign state acts that fall under the responsibility of a public authority, or who carry out such acts on behalf of a foreign political party or other foreign organisation, are subject to punishment by imprisonment for a term of up to three years, or by fine.
- *SCC article 299 (Violation of foreign territorial sovereignty)*: Pursuant to subparagraph 1, shall be subject to punishment by imprisonment for a term of up to three years, or by fine, any person who violates the territorial sovereignty of a foreign state, in particular, by the unlawful performance of official acts on foreign territory, or who enters foreign territory in violation of international law. Pursuant to subparagraph 2, shall be subject to the same punishment any person who attempts, from within Swiss territory, to disrupt by use of force the political order of a foreign state. These offences are prosecuted only subject to decision by the Federal Council (SCC art. 302, para. 1).
- *SCC article 300 (Hostile acts against belligerents or foreign troops):* Under this provision, Swiss or foreign nationals who from within neutral Swiss territory carry out, or provide support for, hostile acts against a belligerent party are subject to punishment by imprisonment for a minimum term of from six months to twenty years, or by fine. This provision is intended for the preservation of Swiss neutrality. In times of peace, it applies to civilians who are not subject to military criminal law. It corresponds to article 92 of the Militarily Criminal Code of 13 June 1927 (MCC).[18] The elements of the offence are satisfied where the perpetrator, acting from within neutral Swiss territory, undertakes or provides support for hostile acts against a belligerent party. This offence is prosecuted only subject to decision by the Federal Council (SCC art. 302, para. 1).
- *SCC article 301 (Military espionage against foreign states)*: Pursuant to this provision, Swiss or foreign nationals who, from within Swiss territory, conduct military intelligence gathering on behalf of a foreign state against another foreign state, or who organise, recruit for, or facilitate such intelligence gathering services, are subject to punishment by imprisonment

17 SR **311.0**
18 SR **321.0**

for a term of up to three years, or by fine. This provision is intended for the preservation of Swiss neutrality. It corresponds to MCC article 93. This offence is prosecuted only subject to decision by the Federal Council (SCC art. 302, para. 1).

Where employees of a security company commit an offence outside of Switzerland, they are subject to the provisions of the Swiss Criminal Code in the following cases:

- *SCC article 6:* The offender commits on foreign territory a crime or misdemeanour that, pursuant to the terms of an international agreement, Switzerland has an obligation to prosecute, provided that the act in question is also punishable in the place of commission, or that the place of commission is not subject to the criminal jurisdiction of any other country, and the offender is present in Switzerland and will not be extradited to another country.
- *SCC article 7 paragraph 1*: A Swiss national who commits a criminal offence on foreign territory is, as a matter of principle, subject to Swiss criminal law, provided that the act in question is also punishable at the place of commission (double punishability). Where the offender is a foreign national, Swiss law is applicable subject to the additional condition that the offender is present on Swiss territory and cannot be extradited due, for example, to a threat of torture, or that the offence in question is of such a particularly grave nature that it has been proscribed by the international community.

National criminal jurisdiction is complemented at the international level, pursuant to article 1 of the Rome Statute of the International Criminal Court of 17 July 1998,[19] by the International Criminal Court. The jurisdiction of the International Criminal Court is restricted to the most serious of crimes, which concern the international community as a whole, i.e., genocide, crimes against humanity, war crimes, and the crime of aggression (art. 5). Pursuant to SCC article 264*m*, the Swiss criminal justice system has jurisdiction where the offender has committed genocide, war crimes, or a crime against humanity, is present on Swiss territory, and cannot be extradited to another country or transferred to an international criminal court whose jurisdiction is recognised by Switzerland.

Pursuant to SCC article 102, where a company, while conducting business affairs in keeping with the company purpose, commits a crime or misdemeanour and, due to organisational deficiencies within the company, the act in question cannot be attributed to a specific natural person, the crime or misdemeanour is to be imputed to the company. In such case, the company is to be punished by a fine of up to CHF five million. The offence must have been committed in the course of conducting business affairs, that is, while conducting activities relating (indirectly) to the sale of goods or to the providing of services for monetary gain.

1.2.7 Military criminal law

A number of provisions of the MCC could apply to members of the personnel of private security companies, where certain requirements as to the person are satisfied

19 SR **0.312.1**

(arts. 4, 5, and 7). Under certain circumstances, the MCC is applicable both to acts committed in Switzerland and to those committed abroad (art. 10, para. 1) It also applies to civilians who have committed genocide, crimes against humanity, or war crimes, provided that they are present on Swiss territory and cannot be extradited to another country or transferred to an international criminal court whose jurisdiction is recognised by Switzerland (art. 10, para. 1bis).

Punishable under the MCC are, in particular, the following offences: hostile acts against a belligerent party or foreign troops (art. 92), military espionage against foreign states (art. 93), service in a foreign army (art. 94), genocide (art. 108), crimes against humanity (art. 109), and war crimes (art. 110–114).

MCC art. 59*a*, like SCC art. 102, governs the criminal liability of companies.

1.2.8 Federal legislation on matters of liability

For harm caused by security companies and their personnel through unlawful conduct abroad, liability is governed by Swiss law and, in particular, the Code of Obligations (CO),[20] provided that the conditions set forth in the Federal Act of 18 December 1987 on Private International Law (PILA)[21] are satisfied.

Where a security company under contract with the Confederation commits an act of unlawful conduct, the matter of its liability is governed by the Federal Act on State Responsibility of 14 March 1958 (SRA).[22] Pursuant to SRA art. 1, para. 1 (f), this law also applies to all other persons who have been entrusted with the performance of public tasks on behalf of the Confederation.

.3 Relevant cantonal law

Cantonal regulations governing security companies differ widely and do not apply to security services provided abroad. Individual cantons in the German-speaking part of Switzerland, and the Canton of Ticino, have introduced regulations imposing a licensing requirement for activities conducted by security companies. Other cantons in the German-speaking part of Switzerland, such as the Canton of Bern, do not provide for any licensing requirement. All of the western cantons of the French-speaking “Suisse romande” have acceded to the Concordat of 18 October 1996 on Security Companies (hereinafter, “Concordat Romand”). This intercantonal agreement sets forth common rules governing the activities of security companies, and makes such activities subject to a licensing requirement.

In response to calls for the harmonisation of the regulations in force, the Conference of the Directors of Cantonal Justice and Police Departments (CDCJP) drafted a proposal for a national intercantonal concordat. Taking into consideration the results of the consultation procedure and the expressed wish of the Western Swiss cantons to maintain their Concordat, the CDCJP was obliged to modify its draft proposal. On

20 SR **220**
21 SR **291**
22 SR **170.32**

12 November 2010, it adopted the final text of the Concordat on Private Security Services to be presented to the cantons for ratification. Together therewith, it issued a recommendation inviting all cantons to accede to either of the two concordats within two years. The Concordat of 12 November 2010 regulates the providing of security services by private individuals or companies. Like the "Concordat Romand", it foresees a licensing procedure. Activities conducted abroad do not fall within the scope of this agreement, either. As of 29 October 2012, six cantons had decided to accede to this Concordat,[23] while eight cantons declined to accede.[24] Five of those cantons had already acceded to the "Concordat Romand" prior thereto.

1.4 Proposed new law

The draft proposal is intended to contribute to the safeguarding of the internal and external security of Switzerland, to the realisation of Switzerland's foreign policy objectives, to the preservation of Swiss neutrality, and to the assurance of respect of international law, where private security services are provided abroad, from Switzerland, or where activities in connection with such services are conducted in Switzerland.

The proposed Act will apply to natural persons, legal persons, and business associations (companies), that provide, from Switzerland, private security services abroad, or who provide in Switzerland services in connection with private security services provided abroad. Its scope also extends to companies based in Switzerland with a financial interest in security companies operating abroad.

The draft Act also foresees the prohibition of certain activities connected with the direct participation in hostilities abroad. Security company employees who are domiciled in or have their habitual place of residence in Switzerland are prohibited from directly participating in hostilities abroad ("mercenary ban"). Companies are also not permitted to provide any services in Switzerland, or from Switzerland, of which it may be assumed that they will be utilised by the recipient in the commission of serious human rights violations.

Companies that wish to conduct any of the activities governed by the Act, must file a declaration thereof in advance with the competent authority. That authority initiates a review procedure whenever there are indications to suggest that the activity in question could be in conflict with the purposes of the Act. Where called for, the authority issues a prohibition. In a narrowly limited number of exceptions, the Federal Council can, however, grant special authorisation. Activities that are not in conflict with the purposes of the Act may be conducted abroad. In order to ensure effective implementation of the Act, the draft proposal also foresees oversight enforcement measures. Infringements of the Act will be subject to punishment. The Act will also apply to activities already being conducted at the time of its entry into force.

Further, the draft proposal also applies to Federal authorities that assign to a security company the performance of protection tasks abroad, or that hire such a company for support services. It regulates the conditions for contracting with the companies.

23 AI, AR, BS, SG, SO, UR.
24 FR, GE, JU, OW, SZ, VD, VS, ZG.

Specifically, the contracting authority must make certain that the security company meets certain requirements and that the security personnel has received adequate training for the performance of protection tasks. As a rule, such personnel is to be unarmed, except in cases where it must be in a position to respond in self-defence or emergency situations. Subject to special authorisation, to be granted in exceptional cases by the Federal Council, the use of force is also not permitted.

.5 Assessment of the proposed solution

1.5.1 Solutions explored

In preparing the draft proposal, the following possible solutions were explored:[25]

- Ex post facto declaration requirement: this solution would entail imposing upon companies that have provided private security services in crisis or conflict zones a duty to make report thereof to the competent authority after the fact. The advantage of such a solution would be that it is largely non-interventionist; nevertheless, it would be difficult to efficiently accomplish the intended purposes of legal regulation in this way.
- Prophylactic declaration and/or licensing requirement: this would involve introducing a declaration requirement for security companies and/or a licensing requirement for certain activities conducted by such companies. In contrast with an ex post facto declaration requirement, this would make it possible to attain the essential objectives aimed for by the Act. The disadvantage of such a system, however, is the sizeable bureaucratic and financial investment it would entail. In particular, the authority would need to conduct a review of the reputation of the security company and its personnel. In order to assess compliance with licensing conditions, it would need to conduct complicated on-site monitoring procedures at the place of contract performance. The granting of a licence could, moreover, be understood elsewhere as a warranty on the part of the Swiss authorities. Newly established foreign security companies could, as a result, have an even greater interest in domiciling in themselves in Switzerland, which due to its reputation, neutrality, and stability, already possesses a high level of attraction for them. The possibility that foreign countries could misinterpret a licence as indicating that Switzerland had issued a warranty for certain security companies could become problematic, in particular, if such companies were to commit violations of the law in the course of their activities.
- Ban on participation in acts of combat or acts preparatory thereto: this would involve the introduction of a complete ban on the participation of security companies in combat operations or the deliberate preparation of such acts. Such a ban could be introduced by itself, or in combination with other measures, such as, in particular, a licensing and/or declaration requirement. This solution would offer the advantage that the activities to be banned, as a result of their incompatibility with certain of Switzerland's interests, would

25 See the FOJ report of 30 December 2010.

be clearly designated. As a disadvantage to introducing such an absolute ban, however, it should be noted that the formulation of an abstract definition for drawing a clear distinction between combat operations and acts preparatory thereto could prove very difficult.

1.5.2 Results of the consultation procedure

On 12 October 2011, the Federal Council opened consultations on the draft proposal for the Federal Act on Private Security Services Provided Abroad. The consultation procedure ended on 31 October 2012. Statements were submitted by 44 of the 57 authorities and organisations that were invited to do so. 13 contributors took part in the consultations at their own initiative.[26]

44 of the contributors to the consultations recognise the need for legislation in the domain of private security services. 22 contributors are in general agreement with the preliminary draft Act. One political party, an umbrella organisation from the business sector, a trade association from the private security services industry, and two other associations, reject the preliminary draft on the grounds that the proposed system is unsuited and ineffective.

25 cantons expressly recognise the need for legislation. 17 cantons expressed general approval for the preliminary draft. Five cantons are willing to agree to the draft proposal, but would prefer a licensing system as foreseen in the "Concordat Romand". Seven cantons would like to see greater prominence given to the foreign element of the security companies and of the security services concerned; six demand an express mention that cantonal law shall continue to apply. One canton sees the delegation of security tasks to private companies by the Confederation as being problematic. Another is of the opinion that the preliminary draft of the Act is somewhat complicated. One canton welcomes the decision to introduce some form of regulation, but questions whether this requires the passage of a new law.

Some of the contributors to the consultations are in favour of enacting a federal law on private security services that are provided either in Switzerland or abroad, and would also like to see the introduction of a licensing system. One contributor to the consultations submits that the draft Act should be constructed exclusively on a system of prohibitions. Others feel that the draft proposal goes too far; they would limit the scope of application to private security services in crisis or conflict zones. Some contributors to the consultations would like to see the traditional activities of security and fire protection service providers, as well as those of companies that have only a holding interest in private security companies active abroad, removed from the scope of application of the Act.

The ban on direct participation in hostilities and on activities connected with serious human rights violations is welcomed. Some contributors would, however, like to see included in the draft proposal a comprehensive definition of the term "direct participation in hostilities" and an express mention of the connection with Switzerland. The meaning of term "serious human rights violations", as it is submitted, should also be made clear. Some consultation contributors consider that

26 A summary of the results of the consultation procedure may be accessed online at www.bj.admin.ch > Topics > Security > Legislation > Private security companies

the criminal sanctions proposed for infringements of the legal prohibitions are too mild.

Some contributors are of the opinion that security personnel to whom a Federal authority has assigned tasks of protection should not be permitted to use force or other police measures, or to employ weapons.

In the view of some contributors to the consultations, the Federal authority competent for enforcement of the Act should be designated in the draft proposal.

1.5.3 Substantive amendments to the preliminary draft

As a result of the consultation procedure, amendments were made to the draft proposal on the following points:

- The scope of application in article 2 of the draft proposal was more sharply delineated, in particular, with regard to the territorial and company-specific applicability criteria (such as, for example, the requirement that there be a connection between the services provided and a place of performance abroad).
- The list of private security services contained in article 4, letter (a), has been made more concise. The list is not exhaustive, but is nevertheless intended as an authoritative reference point with regard to the nature of the services the draft proposal is designed to cover. No longer included on the list are, in particular, the protection and processing of data, and the operation of alarm, intervention, and security service monitoring centres. These changes better reflect the underlying intent of the draft proposal to focus on services that could potentially pose problems in terms of Switzerland's national interests.
- The definition of the term "crisis and conflict zone" has been removed. As this term appears only in article 14 of the draft proposal, the explanation given in the notes to that article should suffice.
- A provision has been added, article 6, to govern the subcontracting of security services. Where such services are subcontracted to another company, the subcontractor that provides the service must conduct its activities in keeping with the same constraints as those to which the primary contractor is itself subject.
- Article 7 now requires that companies not only comply with the terms of the International Code of Conduct for Private Security Service Providers, but now, in addition, that they also become signatories to the Code. This also applies to companies domiciled abroad that conduct activities on behalf of the Confederation.
- The legal prohibition on direct participation in hostilities, as contained in article 8, was extensively redrafted and refined. In the new version, in keeping with the underlying intent of the draft proposal, the focus is now on the companies and no longer on individuals. Prohibited by law is the recruiting, training, and furnishing of personnel, directly or as an

intermediary, for purposes of direct participation in hostilities (para. 1 [a] and [b]), and the establishment, basing, operation, management, or exercise of control over companies that conduct such activities (para. 1 [c] and [d]). With regard to individuals (para. 2), their nationality no longer plays any role; the determinant factor is whether or not they are domiciled or have their habitual place of residence in Switzerland. This makes it possible to avoid various delicate issues of categorization. In contrast to the preliminary draft, the proposed prohibition now also extends to persons who are *in the service of a security company*. Individuals may thus be made subject to punishment only where a dual link to Switzerland can be established (domicile or residency in Switzerland, and conduct of activities for a security company that is based in Switzerland, or operates or is controlled from here). The rationale behind this is that the draft proposal is intended to allow prosecution only of those activities that have a sufficiently strong link with Switzerland as to be capable of seriously prejudicing its interests.

– As compared with the preliminary draft, article 9 now sets a more clearly defined criterion for establishing a link between the activity and a serious violation of human rights. Prohibited are security services of which it may be assumed that the recipients thereof will utilise them in the commission of serious human rights violations.

– Article 10 expressly provides, in paragraph 2, that companies that do not conduct business operations in Switzerland, but which exercise control, from here, over a security company (holding companies), must file a declaration of not only of those activities that they themselves conduct in Switzerland, but also of the activities conducted by the controlled security company. Where there has been a significant change in circumstances subsequent to the original declaration filed, companies subject to the Act must also file notice thereof (para. 3).

– Article 14 (Prohibition by the competent authority) has been made more categorical, in the sense that the authority now *must* issue a prohibition on any activity that is contrary to the purposes set forth in article 1 (para. 1). The discretion of the authority is thus limited to the assessment of whether the activity in question is indeed contrary to those purposes, or not. The non-exhaustive list provided under letters (a) through (f) designates situations that do not automatically give rise to a prohibition by law, but which are particularly sensitive with regard to the interests that Switzerland seeks to safeguard, and which thus merit particularly thorough review by the competent authority. Paragraph 2 sets forth, under the letters (a) through (c), three cases in which the authority must invariably issue a prohibition, without further review as to consistency with the purposes of the Act. Paragraph 3 prohibits the subcontracting of activities where the company that is to provide the service in question fails to comply with the constraints incumbent upon it.

– In article 15 of the draft proposal, refinements have been introduced into the provision authorising the Federal Council, in exceptional cases of high national interest, to permit activities subject to prohibition by the authority under the terms of article 14.

– Article 17 grants the Federal Council the authority to regulate the charging of fees for certain procedures and measures, provided that the principle of cost recovery is maintained.

– In keeping with the amendments made to the legal prohibitions pursuant to article 8 (Direct participation in hostilities) and article 9 (Serious violations of human rights), the corresponding modifications have been made in article 21, which renders infringements of those prohibitions subject to punishment. Severity of the potential punishment, however, has been left as foreseen in the preliminary draft.

– In article 25, paragraph 2, an additional criminal provision has been added which authorises, under certain conditions, the imposition of a penalty of up to CHF 20,000 on companies that contravene infringement provisions.

– The draft proposal includes a new provision, article 27, under which the authorities competent for the implementation of the planned Act will have a duty to report to the Office of the Attorney General any infringements of which they obtain knowledge in the course of conducting their official activities.

– Article 30 restricts the private security services that may be assigned by a Federal authority to a private security company to the following tasks of protection: the protection of persons and the guarding or surveillance of goods and properties. As with article 4, letter (a), the protection of movable property and intellectual property, and the transfer thereof, as well as the protection of data, and the processing thereof, have been removed from the draft proposal.

– As was also foreseen in the preliminary draft, the draft Act provides that a Federal authority that contracts with a security company for the performance of tasks of protection has a duty to make certain, among other things, that the company possesses liability insurance. However, article 31, paragraph 2, now imposes more stringent conditions for releasing the authority from this duty. The authority can contract with a company that does not have liability insurance only where purchasing such insurance would constitute a disproportionate expense for the company and where the risk of the Confederation's incurring liability, and the amount of damages that the Confederation could be obliged to pay, may be assessed as low.

– Unlike the preliminary draft, the draft proposal now states expressly, in article 32, that the training of the personnel of a security company under contract with the Confederation must also cover the use of physical force and of weapons in self-defence or emergency situations.

– Article 33 of the draft proposal now contains a new provision, according to which the personnel of a security company under contract with the Confederation must be identifiable as such when exercising its functions.

– The restrictions on the carrying of weapons by the personnel of a security company under contract with the Confederation are more stringent in the draft proposal than was foreseen in the preliminary draft. Pursuant to article 34 of the draft proposal, all security personnel are, as a general rule, to be unarmed, other than in cases where the situation abroad requires that such

personnel carry weapons in order to be able to react in self-defence or emergency situations.

- In the preliminary draft, it was foreseen that the personnel of a security company under contract with the Confederation would be authorised to use force and other police measures under certain conditions; this has been amended in the draft proposal, so that pursuant to article 35 thereof, it will lie within the authority of the Federal Council to grant authorisation to employ such measures, by way of exception, only where the task of protection cannot otherwise be accomplished.
- Pursuant to the new provision in article 36 of the draft proposal, a security company may subcontract tasks of protection with which it has been entrusted by a Federal authority only subject to the prior written consent of that authority.
- The draft proposal provides explicitly that the competent authority has a duty to ensure that the Federal Council and the public are properly informed, and must, to this end, prepare an annual report on its activities (art. 37).

1.6 Balancing of performance and costs

The draft proposal reflects the political will expressed by Parliament to make subject to Federal regulation security companies that, operating in or from Switzerland, provide private security services abroad.

In keeping with its decisions taken on 16 February 2012 and 29 August 2012, the Federal Council decided in favour of a system of prohibitions linked to a procedure for prophylactic declaration. This regime provides a means for overseeing as completely as possible problematic activities conducted by security companies without undue bureaucracy; cases can be rapidly reviewed, and any prohibitions or other restrictions issued can be effectively enforced. In this way, the Confederation can keep close watch on the market for security services provided abroad from Switzerland, and prohibit individual activities in specific cases without fully banning the providing of unproblematic security services. Federal law already foresees such a registration/declaration system in the domain of the control of goods, under which the competent authority is also able to issue prohibitions (see above, sect. 1.2.2).

Because the oversight system foreseen focuses only on problematic activities, the costs involved in enforcing the draft Act are limited (see also sect. 3.1, below). A comprehensive licensing and/or declaration system would generate far higher personnel and administrative costs, making it significantly more expensive.

.7 Comparison with the legal regimes of other countries

1.7.1 Germany

Germany does not presently have any specific regime for regulating the activities of private military and security companies. There are also no recognisable efforts being made to introduce such a regime in the foreseeable future. The German government explains this on the grounds that regulating the industry could actually have the effect of creating interest in new areas of activity for security companies. This must be avoided, it is argued, as there is little public acceptance of the industry in Germany. Nevertheless, private military and security companies do not operate in a legal vacuum in Germany. Rather, such companies must comply with the generally applicable provisions of national and international criminal law, weapons law, and foreign trade law. With regard to the conduct of activities abroad, for certain countries, UN or EU sanctions must be observed. Finally, Germany's Industrial Code provides that professional services for protection of the life and property of third parties are subject to licensing by the competent authority. This applies not only to the conduct of such activities in Germany, but also to their conduct by German companies abroad. The German government contracts with private security companies for the performance of security and logistical tasks abroad. Military intervention abroad is prohibited by the German Constitution.

1.7.2 Austria

Austrian law, like that of Germany, contains no statutory provisions specifically applicable to private military and security companies, neither with regard to services provided abroad nor to those provided under mandate from the Austrian government. Although the government included the matter in the coalition agreement for the 24th legislative period, as of the present date it has not yet followed up thereon. As in Germany, there are, however, also general legal provisions in Austria that that apply to private security companies. In addition to the Weapons Act, this is also the case, in particular, for the Industrial Code, which imposes a licensing requirement for the security industry. Of particular significance are two provisions contained in the Austrian criminal code. The first renders subject to punishment the unauthorised recruitment of armed personnel, or of personnel for membership in an armed force, and the military training, or command of such a force. The second renders punishable also a number of military support services provided or organised from Austria for foreign parties involved in a present or immediately imminent war or armed conflict.

1.7.3 France

Law no. 83-629 of 12 July 1983 exclusively governs the activities of private security companies conducted on French national territory. The French law is not applicable extraterritorially, so that the activities of French security companies abroad are not covered by it.

The French legislature has not enacted any legal provisions on holding companies with financial interests in private security companies operating abroad.

Criminal law in France punishes active participation in mercenary activities by imprisonment for a term of five years and a fine of 75,000 euros. Also subject to punishment is the leadership or organisation of a group of persons whose purpose is the recruitment, hiring, payment, arming, or military training of persons, the penalty being imprisonment for a term of seven years and a fine of 100,000 euros. The French government has several times examined the question of whether this provision also applies to private military companies operating abroad, without ruling, however, on the legality of such companies. For legal persons, French criminal law foresees the following sanctions: dissolution, permanent or temporary prohibition of an activity, permanent or temporary closure of company offices that have abetted in the commission of the incriminating acts, seizure.

Under French law, the personnel of a private military company may be prosecuted before French courts for war crimes, crimes against humanity, and genocide. These crimes are subject to punishment by imprisonment for a term of between fifteen years and life.

In France, the use of military force is a state monopoly and may not be delegated to private parties.

Since 1990, a number of private military security companies have been established in France, specialising, in particular, in the following activities: crisis prevention, crisis support services, crisis resolution.

1.7.4 United Kingdom

Although the United Kingdom actively cooperates in identifying relevant norms of international law and in developing international standards for the regulation of private security service providers, the country does not at present have any national legislation in this domain. Nor is there even a comprehensive overview available of the contracts awarded by the government to such service providers. In a so-called "Green Paper" dating from 2002, the British government took up the issue of regulating the industry, but did not follow up on this initiative. While there does exist a public oversight authority for private service providers who perform their services within Great Britain (Security Industry Authority, established by the Private Security Industry Act of 2001), there is no such authority for private security services provided abroad. Their services also do not fall within the scope of application of the laws governing the export of military equipment. On the other hand, Great Britain relies heavily on self-regulation within the industry and supports

measures of that nature also at the international level.[27] As the industry trade association, the British Association of Private Security Companies (BAPSC) works to promote adherence to strict quality standards. The government contracts only with security companies that comply with high, internationally recognised standards.

1.7.5 Italy

In Italy, aside from the criminal provisions on the prohibition of mercenary activities, there are no legal regulations governing security companies operating abroad.

Conversely, Italian law does regulate the contracting of private security guards by public bodies or by private parties for the surveillance and guarding of both movable and immovable goods on Italian territory. The protection of the physical integrity of persons and the maintenance of public order are tasks that, with some few exceptions, fall exclusively under the responsibility of the authorities in charge of public security and the police. For the combating of piracy, however, Italian law does permit the contracting of private security companies on commercial ships sailing under the Italian flag in international waters. The conduct of security activities by private parties on Italian territory is subject to a registration and licensing system. The carrying of weapons is subject to a licensing requirement.

Italian law does not contain any provisions on companies with a financial interest in security companies. It imposes licensing conditions only for the founding and management of security companies.

Italy has ratified the Geneva Conventions of 12 August 1949 and their Additional Protocols, as well as the UN's International Convention against the Recruitment, Use, Financing and Training of Mercenaries. In conformity with the requirements of the UN Convention, Italian law makes mercenary activities subject to punishment by imprisonment for a term of between two and seven years; participation in an act that disrupts the constitutional order of a foreign state or violates its territory is punishable by imprisonment for a term of between three and eight years. This is subject to the condition, however, that such acts do not constitute an even more serious criminal offence under Italian criminal law. Also punishable under Italian law, by imprisonment for a term of between four and fourteen years, is the recruitment, training, or financing of persons for the purposes of committing such offences. These criminal provisions apply to Italian nationals who commit such acts abroad, except in cases where such persons are subject to extradition. These rules also apply to foreign nationals who are present on Italian territory and cannot be extradited. The offences are not punishable where they have been authorised by the Italian government in keeping with its obligations under international agreements.

The Italian Criminal Code foresees the punishment of hostile acts against foreign states where, through those acts, Italy is made subject to a risk of war. In addition, punishment by imprisonment, for a term of between four and fifteen years, is foreseen for the recruiting or arming of Italian nationals on behalf of a foreign state,

27 Thus, the United Kingdom is collaborating with Switzerland, the United States, and Australia, and with non-governmental organisations and industry representatives, to develop a mechanism for monitoring compliance of private security service providers with the International Code of Conduct.

on Italian territory, without the authorisation of the Italian government. An Italian court ruled that a company that employed security personnel and intended to conduct activities in politically unstable zones (in the case in question, Iraq, following the end of the war), and which offered bodyguard services for public officials and businessmen, was not to be considered as a company specialising in the recruitment of mercenaries within the meaning of the Italian Criminal Code.

The Italian government contracts with foreign private security companies for military missions abroad, provided that it is not in connection with an armed conflict. This is done, in particular, for the protection of Italian public employees within the framework of peacekeeping programs. The security companies are bound by the instructions of the competent Italian authority and by applicable law at the place where the mission is to be carried out.

1.7.6 Luxembourg

The law on private security and surveillance activities (Loi du 12 novembre 2002 relative aux activités privées de gardiennage et de surveillance) regulates, in particular, the surveillance of movable and immovable property, the operation of alarm monitoring centres, the transport of money and securities, and the protection of persons. Pursuant to article 1, no person within the Grand Duchy of Luxembourg may conduct security or surveillance activities without written authorisation by the Minister of Justice. The question of private security services provided abroad, by contrast, is not regulated under Luxembourg law. The 2002 law thus does not apply to private security companies operating abroad.

The Luxembourg law on holding companies does not count security and surveillance activities among the activities prohibited to such companies. Holding companies may, in addition, hold interests in other companies limited by shares, regardless of whether those companies are incorporated in Luxembourg or elsewhere.

Luxembourg has no law on mercenary activities.

There is also no law on the contracting of private security forces by the government of Luxembourg.

1.7.7 Sweden

The Swedish law of 1974 on security companies regulates the providing of private security services, including the protection of goods, persons, and negotiable securities. The question as to whether this law applies also to security services provided abroad remains open. The possibility that the law could, to a certain extent, be applied extraterritorially, cannot be excluded, however. Under this law, companies are required to obtain an authorisation from the competent authority, at the place where they are domiciled. No general authorisations are granted; the authorisation applies only for specific activities. Companies that have obtained an

authorisation must report annually on their activities to the competent authority. Infringements of the conditions set forth in the authorisation are subject to punishment either by fine, or by imprisonment for a term of up to six months.

There are no specific provisions under Swedish law governing the providing of security services in crisis and conflict zones. There are, however, other statutory regulations – as found, for example, in the law on arms exports or the criminal code – which may find application. There are very few private security companies domiciled in Sweden that are active in crisis or conflict zones.

Swedish law contains no provisions on companies with a holding interest in security companies that are active in crisis or conflict zones.

Under the law on military goods, the training of foreign nationals for military purposes on Swedish territory is subject to a licensing requirement. Swedish authorities, as well as persons or companies domiciled in Sweden, must obtain a licence if they offer such training abroad. The military training of Swedish nationals in Sweden in a non-governmental context, on the other hand, may be seen as a criminally prohibited military activity.

Mercenary activities are not expressly prohibited under Swedish law. Certain criminal provisions may nevertheless find application. The Swedish criminal code foresees punishment, by fine or by imprisonment for up to two years, for the conduct of organised military training, outside the Swedish armed forces, for combat missions or similar purposes. It is further prohibited for persons without a licence from the government to recruit for military service abroad or to encourage such service. Infringements during times of peace are subject to punishment by fine or by imprisonment for up to six months.

The contracting of security companies by the government for the performance of tasks of protection abroad is not specifically regulated under Swedish law. In connection with a matter that arose in 2010, the then foreign minister made known that he had contracted with a security company in order to reinforce the protection of Swedish embassy personnel in Kabul. The employment conditions for the staff of the security company were the same as those for diplomats. Staff members were chosen in a selection process, and were required, pursuant to the security company's code of conduct, to respect Swedish, Afghan, and international law. The use of force was permitted exclusively for self-defence.

1.7.8 South Africa

In South Africa, the legal regime in this domain is largely determined by two laws. The oldest is a law from 1998, still applicable today, which prohibits the providing of military services abroad in regions where an armed conflict is underway. The definition used for the term armed conflict is not identical, but nevertheless similar to that found in the Geneva Conventions. Services of a military nature are understood also to include classic protection and surveillance tasks for persons involved in a conflict. Not considered as military services, by contrast, are humanitarian services. Persons or companies who, in the context of an armed conflict, intend to provide such military services as those to which the law applies require the authorisation of the Minister of Defence. The latter makes his or her

decision based on the recommendation of a committee (National Conventional Arms Control Committee). Authorisation may not be granted where, among other things, an activity contravenes international law, is prejudicial to the interests of South Africa, violates human rights in the country of performance, is a threat to peace there, or alters the regional balance of power. Also prohibited under the 1998 law are mercenary activities, that is, participation in armed conflicts in pursuit of monetary gain, and the recruiting, training, or financing of such activities in South Africa. It should be noted, however, that South Africa has to date acceded neither to the UN Mercenary Convention of 1989, nor to the Convention for the Elimination of Mercenarism promulgated by the Organisation of African Unity (OAU).

In 2007, then President Mbeki signed a new version of the law, that had been drafted the previous year. The act of promulgation, however, has not yet been executed, as the requisite implementation provisions are still outstanding. The 2006 bill was intended to fill a number of gaps in the 1998 law. Thus, for example, the scope of the term "armed conflict", in the presence of which the law becomes applicable, has been widened, in the sense that the National Conventional Arms Control Committee would have a duty to report to the President the names of countries in which, in the Committee's view, an armed conflict has broken out or is immediately imminent. The President would then be authorised to designate those countries as "regulated countries", to which the law would apply. Newly subject to regulation would also be security services for humanitarian purposes. The providing of such services in countries in which an armed conflict is taking place, or which have been designated as "regulated countries" by the President, would be subject to prior authorisation by the Committee.

1.7.9 United States

The legal situation concerning private security companies in the US is complicated. This is largely due to the fact that the American legal system bears little similarity to the legal regimes of continental Europe. There is little systematic legislative regulation in individual domains. In lieu thereof, judicial precedent plays a major role. The rules applicable in the domain of private security services lack coherence and, for the most part, reflect the national interests of the United States. There are numerous provisions, at various levels, applicable to security companies operating abroad. At the highest level are the laws enacted by the Federal Congress and the instructions and guidance on implementation issued by the Department of Defence. Particularly important are the contracts concluded with the private security service providers, which contain highly detailed stipulations on the conditions and constraints applicable to the mission in question, also regulating, in particular, the issues of training, use of weapons, and liability.

Among the more important statutes is the "Arms Export Control Act" (AECA), along with the provisions governing its implementation (International Traffic in Arms Regulations 2011). Services of a military nature to be provided abroad, including such things as advisory services or security training, are treated in the same manner as the export of military equipment, and are subject to authorisation by the competent executive authorities. Pure surveillance activities, however, do not, as such, fall within the scope of the law. Companies that provide or export such

services must file for registration with the American government and must obtain for each contract a licence from the State Department. Failure to comply with the registration or licensing requirement is subject to punishment.

On 12 September 2011, a Final Rule issued by the Department of Defence went into effect, setting forth detailed requirements for private providers of security services in armed conflicts outside the United States. Included therein are regulations governing, in particular, the selection, training, equipping, conduct, and accountability of private service providers. Also regulated is the use of force. Force may be employed only when "acting in a defensive manner in response to hostile acts or demonstrated hostile intent". The scope allowed for the use of force thus goes beyond pure self-defence or emergency measures. The "Defence Federal Acquisition Regulation", drafted in consultation with various government agencies, as published on 15 June 2012, permits the use of deadly force by civilians in self-defence or "when the use of such force reasonably appears necessary to execute their security mission to protect assets and/or persons". Private security service providers must respect American law, the law of the host country, and international agreements and conventions, also abroad.

The personnel of private security companies operating in areas where American military forces are deployed, or who act on behalf of the US armed forces, are not subject to the direct authority of the military high command. Security company employees remain civilians even when carrying out tasks on behalf of combat forces, and are subject to the supervision of an Army Procurement Contracting Officer appointed specifically for the purpose.

For harm caused to them by American security service providers abroad, foreign nationals, or, as the case may be, members of their families, may sue for damages in the United States under the "Alien Tort Statute" (ATS). In such suits, however, the plaintiffs may assert only the violation of an international treaty or of customary international law. Other laws also exist on which civil claims may be based; in practice, however, there are substantial impediments to the successful prosecution of such claims. Finally, under the 1996 War Crimes Act, serious violations of the terms of the Geneva Conventions, like war crimes, are subject to punishment in United States by fine, imprisonment, or, in particularly grave cases, by death.

.8 International law

1.8.1 International regulations on mercenary activities

Switzerland is a signatory to the Hague Convention of 18 October 1907 Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land.[28] Pursuant to articles 4 and 5 of the Convention, a neutral power may not tolerate the forming of corps of combatants or the opening of recruiting agencies on its territory. Switzerland, as a neutral country, thus has an obligation under international law not to permit that combatants be recruited on Swiss territory, or by Swiss companies, for direct participation in hostilities in international armed conflicts. Pursuant to article

[28] SR **0.515.21**

6, however, the responsibility of a neutral power is not engaged by the fact of persons crossing the border individually to offer their services to one of the belligerents. A neutral power is also not obliged to prevent the export or transport, on behalf of one or other of the belligerents, arms, munitions of war, or, in general of anything which can be of use to an army or a naval fleet (art. 7). Where a neutral Power restricts commerce in such goods, those restrictions must be applied impartially to both belligerent parties (art. 9). Further, article 18 of the Convention provides that services rendered in matters of police or civil administration are not to be considered as acts committed in favour of one belligerent.

Article 47 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977,[29] does not prohibit mercenary activities, but does foresee the possibility of denying to mercenaries the privileged status of combatants and prisoners of war. The term "mercenary" is defined in article 47, paragraph 2, which names six cumulatively required constituent elements.[30] Because of the overly restrictive manner in which it is formulated, however, this provision has never attained appreciable significance in practice. Because it is normally not possible to demonstrate that all six of the required conditions are satisfied in a given case, the provision can rarely be made to apply to the personnel of companies that provide private security services abroad.

The UN's International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, of 4 December 1989, defines mercenary in a manner very similar that of article 47 of Protocol I, which gives rise to the same difficulties in implementation. Because of these concerns as to the effectiveness of the Convention, it has thus far been ratified only by a small number of countries. Switzerland has to date not yet ratified the Convention. On 16 March 2011, National Council Member Fässler-Osterwalder submitted before the parliament Motion 11.3128, "Accession of Switzerland to the UN Convention against Mercenaries". The motion is for the issuance of a parliamentary mandate to the Federal Council to begin the procedure for accession to the Convention. In its response, dated 11 May 2011, the Federal Council recommends that the motion be rejected, on the grounds that the Convention defines the notion of mercenary in terms that are too narrow for practical application. The Federal Council notes that the Convention has been ratified by only 32 countries, and can thus not be considered to have gained the universal recognition of the international community. The controversial nature of the Convention is also reflected in the fact that it entered into force only after a period of twelve years following its adoption.

29 SR **0.518.521**.

30 The provision reads as follows:
"A mercenary is any person who:
a) is specially recruited locally or abroad in order to fight in an armed conflict;
b) does, in fact, take a direct part in the hostilities;
c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
e) is not a member of the armed forces of a Party to the conflict; and
f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces."

1.8.2 Applicability of international humanitarian law and human rights to security companies

The first article of all four of the Geneva Conventions of 1949[31] provides that the High Contracting Parties have an obligation to respect and to ensure respect for international humanitarian law. As the Federal Council noted in its Report of 2 December 2005 on private security and military companies,[32] the States Signatories cannot discharge themselves of their responsibilities under international humanitarian law simply by outsourcing certain tasks to private security companies. It is, to the contrary, incumbent upon them, when deploying to conflict situations private companies that are domiciled in or operate within their territory, to make certain that those companies respect international humanitarian law. The significance of the first article of the four Geneva Conventions is also underscored in the Montreux Document (see below, section 1.9.1). This Document serves as a reminder to the States of their responsibility not only to respect international humanitarian law themselves, but also, acting within the scope of their authority, to institute such measures as necessary for ensuring that private security companies, as entities independent of those States, also respect international law.

Security companies are not, as such, under an obligation to respect international humanitarian law, which applies exclusively to States involved in an armed conflict and to individuals, but not to legal persons.[33] A natural person, by contrast, does have a duty to respect international humanitarian law in conducting activities in connection with an armed conflict. Security company personnel are no exception to that rule. As stated in the aforementioned Federal Council Report,[34] all individuals who participate in hostilities – regardless of their nationality – must respect international humanitarian law, without distinction as to whether they are members of a country's armed forces or employees of private security companies. Serious violations of international humanitarian law (e.g., attacks against civilians or mistreatment of prisoners) are considered to be war crimes and must be criminally prosecuted.

The traditional notion of human rights creates a duty on the part of the States only vis-à-vis their own nationals or other persons. As with international humanitarian law, however, here again, States cannot just rid themselves of their human rights duties by outsourcing tasks to private entities. It is thus the duty of States to make certain that human rights are respected by those parties who act on their behalf.[35]

At the same time, however, there is still some controversy as to whether the rules of human rights also affect relations between the employees of private security companies and other private individuals, that is, in cases in which a security company is hired by a private individual and not by a State.[36]

31 SR **0.518.12**, **0.518.23**, **0.518.42**, **0.518.51**
32 BBl **2006** 623, at 5.3.3
33 BBl **2006** 623, at 5.3.1
34 BBl **2006** 623, at 5.3.2
35 BBl **2006** 623, at 5.4.1
36 BBl **2006** 623, at 5.4.2

The personnel of a security company can be held accountable in direct application of international criminal law for certain severe violations of human rights. This is affirmed by the Rome Statute of the International Criminal Court of 17 July 1998.[37] Pursuant to article 7 of that treaty, private individuals may also be prosecuted for crimes against humanity.

The protection accorded by international humanitarian law and human rights also extends to the employees of security companies. The scope of that protection varies depending on the nature of the activities in which they are involved. For the most part, they are not hired for deployment in combat, but perform various support tasks (equipment maintenance, logistical services, guarding of diplomatic missions and other civilian facilities, caretaking services, etc.). In such cases, they are considered to be civilians and are protected under international humanitarian law from attacks of any kind. In cases in which they directly participate in hostilities, however, they forfeit this protection for the duration of their participation. In rare cases, the employees of security companies are integrated into a country's armed forces, or form a part of the troops or units under the command of a party participating in an armed conflict. As such, they do not enjoy the protection that is accorded to civilians.[38]

1.9 Developments at the international level

1.9.1 The Montreux Document

The "Montreux Document of 17 September 2008 on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict" (hereinafter, the "Montreux Document") resulted from an initiative launched jointly by Switzerland and the International Committee of the Red Cross (ICRC) in early 2006. It is based on a practical and realistic approach, with the declared purpose of achieving improved compliance with international humanitarian law and human rights standards. In the Preface, all States and international organisations are invited to communicate their support for the document to the FDFA. As of the present date, one international organisation (the European Union) and 43 States have communicated their support for the Montreux Document, including Afghanistan, South Africa, Germany, China, the USA, France, Iraq, the United Kingdom, and Italy.[39] Switzerland is currently making an active effort to garner further support for the Montreux Document. On 12-13 May 2011, a first regional seminar was conducted in Chile to help publicise the Montreux Document in Latin America. An additional regional seminar, for North-East and Central Asia, was held in Mongolia on 12-13 October 2011.[40] Finally, a seminar for the Pacific region took place in Australia on 8-9 May 2012.

37 SR **0.312.1**
38 Montreux Document, pp. 40 and 41.
39 The full list is accessible at www.eda.admin.ch > Topics > International law > International humanitarian law > Private military and security companies > The Montreux Document – Participating States
40 The reports on the meetings can be accessed at: www.dcaf.ch > What we do > Private Security Governance > Raising Awareness of the Montreux Document on PMSCs (last consulted on 19 July 2012).

On 12 June 2012, Switzerland presented the Montreux Document and the International Code of Conduct for Private Security Service Providers of 9 November 2010 (see below, section 1.9.2) to diplomats at a meeting of the NATO's Euro-Atlantic Partnership Council. On 8 September 2012, on the occasion of an international conference on the subject of private military and security companies at the highly respected International Institute of Humanitarian Law in San Remo, Switzerland announced that it would be holding a conference on the Montreux Document, in cooperation with the ICRC, at the end of 2013. The conference is intended to serve – five years after the adoption of the Montreux Document – as an occasion not only to look back, but also to look forward and consider the challenges still to be dealt with in connection with private military and security companies.

The Montreux Document, which is not itself a legally binding instrument, provides in a first part a reiteration of applicable international law governing security companies and their activities in the context of armed conflicts. A second part lists a series of Good Practices, which are intended to assist States in enacting appropriate measures so as to meet their obligations under international law. In the following, the most important obligations under international law held by States that intend to contract with security companies ("Contracting States") and by States in which a security company is domiciled or headquartered ("State of Origin") will be cited. Thereafter, the Good Practices for security companies will be enumerated.

Pertinent international legal obligations relating to private military and security companies (Part One of the Montreux Document)

The Montreux Document recalls to the States, in a series of numbered Statements, the following international obligations on their parts:

- Contracting States, even where they have contracted with private security companies for the performance of certain activities, remain bound by their obligations under international law (Statement 1). They may not contract with security companies to carry out activities that international humanitarian law explicitly assigns to a State agent or authority (Statement 2).
- The Contracting States and States of Origin have an obligation to act within their powers to ensure respect for international humanitarian law by security companies with which they contract or which are domiciled on their territory (Statements 3 and 14).
- The Contracting States and States of Origin have a responsibility to perform their human rights obligations, and have a duty, to that end, to enact appropriate measures to prevent infringements by security companies (Statements 4 and 15).
- The Contracting States and States of Origin have an obligation to ensure that grave breaches of the Geneva Conventions, and other crimes under international law, are prosecuted (Statements 5, 6, 16, and 17).
- Although the responsibility of a Contracting States is not engaged by the fact of its entering into a contractual relationship with a security company, it may be held responsible for violations of international humanitarian law, human rights, or other rules of international law, as committed by security companies or their personnel, where such violations are attributable to the

Contracting State under customary international law, in particular, where the security companies have been integrated by the State in question into its regular armed forces or are acting on the instructions of the Contracting State (Statement 7).

– The Contracting States have an obligation to make reparations for violations of international humanitarian law and human rights committed through the wrongful conduct of security company personnel, where such conduct is attributable under customary international law to the State responsibility of the Contracting State (Statement 8).

The Montreux Document also calls the attention of security companies and their personnel to their obligations under international law:

– Security companies have an obligation to comply with the provisions of international humanitarian law and of human rights law to which they are subject under applicable national law. They have a similar duty to comply with the provisions of applicable national law (Statements 22, 23, and 26 [a]).

– The status of members of security company personnel is determined on an individual basis pursuant to international humanitarian law based, in particular, on the nature and circumstances of the functions they assume (Statements 24, 25, 26 [b] and 26 [c]).

– To the extent that they exercise the prerogatives of government authority, they have a duty to comply with the human rights obligations of the State (Statement 26 [d]).

– They are subject to criminal prosecution for the commission of criminal acts punishable as offences under applicable national or international law (Statement 26 [e]).

– The superiors of security company personnel may be held liable for offences under international law committed by personnel that are subject to their effective authority and control, where the superiors fail to properly exercise such control (Statement 27).

Good Practices relating to private military and security companies (Part Two of the Montreux Document)

The Montreux Document recommends the following Good Practices:

– Contracting States and Home States determine which services may or may not be contracted out to security companies (Good Practices 1 and 53).

– Home States provide for the establishment of an authorisation system, such as requiring a business licence valid for a limited and renewable period, for specific services, or through other forms of authorisation (Good Practice 54).

– Contracting States and Home States ensure transparency, e.g., through the publication of annual reports addressed to parliamentary bodies (Good Practices 4 and 59).

- Contracting States and Home States take into account, in the awarding of contracts and the granting of authorisations, the following factors: past conduct, compliance with authorisation requirements, financial capacity, training of personnel, lawful acquisition and use of weapons, appropriate internal company guidelines (Good Practices 6-8, 10-12, 60, 61, 63-66). The States further assess whether the security company is capable of conducting its activities in conformity with applicable national law and international law (Good Practices 2 and 57).
- The Contracting States prescribe contractual clauses governing, in particular, the observance of international humanitarian law, weapons needed for performance of the contract, the subcontracting of tasks, and the identifiability of security personnel (Good Practices 14-16). The Home States include in the terms and conditions of authorisations clauses to ensure that security companies are operated in conformity with applicable national and international law, and that security personnel conduct themselves in accordance therewith (Good Practice 67).
- The Contracting States establish requirements for security companies and their personnel concerning respect of the rules on the use of force and of firearms. Such means are to be deployed only in self-defence or for the defence of third parties. In such cases, the competent authorities are to be informed without delay (Good Practice 18).
- Contracting States and Home States shall make provision for the criminal prosecution of crimes under applicable international and national law committed by security companies or their personnel, establishing, as needed, national jurisdiction over such cases (Good Practices 19 and 71). Home Countries establish additional sanctions for security companies that operate without authorisation, or that fail to respect the conditions on which they were granted authorisation, such as, the revocation or suspension of authorisation, a bar on re-applying for authorisation, or civil and criminal fines and penalties (Good Practice 69).
- The Contracting and Home States make provision for the establishment of mechanisms for oversight, civil liability, and the imposition of sanctions (Good Practices 20, 21, 68, and 72).
- Home States assure cooperation with the authorities of the Territorial States (Good Practice 73).

In a departure from the recommendation contained in the Good Practices of the Montreux Document, the Federal Council has not proposed the establishment of a licensing system. It is nevertheless of the view that the system proposed in the draft Act (statutory prohibitions in combination with a comprehensive registration requirement and prohibitions in the form of administrative orders) is the equal, in its effects, of a licensing system. The proposed system makes it possible to prohibit all activities on the part of security companies that are contrary to Switzerland's interests. The disadvantages of an authorisation system (high bureaucratic and financial investment, complications of monitoring at the place of contract performance, risk of authorisation being misconstrued as a government warranty of quality, cf. section 1.5.1) can in this way be avoided.

1.9.2 International Code of Conduct of 9 November 2010

The International Code of Conduct for Private Security Service Providers, of 9 November 2010 (hereinafter, "Code of Conduct"), is the result of an initiative launched by Switzerland in collaboration with a number of industry associations. Any private security company, regardless of its legal structure, may accede to the Code. As of 1 October 2012, 511 security companies had acceded to the Code of Conduct.[41] The Code of Conduct places the Signatory Companies under an obligation, when providing services in areas in which the rule of law has been undermined, to respect human rights. It also requires that the Companies comply with all applicable laws at the local, regional and/or national levels. The Companies further undertake not to enter into a contractual relationship with any State or other body in violation of sanctions imposed by the Security Council of the United Nations.

The Companies place their personnel under a duty to take all reasonable steps to avoid the use of force. Where force is employed, this must be done in keeping with applicable law and with the principle of proportionality. The Companies further place their personnel under a duty not to use firearms against persons, except in self-defence or to protect other persons from an immediately imminent threat of death or serious injury, or for the prevention of a particularly serious offence constituting a grave threat to life. To the extent that any personnel have been expressly authorised to provide assistance to the law enforcement authorities of a State in the exercise of their functions, such personnel shall be placed by the Signatory Company under a duty to comply with all legal obligations under applicable national and international law on the use of force.

The Code of Conduct contains important provisions on the banning of certain conduct, such as torture, discrimination, and human trafficking. Similarly, it sets forth management guidelines designed to promote compliance with the Code by the personnel of the Signatory Company, as well as recruitment and on-going training standards. These are complemented by rules for internal reporting and for control mechanisms within the Company.

The Code of Conduct also serves as a basis for the development of independent governance and oversight mechanism for monitoring compliance with the Code. To this end, it foresees the introduction of measurable standards and a certification procedure in order to ensure that the Companies properly implement the Code of Conduct. An interim steering committee was established and charged with the task of drafting a Charter setting out the functions and structure of this oversight mechanism. A first draft of this Charter was made public by the steering committee on 16 January 2012. More than forty stakeholders (governments, organisations, companies, etc.) contributed statements to the consultations on the draft. Under the terms of the Draft Charter, a certification procedure is to be created for assessing whether the security companies are in compliance with the principles of the Code of Conduct. The draft also foresees the introduction of a mechanism for the oversight of the security company activities and the effective handling of complaints based on violations of the Code of Conduct. The Charter is expected to be adopted in 2013.

41 www.icoc-psp.org

The Code of Conduct also sets criteria for the selection of security personnel and of subcontractors. The Signatory Companies make certain that security personnel has received appropriate training. They are required to have obtained the statutorily required authorisations for the possession and use of weapons. They further undertake to report to the competent authorities any incident of which such report is required under applicable national law. Finally, the Companies make certain that they are at all times in a position to meet any obligations arising out of harm caused for which they bear liability towards third parties.

The Code of Conduct is today regarded as a reference in the private security industry. It used as a source for numerous organisations and governments in the introduction of national and international standards. The bodies that call upon the services of private security companies often demand of those companies that they accede to the Code of Conduct and comply with its principles.

1.9.3 Project for a UN Convention

A United Nations working group is currently discussing the various options for international regulation and, in particular, the possibility of drawing up a new, legally binding agreement to govern the obligations of States in connection with the activities of private military and security companies. The extent to which these efforts will bear fruit can, at present, not yet be predicted, as individual countries where large private military and security companies are domiciled, and which also award the largest contracts to such companies, have expressed reservations with regard to such a convention. Switzerland is keeping a close eye on the progress of these efforts.

1.9.4 Developments in the EU

On 27 July 2012, the European Union declared its support for the Montreux Document. The European Union has undertaken to abide by the rules set forth therein when contracting with private military and security companies on its own behalf.

Priv-War is a research project financed by the EU and coordinated by the European University Institute (EUI), which, in cooperation with seven European universities, conducted a study on the impact of the extensive use of private military and security companies in situations of armed conflict. An analysis of the current political climate in this regard, with reference, among other things, to the Montreux Document and the International Code of Conduct, served as the project's point of departure. In addition to publishing its results in academic publications,[42]Priv-War also issued, in March 2011, a number of recommendations to the EU, suggesting various options for regulatory measures, both of a binding and of a non-binding nature. These recommendations are currently being reviewed by the EU.

42 See, esp., F. Francioni und N. Ronzitti (eds.), "War by Contract: Human Rights, Humanitarian Law and Private Contractors", Oxford University Press, 2011.

Mention should also be made of the European Parliament resolution of 11 May 2001 on the development of the common security and defence policy following the entry into force of the Lisbon Treaty, in which that body expresses its view that there is a need for the EU to adopt regulatory measures in this domain, including a comprehensive normative system governing the establishment, registration, licensing, and monitoring of private military and security companies, with a mechanism for reporting on violations of applicable law. It calls upon the Commission and the Council to draft a Directive aimed at harmonising national regulatory measures in this domain, and to adopt a Decision regulating the export of services by such companies.

1.10 Implementation

According to the terms of the proposed Act, the implementation provisions are to be enacted pursuant to article 38 of the draft proposal. In addition, adjustments to the Ordinance on the Use of Private Security Companies (OUPSC)[43] will be necessary.

By its decision dated 29 August 2012, the Federal Council pronounced itself in favour of a regime based on prohibitions in conjunction with a procedure for prophylactic declaration. Prior thereto, it had also looked into other possible solutions such as a system for ex post facto registration, a registration or licensing requirement, or a general ban on participation in acts of combat. It arrived at the conclusion that the regime here proposed makes it possible to exercise oversight over problematic activities in as full a manner as is possible, without undue bureaucracy; it allows for rapid case review and the effective enforcement of any prohibitions or restrictions that may be imposed.

While a review of the provisions for the implementation of the proposed Act is not expressly foreseen, pursuant to article 170 of the Federal Constitution (SFC)[44] the measures enacted are subject to a review for their effectiveness. In addition, the competent authority will be required under the proposed Act to submit an annual report on its activities to the Federal Council. The report is intended to provide an overview of the manner in which the statutory provisions contained in the Act have been implemented, and of any difficulties encountered in connection therewith by the competent authority.

1.11 Action on parliamentary motions

DefC-S motion 10.3639 can be set aside. The draft proposal has taken the substance of the motion into account by prohibiting activities that run counter to Switzerland's foreign, security, and neutrality policy interests. Its scope of application also extends to the companies designated in the Parliamentary motion. For the reasons mentioned in sections 1.5.1 and 1.6, however, the draft Act departs from the suggestion contained in the motion that a licensing system be introduced. The reasons given are in keeping with the conclusions of the FOJ report of 30 December 2010. The Federal

43 SR **124**
44 SR **101**

Council's 17 December 2010 recommendation that the motion be adopted was given prior to its having taken note of this report.

For the same reasons, motion 10.3808, put forward by Lang, can also be set aside.

2 Notes to the individual articles of the draft Act

2.1 General Provisions

Article 1 Purpose

The proposed Act is intended to contribute to the protection of certain of Switzerland's interests. These are specified in article 1, whereby the enumeration does not reflect the order of importance. Contrary to customary practice, the purpose set forth in article 1 is not merely a general statement of the overall aims of the draft proposal. The objectives named in article 1 serve as the basis on which prohibitions issued by the competent authority pursuant to article 14 of the draft proposal are to be grounded. Article 14, paragraph 1, provides that the competent authority is to prohibit, in full or in part, any activity that is contrary to the purposes set forth in article 1. Infringements of this prohibition give rise to criminal sanctions (art. 22).

Pursuant to article 1, letter (a), the draft Act will contribute to the safeguarding of the internal and external security of Switzerland. Internal security comprises, in the words of the former Constitution of 1874, primarily the "maintenance of internal peace and security", while external security refers to defence against threats from without, such as attacks against Switzerland by other countries, terrorism, political pressuring, and organised crime.[45] The notions of internal and external security are nevertheless closely related to each other. Thus, for example, the Federal Act on Measures for the Safeguarding of Internal Security[46] also foresees preventive measures to defend against threats posed by terrorism, illegal intelligence activities, or violent extremism.

Pursuant to article 1, letter (b), the draft Act will contribute to the realisation of Switzerland's foreign policy objectives in conformity with article 54 of the SFC. This Constitutional provision grants the Confederation comprehensive powers that comprise all aspects of "foreign affairs", including the conclusion of treaties, the recognition of foreign states, and the conduct of diplomatic relations. Article 54, paragraph 2, of the SFC contains a non-exhaustive list of the foreign policy objectives towards which it is incumbent upon the Confederation to work. Among these are the maintenance of Switzerland's independence and welfare, respect for human rights, the promotion of democracy, and peaceful coexistence among peoples.

Article 1, letter (c), concerns the preservation of Switzerland's neutrality. Neutrality is an instrument of Swiss foreign policy (SFC, articles 173 and 185). It serves to

45 Jean-François Aubert and Pascal Mahon, Petit Commentaire de la Constitution fédérale de la Confédération suisse du 18 avril 1999, Art. 57, p. 481, Zürich, 2003.

46 SR 120; Bundesgesetz über Massnahmen zur Wahrung der inneren Sicherheit (BWIS)

protect Switzerland's independence and the inviolability of its national territory. In return, Switzerland undertakes not to participate in wars between other states. A distinction must be drawn between the neutrality as a matter of law and neutrality as a matter of policy. The law governing the neutrality of states has been bindingly set down in the Hague Conventions of 1907[47] and in customary international law (see section 1.8.1, above). These rules apply to Powers that declare themselves as neutral in the event of international armed conflict. Switzerland has chosen for itself the special status of a permanently neutral state. Switzerland's neutrality is today globally acknowledged and respected. This special status, in accordance with the principle of legal security, gives rise to certain duties under international law even in times of peace. The status of permanent neutrality also makes necessary the formulation of a coherent foreign policy. Neutrality policy refers to all those measures taken by a neutral country at its own discretion, going beyond what is required of it by law, to ensure the credibility of its neutral status. The concrete formulation of Switzerland's neutrality policy must take into account the country's various foreign policy and security interests.

The mention of the principle of neutrality in article 1, letter (c), comprehends Swiss neutrality both as a matter of law and as matter of policy. Activities to which the draft Act applies must, accordingly, be reviewed in terms of their compatibility both with Switzerland's legal obligations as a permanently neutral State, and with the credibility and effectiveness of Swiss neutrality policy. Activities in support of the implementation of military sanctions imposed under Chapter VII of the UN Charter,[48] other than direct participation in hostilities, are not fundamentally incompatible with neutrality. Countries implementing the UN mandate contribute to the maintenance or restoration of peace and international security. Such UN missions are in line with Switzerland's peace policy interests and supporting them is fundamentally compatible with neutral status.

Lastly, pursuant to article 1, letter (d), the draft Act will contribute to the assurance of respect of international law and, in particular, of human rights and of international humanitarian law. International law governs the relationships between States and other subjects of international law. It encompasses different domains, including the prohibition on the use of force for the settlement of international conflicts, and the prevention of terrorism and other serious criminal offences. The draft Act will also contribute to assuring the respect of human rights and international humanitarian law. The international obligations of a state may be grounded in various sources. In terms of numbers, international treaties are the most important source. Certain fundamental international obligations, however, are grounded in customary international law or in general principles of law. The reference in article 1, letter (d), is thus to all international obligations to which Switzerland is subject. Strict respect of international law, including, in particular, respect for human rights and international humanitarian law, is a central element of Switzerland's own self-image and the image it projects to the outside world. As the depositary State of the Geneva Conventions and the Additional Protocols,[49] Switzerland has an eminent interest in

47 Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, The Hague, 18 October 1907 (SR 0.515.21; Fifth Hague Convention); Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War, The Hague, 18 October 1907 (SR 0.515.22; 13th Hague Convention).

48 SR **0.120**

49 SR **0.518.12**, **0.518.23**, **0.518.42**, **0.518.51** and **0.518.521–523**

not being drawn into conflict situations that could tarnish its excellent reputation in the domain of humanitarian action.

Article 2 Scope of application

Paragraph 1, introductory clause

Pursuant to the introductory clause of paragraph 1, the draft Act applies to all natural and legal persons, and to business associations ("companies"), that conduct any of the activities designated under letters (a) through (d). Intended here, specifically, are all businesses, whether structured as corporations, limited liability companies, partnerships, foundations, or sole proprietorships, as well as private individuals. The purposes pursued by companies subject to the draft Act may be of a profitable or of a non-profitable nature.

The list of activities governed by the draft Act, as set forth in paragraph 1, is exhaustive. This paragraph establishes a dual criterion for applicability: the activities in question must exhibit a connection both with Switzerland and with a place abroad. Activities of which the conduct takes place, and the effects are felt, exclusively in Switzerland, or exclusively abroad, are not covered by the draft Act. These are subject either to cantonal law (security services provided in Switzerland) or to foreign law.

Paragraph 1 (a)

The draft Act applies to companies that provide, from Switzerland, private security services abroad. The term "private security services" is defined in article 4, under letter (a).

A service is provided "from Switzerland" where the company providing the service is domiciled or based in this country; but this is also the case where, for example, a foreign company organises the providing of private security services abroad either through a company domiciled in Switzerland, or by itself conducting operations out of Switzerland.

The term "abroad" means within the sovereign territory of any state other than Switzerland. The scope of the term is, however, subject to the limits set forth in article 3. That article provides for exemptions from the Act's scope of application for companies that conduct, from Switzerland, certain specified activities in territories subject to the Agreement on the Free Movement of Persons of 21 June 1999 (FMPA),[50] or to the Convention of 4 January 1960 establishing the European Free Trade Association (EFTA; EFTA Convention)[51] (see below, article 3).

Subject to the exemptions foreseen in article 3, the term "abroad", within the meaning of the draft Act, also comprehends the territorial waters of foreign coastal states, the high seas, and international air space. The private security industry has recently expanded its range of services to include the protection of deep sea shipping against acts of piracy.[52] This development should accordingly be taken into account in construing the term "abroad".

50 SR **0.142.112.681**
51 SR **0.632.31**
52 FOJ Report of 30 December 2010, sect. 4.2.1.1.

Pursuant to the Maritime Navigation Act of 23 September 1953 (MNA),[53] ships registered in the Register of Swiss Seagoing Vessels are considered to be Swiss vessels (MNA, article 2). Article 4 of the MNA further provides that, on board Swiss seagoing vessels navigating on the high seas, Swiss Federal law shall apply exclusively; in territorial waters, Swiss Federal law applies on board Swiss seagoing vessels except in such cases where the coastal state declares the application of its own law to be compulsory. The doctrinal literature and case law are in agreement in considering the high seas as foreign territory (with territorial waters, as belonging to the national territory of a third country, unquestionably also falling under the definition of "abroad"). A vessel sailing under the Swiss flag is not a "part of Switzerland".[54] Under the "flag principle", however, on a vessel sailing on the high seas under the Swiss flag, Swiss law applies. A security service provided on the high seas on board a vessel sailing under the Swiss flag is considered to have been provided abroad and will, accordingly, be subject to the provisions of the draft Act.

A Swiss shipping line whose ships sail under the Swiss flag will not normally have its own armed personnel for protection against pirates. For this purpose it will hire a company specialising in protection, as needed, for the more dangerous stretches on its routes. As a rule, the company hired will be domiciled abroad. However, should that company be domiciled or based in Switzerland, or operate out of Switzerland, it will be subject to the draft Act.

Article 1 of the Convention of 7 December 1944 on International Civil Aviation[55] provides that the airspace above a State's territory is also considered a part of that State's sovereign national territory. Pursuant to article 17 of the Convention, privately owned aircraft have the nationality of the State in which they are registered.[56] Similar to the situation in maritime navigation, it is the law of the registering State that applies on board the aircraft, except where the State over whose territory the aircraft is being flown is entitled under international law to insist upon application of its own law. Privately owned aircraft, however, are no more considered to be a "movable part of the sovereign territory" of the registering State than ships are so considered under maritime law. Where a company based in or operating out of Switzerland provides security services on board an aircraft registered in Switzerland, those services fall within the scope of the draft Act, because Swiss law applies on the aircraft, while the services in question are considered as being provided abroad.

Paragraph 1 (b)

The draft Act also applies to companies that provide in Switzerland services in connection with a private security service provided abroad, that is, companies that recruit or train security personnel for private security services to be provided abroad, or that furnish security personnel to companies that offer private security services abroad (see the definition in article 4, letter [b]).

53 SR **747.30**

54 Federal Council Message of 7 December 2007 on the Ratification of a Convention and the Amendments to a Convention, as well as the Accession to two Supplementary Protocols, of the United Nations, for the Prevention of Terrorist Acts Against Nuclear and Maritime Safety BBl 2008 1153.

55 SR 0.748.0 (in force in Switzerland as of 4 April 1947).

56 Cf. Message of the Federal Council of 28 September 1962 on the Amendment of the Swiss Federal Civil Aviation Act, BBl 1962 II 717.

A relationship with Switzerland exists where the service provided in connection with a security service abroad is provided in Switzerland. It is not necessary that the name of the country in which the security personnel are to provide private security services at sometime in the future already be known.

Recruitment is considered to have taken place in Switzerland whenever a substantial part of that activity was conducted on Swiss territory, as, for example, where a company conducts recruitment interviews in Switzerland or concludes employment contracts here. The company must act with the specific objective of recruiting or training security personnel for private security services that are to be provided on foreign territory. Not concerned, therefore, is the recruitment and training of security personnel for private security services to be provided on Swiss territory. Such services are subject to cantonal law.

The training must be carried out in Switzerland, e.g., at a training centre or camp. The subject-matter of the training can include such things as attack and defence techniques in armed conflict, self-defence and survival tactics, weapons use, mission planning and logistical support, or familiarisation with the rules of international law and the combating of corruption.

The draft Act further applies to companies that furnish security personnel, whether directly or as an intermediary, for a company that offers private security services abroad. This provision would find application, for example, if a company were to furnish personnel in Switzerland who could then be hired by a company that operates abroad.

Paragraph 1 (c)

The draft Act is also applicable to companies that establish, base, operate, or manage a company in Switzerland that provides private security services abroad or provides services in connection therewith in Switzerland or abroad.

A connection with Switzerland is considered to exist whenever these activities are conducted on Swiss territory. This would be the case, for example, if a company were to establish a base in Switzerland and, from that base here, manage a company that was incorporated abroad for the purpose of providing of private security services there. The draft Act thus applies not only in “operational” cases, in which security services are provided abroad from Switzerland. As important as this category of activities may be, equally so are the other criteria for establishing a relationship with Switzerland, making the Act applicable also in the other cases in which Switzerland has an interest in avoiding risks to its security and reputation.

Paragraph 1 (d)

Pursuant to this provision, the draft Act is also applicable to countries that exercise control, from Switzerland, over a company that provides private security services, or other services in connection therewith as defined in article 4, letter (b). Even in such cases where the activities of the companies in question are of a purely financial nature, it is necessary that they also be subject to the Act, as both their own repute and the activities of the security companies over which they exercise control are capable of jeopardising Swiss interests.

This provision covers all types of ownership structures by means of which a company is able to exercise control over a private security companies operating abroad. Such companies are generally referred to as “holding companies”. Article 5

defines when a company is considered to exercise control over another. A relationship to Switzerland exists whenever the company that exercises control is domiciled or based in Switzerland. A company over which control is exercised may be based in Switzerland or abroad.

Paragraph 2

The draft Act is also applicable to persons who are in the service of companies that are subject to the Act. This takes on significance wherever the draft Act foresees duties and sanctions for individual natural persons, as, for example, in cases of direct participation in hostilities abroad (see below, article 8, paragraph 2). The term "in the service of" is meant to include more than formal employment relationships. The scope of the draft Act extends to all business or personal relationships in which natural persons accept instructions or mandates of whatsoever nature. The legal form of the relationship is of no consequence.

Paragraph 3

Finally, the draft Act also governs Federal authorities that contract with security companies for the performance of tasks of protection abroad. The term "contract with" covers not only those cases in which a Federal authority fully delegates a task of protection to a company, but also those in which it avails itself of the services of a security company for assistance in its own performance of a mandate (see below, sect. 2.7).

Outside the scope of the draft Act are contracts with security companies for the performance of protection tasks on Swiss territory. In such cases, it is the OCSC[57] that applies. The draft Act also does not apply to Federal authorities that avail themselves of the assistance of private individuals acting on the authority's instructions, without autonomy or decision-making powers.[58]

Article 3 Exemptions from the scope of application

Article 3 introduces exemptions from the Act's scope of application for certain private security services provided from Switzerland in territories that are subject to the FMPA[59] or to the EFTA Convention.[60] The territories referred to are the national territories of the 27 Member States of the European Union, including the French Overseas Departments, the Azores, Madeira, the Canary Islands, Ceuta and Melilla, and the Åland Islands. Also included are the territories of the EFTA Member States, that is, Iceland, Liechtenstein, and Norway (cf. article 58 of the EFTA Convention).

The exemptions are included in order to preserve the free provision of services in keeping with the FMPA and the EFTA Convention. Pursuant to those agreements, service providers, both natural persons and companies, have a right to provide services on the territory of the other States party to the agreements, for a period whose effective duration is not to exceed 90 working days per calendar year (FMPA art. 5, para. 1). Under these agreements, restrictions on the cross-border provision of services are prohibited (FMPA, Annex I, art. 17 [a]); this prohibition is, however, without prejudice, in particular, to legal provisions enacted by the respective States

57 SR **124**
58 Gesetzgebungsleitfaden des BJ [FOJ Legislative Drafting Guidelines], p. 346.
59 SR **0.142.112.681**
60 SR **0.632.31**

party to the agreements on grounds of imperative public interest (FMPA, Annex I, art. 22, para. 4). Service providers who are Swiss nationals (or companies incorporated under Swiss law) are also entitled to invoke before the Swiss authorities the provisions on the free provision of services, as contained in the FMPA or the EFTA Convention, where they have exercised a right to freely provide services as protected by either of those agreements.[61]

The purposes of the draft Act – i.e., the safeguarding of the internal and external security of Switzerland, the realisation of Switzerland's foreign policy objectives, the preservation of Swiss neutrality, and the assurance of respect of international law – unquestionably constitute grounds of imperative public interest justifying restrictions on the free provision of services. In order for the statutory measures enacted by Switzerland to be considered as justified pursuant to the terms of the FMPA and EFTA Convention, however, they must also meet the objective test of being proportionate to the purposes pursued.[62] In the present case, an obligation to file a declaration of every activity conducted in the domain of security services, and a duty to forbear from conducting any such activity for at least fourteen days, or until notification by the competent authority, insofar as the security services set forth in article 4, letter (a), nos. 1-4 of the draft Act are concerned, would manifestly constitute a restriction on the free provision of services that is disproportionate to the purposes pursued. Because there is only a minor risk that the provision of such services would imperil Switzerland's security or neutrality, and there is no effective danger of hostilities or serious human rights violations on the territories of the EU/EFTA Member States, such restrictions on the free provision of services would go beyond what is necessary for achieving the purposes of the draft Act.

Accordingly, in the interest of proportionality, certain exemptions from the scope of application have been included in the draft proposal. These apply, as set forth in article 4, letter (a), nos. 1-4, to the following security services: the protection of persons, the guarding or surveillance of goods and properties, and security services at events. The personnel charged with the performance of such private security services, subject to the applicable weapons regulations at the place of performance of the service, may be armed or unarmed.

For the same reasons, the exemptions were extended to include persons and companies that perform services in Switzerland in connection with any such private security service as set forth in article 3, paragraph 1, in the territories where the above-named agreements apply. The exemptions also apply to companies that establish, base, operate, manage, or exercise control over a company that provides such services as set forth in article 3, paragraph 1, or article 3, paragraph 2 (a).

Conversely, where the private security service to be performed within the territories of the EU/EFTA Member States is not a service as set forth in article 4, letter (a), nos. 1-3, article 3 does not make provision for any exemption from the Act's scope of application. This is because services such as measures of constraint, the guarding of prisoners, operational or logistical support of armed forces, the operation of weapons systems, or espionage, can pose a threat to Switzerland's interests and, in particular, to its neutral status. In such cases, restrictions on the free provision of services are therefore justified.

61 BGE **136** II 241
62 See, e.g., BGE **131** V 390 and **131** V 209.

Article 4 Definitions

Paragraph 4 (a) "private security service"

Governed by the Act are services performed by privately owned companies. It does not apply to the activities of publicly owned enterprises. Article 4, letter (a), contains a non-exhaustive list of such services, numbered 1 through 9. This enumeration, however, does not contain any concrete indications as to the nature and intensity of the security services that the draft Act is intended to cover. Simple doorman and porter services, or the design, installation and servicing of building security alarm systems are not included, unless they are accompanied by additional services that could require the use of force or of arms.

A private security service, as defined in article 4, letter (a), may be provided by armed or unarmed personnel. The term encompasses, in particular, the following activities:

- the protection of persons, e.g., the protection of government officials or the escorting of humanitarian aid convoys;
- the guarding or surveillance of goods and properties, e.g., armed protection of buildings (embassies) or sites, or surveillance thereof (patrols);
- security services at events, e.g., at concerts or sports events;
- measures against persons, e.g., the monitoring, detention or searching of persons; the searching of premises or containers, including vehicles (see article 6 of the Federal Act of 20 March 2008 on the Use of Force [UFA]);[63]
- the guard, care, and transport of prisoners; operation of prison facilities; and assistance in the operation of camps for prisoners of war or civilian detainees;
- the operational or logistical support of combat or security forces, insofar as such support is not provided as part of a direct participation in hostilities as set forth in article 8. Operational and logistical support as part of a direct participation in hostilities have not been included here, since these activities, according to the terms of the draft Act, do not fall under the definition of security services. Such activities are entirely prohibited (cf. article 8, below). The security forces referred to in article 4, letter (a), no. 6, could be the police forces of a State. The support in question could be provided in response to internal unrest, rioting, isolated instances of violence, or other acts of a similar nature (see article 1, paragraph 2, of the Protocol [II] Additional of 8 June 1977 to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts [Protocol II]).[64] The service must be related to the tasks falling under the responsibility of the combat or security forces. The term "operational support" is to be understood as referring, for example, to the furnishing of armed security personnel for a foreign State that is confronted with popular demonstrations or other forms of internal unrest. Logistical support includes, for example, the construction or operation of infrastructures in an emergency situation (arrival of large numbers of refugees in a foreign State), the maintenance of a country's war material, the

63 SR **364**
64 SR **0.518.522**

operation of its communications system other than in the context of an armed conflict, or the training of members of its combat or security forces. The operation of a laundry facility on behalf of combat forces, by contrast, does not constitute logistical support, within the meaning of the draft Act, as there is not a sufficient relationship between such services and the tasks of the combat forces;

- the operation and maintenance of weapons systems, e.g., an air raid defence system;
- the advising or training of members of combat or security forces;
- intelligence activities, espionage, and counterespionage.

Paragraph 4 (b) "service in connection with a private security service"

The term "service in connection with a private security service" encompasses the recruiting or training of personnel for private security services abroad (1), and the furnishing of personnel, directly or as an intermediary, for a company that offers private security services abroad (2). This definition is exhaustive. As recalled in the notes to article 2, paragraph 1 (b), the security personnel must be recruited or trained with the *specific objective* of providing private security services *on foreign territory*. Not covered by this provision, by contrast, is the recruiting of personnel for the performance of exclusively administrative tasks in Switzerland for a company subject to the Act.

Paragraph 4 (c) "direct participation in hostilities"

The term "direct participation in hostilities" is to be understood as referring to a direct participation in hostilities in the context of an armed conflict abroad, within the meaning of the Geneva Conventions and the Protocols I and II Additional thereto.[65] With the present draft proposal it is recommended that the term be construed in the Act as it is used in those international instruments. Inclusion of a more precise definition has been forgone, as the term is well known in international law and there is a substantial body of case law that deals with the notion in detail.

Pursuant to the Geneva Conventions and the Protocols I and II Additional thereto, the term "direct participation" in hostilities refers to the personal involvement of an individual in such hostilities. The term encompasses specific acts by an individual in the context of hostilities conducted between the parties involved in an armed conflict. The International Committee of the Red Cross (ICRC)[66] has issued a publication offering interpretive guidance on the concept, which seeks to establish clarity on the question of when an individual is considered to be participating directly in hostilities and thus no longer enjoys the protection of international humanitarian law against direct attacks. For a given an act to be considered as constituting direct participation in hostilities under the ICRC definition, it must meet the all of following criteria, *cumulatively*:

a. The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death,

65 SR **0.518.12**; **0.518.23**; **0.518.42**; **0.518.51**

66 See "Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law", available online at www.icrc.org > Resource centre > Search > "Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law".

injury, or destruction on persons or objects protected against direct attack (threshold of harm).

b. There must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation).

c. The act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).

The Federal Council recommends that the term "mercenary activities" not be used. This term carries an implicit reference to Protocol I and to the UN's International Convention of 4 December 1989 Against the Recruitment, Use, Financing and Training of Mercenaries, which, as noted above in section 1.8.1, can rarely be applied to the employees of a company that provides private security services abroad. Adopting the terminology of the UN Convention, which has thus far been ratified by only a small number of States of no particular significance with regard to the supply and demand of private security services, would not provide any advantage, but would rather create ambiguities, which, in the interest of legal security, would best be avoided.

Article 5 Control over a company

Article 5 defines what is meant by exercising "control over a company". The term "control" is to be understood in a broad sense. It can also refer to a subsidiary that is controlled by a company that is itself under the control of another holding company.

The definition given in article 5, paragraph 1 (a)-(c), is based on article 963 of the amended Code of Obligations.[67]

This provision sets forth, in connection with the duty of holding companies to prepare group financial reports (consolidated annual financial statements), the criteria for determining whether a legal person exercises legally relevant control over another company. The existing rule, as set forth in CO article 663*e*, is based on the unified management principle, that is, the consolidated reporting duty is subject to the effective exercise of control. In practice, however, such exercise of control can rarely be demonstrated. For this reason, with the introduction of the new article 963 into the CO, this criterion has been dispensed with, and the consolidated reporting duty is now subject only to a company's having the potential ability to control another (control principle). The present draft proposal is intended to regulate the providing of security services in a comprehensive manner, so that the scope of application is broad. For this reason, the potential ability to control a company that provides security services abroad should here also be a sufficient criterion. CO article 963 (amended) applies only to legal persons (public and private corporate bodies and establishments), and is thus too narrow in its application. For this reason, the meaning of the term company in article 5 comprehends natural persons, legal persons, and business associations, as defined in article 2. Article 2 includes in the scope of application also firms without legal personality (unincorporated associations, limited partnerships, and general partnerships). Such firms, and their

67 Federal Council Message of 21 December 2007 on the Amendment of the Code of Obligations (BBl 2008 1589; notes to art. 963 draft-CO, BBl 2008 1722f.); BBl 2012 63.

members, are also potentially capable of exercising control over another company that provides security services abroad.

Control over a company is considered as given where a natural or legal person, or a business association without legal personality, holds directly or indirectly a majority of the votes in the controlled company's highest decision-making body (in the case of a corporation, the General Meeting of Shareholders). Control is also considered to be exercised where a natural person or company directly or indirectly holds the right to appoint or remove a majority of the members of the highest executive or management body of the controlled company (in the case of a corporation, the board of directors). Finally, a relationship of control also exists where, pursuant to the articles of incorporation, foundation charter, or a contractual agreement (e.g., shareholders' agreement, unincorporated association agreement), or other similar instrument, controlling influence can be exerted.

Article 5, paragraph 2 (a)-(c), of the draft Act was modelled on article 6 paragraph 3 (a)-(c), of the Federal Act of 16 December 1983 on the Acquisition of Real Estate by Persons Abroad.[68] This provision is intended to cover the control of business associations without legal personality that provide security services abroad. The business assets of such associations are owned in common by the members thereof. As a result, each member of the business association has access to those assets. In companies that provide security services, the assets include the physical equipment needed specifically for the conduct of the company's activities (e.g., motor vehicles, weapons, training facilities, etc.). Security companies that dispose of such equipment abroad are also intended to fall within the draft Act's scope of application. The exercise of control over a partnership is presumed where a legal person or one or more natural persons are partners therein bearing unlimited liability. This is meant to include each member of a general partnership (cf. CO art. 552, para. 1), and each general partner in a limited partnership (CO art. 594, para. 1 and 2). These are situations in which one or more natural persons bear personal and unlimited liability for the business's liabilities.

The provision contained in article 5, paragraph 2 (b), is intended to cover limited partners (natural or legal persons, or business associations). Partners in limited partnerships, despite the limitation on their liability, enjoy common ownership of the firm's assets.

A limited partner is considered to be in a position of control in a limited partnership where he makes funds available to the business – in the form of a partnership contribution – in an amount exceeding one third of the firm's total equity.

Article 5, paragraph 2 (c), of the draft Act applies to those cases in which third parties make reimbursable funds available to business associations without legal personality that provide security services, or to those members of such associations who bear unlimited liability, e.g., by furnishing them with loans. Control is then said to be exercised where the funds in question are in an amount exceeding one half of the difference between the firm's total assets and its liabilities (debt capital) towards third parties that do not provide security services.

Article 6 Subcontracting

68 SR **211.412.41**

Article 6, paragraph 1, of the draft Act ensures that not only those companies that have given to a principal an undertaking to provide a security service, or a service in connection therewith, but also those companies to whom performance of such undertakings has been subcontracted, are required to comply with the legal prescriptions. These apply to the same extent for all parties involved.

With regard to the liability of the primary contractor for harm caused by the subcontractor that performs the service, article 6, paragraph 2, refers to the applicable provisions of the Code of Obligations. There is good reason for this, as it renders applicable the liability provisions and exculpatory clauses as developed for the different specific contract types.

Infringements of article 6 are subject to punishment. Pursuant to article 14, paragraph 3, of the draft Act, the authority may prohibit a company from subcontracting the providing of a service to another company where the subcontractor that is to provide the service fails to comply with the constraints set forth in article 6.

Article 7 Accession to the International Code of Conduct for Private Security Service Providers

Article 1 imposes on companies an obligation to accede to the International Code of Conduct for Private Security Service Providers, in the Version Dated 9 November 2010 (Code of Conduct). The duty to become a signatory applies not only to companies that operate in Switzerland or out of Switzerland (art. 2, para. 1), but also to companies that perform on behalf of the Confederation a task of protection abroad (art. 2, para. 3, and art. 31, para. 1 [b]). Hence, also subject to the obligation to accede are, for example, local security service providers domiciled abroad who conduct activities there on behalf of a Federal authority. It is self-evident that the duty to accede also comprises a duty to fully adhere to the terms of the Code of Conduct.

Infringement of the duty foreseen in article 7 is subject to administrative sanction by the competent authority in the form of a prohibition (art. 14, para. 2 [c]).

Paragraph 2 provides for a delegation of authority to the Federal Department to which the competent authority is subordinated, empowering the Department in question to determine that an amendment to the Code of Conduct is to be applicable to subject matters governed by the draft Act, provided that the amendment is not contrary to the provisions of the draft Act.

2.2 Prohibitions

Article 8 Direct participation in hostilities

Article 8 is one of the central elements of the draft Act. It defines the prohibited domain of direct participation in hostilities abroad. Activities belonging to that domain are strictly prohibited by law. It reflects the unanimous desire of the members of the Federal Council to fully outlaw “mercenary activities”, whereby that term is understood in a much broader sense than is assigned to it in the highly

restrictive definition found in existing instruments of international law (see above, section 1.8.1). The strict statutory prohibition on such activities is intended to protect Switzerland from becoming implicated, even indirectly, in armed conflicts abroad.

In keeping with the definition set forth in article 4, letter (c), the statutory prohibition imposed in article 8 applies to direct participation in hostilities in the context of an armed conflict abroad, within the meaning of the Geneva Conventions and the Protocols I and II Additional thereto.

Article 8, paragraph 1

Article 8, paragraph 1, prohibits companies from conducting various activities conducive to direct participation in hostilities abroad. The focus here is not on the individuals who themselves take part in an armed conflict, but on the companies that organise such participation from Switzerland, or conduct activities preparatory thereto in Switzerland. Paragraph 2 addresses the issue of direct participation by individual natural persons.

Paragraph 1 (a) prohibits the recruitment or training of personnel in Switzerland for purposes of direct participation in hostilities abroad. Recruitment means the seeking of new personnel on Swiss territory, whereby the act of recruitment may also be carried out virtually, as, for example, by means of an Internet platform operator who may be held to be domiciled in Switzerland. The forms of training covered by the draft Act include such things as combat training camps and training in the use of weapons; also included, however, are lessons in strategic and tactical planning, or lessons in logistics, communications, intelligence gathering, or counterespionage. The statutory conditions are fulfilled not just in cases where participation in a specific conflict is being prepared for, but even in those cases where the recruitment or training of personnel is carried out for the more general purpose of preparing them for future participation in combat operations abroad.

Paragraph 1 (b) prohibits the furnishing of personnel, from Switzerland, whether directly or as an intermediary, for purposes of direct participation in hostilities abroad. It is not necessary that the personnel in question be present on Swiss territory; their recruitment can also have been conducted abroad. The prohibition nevertheless applies, however, where activities conducted in Switzerland bring together suppliers of “mercenary services” with clients seeking such services.

Paragraph 1 (c) prohibits the establishment, basing, operation, or management, in Switzerland, of a company that furnishes personnel, directly or as an intermediary, for purposes of direct participation in hostilities abroad. In contrast to letter (b), the decisive element here is the existence of a relation between the company and Switzerland at the time when the activities subject to prohibition are conducted abroad. This also applies with respect to holding companies, which are addressed under letter (d).

Article 8, paragraph 2

Article 8, paragraph 2, applies to individual natural persons who directly participate in hostilities abroad. This is intended to prohibit individuals from engaging in mercenary activities. The prohibition applies to persons who fulfil the two cumulative criteria of being domiciled or having their habitual place of residence in Switzerland and of being in the service of persons or of companies that are subject to the draft Act. Conversely, where only one of these criteria is satisfied, the conduct in question is not prohibited.

Individuals are thus rendered subject to punishment only where a relationship with Switzerland can be established at a dual level. In addition to being domiciled or having their habitual place of residence in Switzerland, they must also conduct activities on behalf of a security company that is based in Switzerland, operates out of Switzerland, or is controlled from here. The rationale behind this is that the draft Act is intended to allow prosecution only of those activities that have a sufficiently strong link with Switzerland as to be capable of seriously prejudicing its interests. Mere "adventurism" on the part of an isolated individual, by contrast – unless criminal activities are involved – has thus far never been treated as a punishable offence, and there is no reason to change this policy. Sporadic cases of individual Swiss citizens acting of their own accord on foreign territory is of no particular significance for Switzerland in its capacity as a sovereign state. The present draft Act is intended to bar companies from organising mercenary activities that could be seen as having a connection with our country. In the event that further reaching prohibitions on activities by individuals should be desired, these would need to be discussed not in connection with the present draft proposal, which focuses on security companies, but in the framework of a revision of various statutory provisions relating to national security and defence, as are found in the Criminal Code and in the Military Criminal Code.[69]

The following considerations played a determinant role: Switzerland cannot impose a universal ban on the provision of mercenary services by individual natural persons. In the interest of feasibility and efficiency, the draft Act must limit itself to situations in which there is a clear connection with Switzerland. These are the cases in which the risk of the country becoming implicated in an armed conflict is the highest. The primary purpose of the draft Act is to prevent such risks from arising.

The criterion of an individual's domicile or habitual place of residence takes its reference from the definitions provided in article 20, paragraph 1 (a) and (b) of the PILA.[70] Intended are both Swiss nationals and foreign citizens whose presence in Switzerland is not merely temporary. Individuals who are only transiting through, or vacationing in, Switzerland do not fall within the scope of the Act. Conversely, it makes no difference whether contact with a company that participates in hostilities was established in Switzerland or abroad, as long as the domicile or habitual place of residence of the person establishing such contact is in Switzerland. At the same time, Swiss citizenship is not a criterion for determining applicability. Swiss citizens domiciled or residing abroad are thus not subject to the terms of article 8, paragraph 2. The rationale behind this is based on considerations of feasibility and the purpose of the Act. The investment required for imposing penalties on individual natural persons living far away from home and participating in an armed conflict in that place, or in another country, would be disproportionately high. Moreover, it is primarily the responsibility of the country of domicile to prevent such conduct. Swiss interests are far less affected in such cases than in those in which the individual in question lives in Switzerland.

With regard to the terms of the definition of direct participation in hostilities, reference may be made to the practice that has been developed in the framework of the Geneva Conventions and Protocols Additional thereto (cf. art. 4, letter [c]). As may be inferred from the Interpretive Guidance published by the ICRC, the following acts can be considered as constituting direct participation in hostilities:

69 See above, sect. 1.2.6 and 1.2.7
70 SR **291**

– The assumption of a combat function on behalf of the armed forces of a State party to a conflict. By contrast, the assumption of a function in the medical corps or in the pastoral services of the armed forces of a State party to a conflict does not constitute direct participation in hostilities.

– The assumption of a combat function on behalf of an organised armed group belonging to a non-State party to a non-international armed conflict.

– The defence of military personnel and other military objectives against enemy attacks. The protection of military personnel and military objectives against crime or violence unrelated to hostilities, on the other hand, falls into the category of law enforcement or defence of self or others.

– The delivery of ammunition to an active firing position at the front line. However, transporting ammunition from a factory to a port for further shipping to a storage depot in a crisis or conflict zone cannot be considered to have a sufficiently close connection with on-going military operations to be qualified as "direct" participation in hostilities.

Logistical services, such as the organisation of food and shelter in a combat zone, must also be seen as a form of "direct participation", since such services are indispensable for the conduct of combat operations. This is not the case, on the other hand, with the providing of laundry services or the operation of a military canteen behind the lines of combat. There may also be circumstances under which an activity conducted in Switzerland may be qualified as direct participation in hostilities abroad. This would be the case where an individual carried out, in Switzerland, specific acts pertaining to the actual conduct of hostilities, e.g., by attacking from here the computer system or military communications system of one of the parties to the conflict in direct support of the military operations of another party to the conflict.

Direct participation in hostilities is prohibited only where the person in question is acting in the service of persons or companies that are subject to the draft Act. This is in keeping with the main thrust of the draft Act, which is directed primarily against "mercenary firms". Insofar as Swiss interests are concerned, the isolated acts of individual adventurers, however morally reprehensible their conduct may in some cases be, are far less likely to create problems than are the organised operations of business enterprises. Limiting the scope of application to business undertakings, moreover, makes it possible to circumvent various difficulties in the balancing of public and private interests and in the drawing of certain delicate distinctions under international law. This can be seen particularly clearly in cases involving internal armed conflict. In such cases, Switzerland could not prohibit a foreigner living in Switzerland from taking part in an internal armed conflict on the side of the government of his home country unless he were to do so while operating out of Swiss territory. A prohibition of that kind would be incompatible with the duty of non-intervention in the domestic matters of other states, as foreseen in article 2, paragraph 7, of the UN charter[71] and by customary international law. For the same reasons, and in keeping with the country's neutrality policy, Switzerland may also not give its support to direct participation on the side of rebel forces. Under existing law, the armed participation of foreigners, whether on the side of government forces or that of rebel forces, is not a punishable offence, provided that the activities in

71 SR **0.120**

question are not conducted on Swiss territory and are not prohibited under international law.[72]

By setting as the criterion for the applicability of the prohibition the conduct of an activity in the service of a person or company subject to the draft Act, fruitless discussions as to the motivations of the actors are avoided. Whether an individual participates in an armed conflict out of conviction, or whether it is for purely financial reasons, is of no account where the person in question is acting in the service of other persons or of a business undertaking. As a rule, there will be a formal employment relationship. This is not a requirement, however. By leaving the formulation open, it is possible to extend the prohibition to include, for example, also unpaid combat service. This is done with good reason, as experience has shown that the definitions of mercenary activities currently in use in international instruments, which require, among other things, the seeking of personal gain, are too narrow and, consequently, not practicable. In addition, Swiss interests can also be seriously prejudiced even where the individuals participating in hostilities do so out of conviction, when those convictions are politically or ideologically motivated.

The prohibitions imposed in article 8 form the basis for the criminal sanctions set forth in article 21 of the draft Act. Violations are subject to punishment by imprisonment for a term of up to three years.

In addition, all persons who are subject to the SCC[73] may also be sentenced to punishment, pursuant to the terms of that Code, for any crimes they may commit in the context of an armed conflict (see above, sect. 1.2.6).

Article 8 implements the Montreux Document's recommended Good Practices 1 and 53.

Article 9 Serious violations of human rights

The prohibition imposed in article 9 applies not to the human rights violations themselves. Rather, the prohibition in question is directed against security companies and security services, and services connected therewith, that make an identifiable contribution to permitting the commission of serious human rights violations ("of which it may be assumed that they will be utilised by the recipient or recipients in the commission of serious human rights violations"). Switzerland has an interest in preventing the conduct, from within its territory, of activities that discernibly facilitate the commission of serious human rights violations. The statutory prohibition foreseen in article 9 is limited to serious violations of human

72 Pursuant to SCC article 300 (Hostile acts against a belligerent or against foreign troops), shall be subject to punishment "any person who, from within Swiss territory, undertakes or provides support for hostile acts against a belligerent". Under this provision, only activities undertaken from within Swiss territory in connection with international conflicts are subject to punishment. Paragraph 2 (1) of article 299 (Violation of foreign territorial sovereignty) is formulated somewhat more broadly, in that it foresees prosecution for the entering of foreign territory in violation of international law. The return of a foreign national to his home country for the purpose of fighting on the side of rebel forces would thus presumably not be subject to prosecution, at least in such cases where the individual in question was not armed when entering the country. Paragraph 2 (2) of the same provision renders punishable the violent disruption of the public order of a foreign State only in cases where the offender operates from within Swiss territory. Finally, the provision on weakening the national defence, as found in article 94 of the MCC (SR 321.0), is applicable only to Swiss citizens.

73 SR **311**

rights, the commission of which in Switzerland would be subject to criminal prosecution as crimes or misdemeanours (see, in this connection, also art. 21, para. 2). For all other violations of human rights, the draft Act foresees the alternative of the competent authority issuing a prohibition, pursuant to article 14, letter (b), on security services that facilitate the commission of such violations (see the notes to article 14).

Article 9, *letter (a)*, covers security services or services in connection therewith. The reference here is to the recruiting, training, or furnishing, directly or as an intermediary, of personnel for private security services to be provided abroad (art. 4, letter [b]). In order for such activities to be subject to the prohibition, they must be conducted from Switzerland. They must be of service to the recipient or recipients in the commission of serious human rights violations abroad.

A non-exhaustive list of examples of serious human rights violations would include arbitrary killings, torture, and other cruel, inhuman or degrading treatment or punishment, kidnapping, arbitrary arrests, the deprivation of liberty, or the systematic suppression of freedom of expression. Similar definitions are also found in the SCC,[74] as, for example, in article 264*c*, which renders punishable severe violations of the Geneva Conventions. Restriction of the scope of application to serious human rights violations reflects the fact that what is at issue in article 9, paragraph 1 (a) is not the human rights violation as such, which is in any case subject to punishment. The party committing the human rights violation is the recipient of the security service in question, and not the provider thereof. Paragraph 1 (a) covers activities that, in a specific, concrete case, facilitate the commission of serious human rights violations, but which, as such, would not otherwise be objectionable. An example is the operation or oversight of prison facilities by private security companies. Where this service is provided in a democratic State subject to the rule of law, it is not, as such, objectionable. The situation is different, however, where the prison is located in an authoritarian State, of which it is known that the authorities employ torture. In such a case, the operation or oversight of the prison facilities by a private service provider contributes considerably to the capability of the recipient of that service to commit serious human rights violations. This also means that is not sufficient for any contribution whatsoever to have been made; rather, it must be a contribution that reaches a certain degree of intensity. Pursuant to the draft Act, private security services are prohibited only where "it may be assumed that they will be utilised by the recipient or recipients in the commission of serious violations of human rights". In addition to the intensity of the contribution, it is also necessary that the connection between the providing of a security service and the commission of serious human rights violations be discernible to the service provider. A sufficient degree of discernibility is given where any reasonable individual would have to be aware that a given security service plays a substantial role in the commission of serious human rights violations.

Letters (b) and (c) cover the establishment, basing, operation, and management (letter [b]), or control (letter [c]) of companies that provide private security services or services in connection therewith, as set forth in letter (a). It is consistent with the purposes of the draft Act not to tolerate the presence in Switzerland of security companies, or of holding companies that exercise control over security companies, for whom it is easily discernible that the services they provide, or the services

74 SR **311**

provided by companies over which they exercise control, contribute to the commission of serious human rights violations.

Infringements of article 9 are subject to punishment by imprisonment for a term of up to three years (art. 21, para. 2).

This provision implements the Montreux Document's recommended Good Practices 1 and 53.

2.3 Procedure

Article 10 Declaration

Paragraph 1 establishes the principle, according to which any company that intends to conduct such activities as are set forth in article 2, paragraph 1, has an obligation to file a declaration thereof in advance with the competent authority, and to provide that authority with certain information concerning the intended activities and the service provider (including any subcontractors), the personnel that is to provide the service, their training, and the business sectors in which the company is active. The company also has a duty to inform the authority as to the identity of all persons of responsibility. In addition, it must produce an attestation of its accession to the Code of Conduct.

Paragraph 2 provides that any company that exercises control over a security company (art. 2, para. 1 [d], and art. 5 of the draft Act) must file a declaration not only on its own exercise of control, but also on that of the security services provided abroad by the company it controls, including all of the information required pursuant to paragraph 1. A holding company domiciled in Switzerland is thus precluded from asserting that it is capable of providing information only concerning its own limited activities, but not with regard to the activities of its operating units located abroad. This "holding company clause" is consistent with the draft Act's overall purpose of protecting Switzerland's interests, given that a connection with Switzerland can be established not only with security companies that operate abroad from within our territory, but also with parent companies that exercise control from here over subsidiaries that provide security services abroad.

The declaration procedure must be made simple. Filing may be made in writing or electronically. The declaration duty is considered to be a "debt of delivery" on the part of the company in question. It is incumbent upon that company to provide the competent authority with the required information. Where needed, the competent authority may request further information. The companies have a duty to cooperate.

Paragraph 3 is designed to ensure that security companies not only provide the competent authority with the required information prior to the providing of a service or conduct of another activity governed by the draft Act; they are also called upon to inform the authority forthwith at any time that the circumstances relating to their declaration undergo, or have undergone, a significant change. The reference here is not to changes in contractual agreements or the addition of new services, since these cases are already covered by paragraph 1. Rather, what is at issue here are external factors over which the company has no influence, but which can give rise to a situation in which certain services must be qualified differently in terms of the

purposes of the draft Act, as defined in article 1 thereof. Thus, for example, a region that was initially considered to be safe could, due to the outbreak of an internal conflict, be transformed into a crisis and conflict zone. In such cases, the authority must be in a position to conduct a reassessment, which is possible only if the company provides it with the necessary information. The competent authority, for its part, then has a duty to inform the company without delay as to whether the latter is permitted to continue conducting the activity in question. The possibility exists that an on-going operation cannot simply be interrupted, or cannot be interrupted without undesirable consequences for the service provider or for the persons under its protection. Thus, for example, where a company takes on an assignment for the protection of persons in a foreign State and an armed conflict breaks out there, circumstances may require that it continue in the performance of its task at least until such time as the persons under its protection have been brought to safety. The competent authority must take such factors into account.

Infringements of the duty to file a declaration are subject to punishment (art. 23).

A transitional provision governing the duty to declare activities already being conducted at the time of the Act's entry into force has been included in the draft (art. 39, para. 1).

Articles 10ff. implement the Montreux Document's recommended Good Practices 54 and 57-67.

Article 11 Duty to forbear

This duty requires of companies that they forbear from commencing conduct of the activity for which they have filed a declaration they have received from the competent authority notification or a decision pursuant to articles 12-14.

Pursuant to the terms of paragraph 2, the authority may make an exception and permit the conduct of an activity while a review procedure is being carried out, where an overriding public or private interest so demands. An overriding private interest could exist, for example, where there is no question of a statutory prohibition and the issuance of a prohibition by the authority also appears highly unlikely, or where a certain security service must be provided within a fixed, narrowly restricted period of time (e.g., the protection of a shipment from A to B on day X).

Infringements of the duty to forbear are subject to punishment (art. 23).

Article 12 Notification by the authority

This provision governs the procedure once filing the declaration with the authority has been made. The competent authority has an obligation to notify the company within fourteen days following receipt of the declaration as to whether the activity declared gives cause for the initiation of a review procedure at that time.

Where the authority determines that in the case in question none of the grounds set forth in article 13 apply, it informs the company that there is no cause for the initiation of a review procedure. The company in question may then commence conduct of the declared activity. Such notification, however, does not constitute a decision within the meaning of article 5 of the Federal Act of 20 December 1968 on

Administrative Procedure (APA).[75] In other words, the competent authority does not issue to the company in question a licence to perform the private security service abroad. In its notification, the competent authority states only that there is no cause for the initiation of a review procedure "at the present time". It thus still has the option of initiating a review procedure at a later date, in the event of any significant change occurring in the circumstances of the case in question (art. 13, para. 1 [b]).

Where the competent authority reaches the conclusion that, based on one of the grounds set forth in article 13, a review procedure must be initiated, it notifies the company in question thereof.

Article 13 Review procedure

Pursuant to article 13, paragraph 1 (a), the competent authority initiates a review procedure where there are indications to suggest that the activity declared could be in conflict with the purposes set forth in article 1. Such indications may be seen, among other things, in the nature of the service to be provided (e.g., care of prisoners and operation of a prison facility), in the location where the activity is to be conducted (zone in which an armed conflict is taking place), in the identity of the recipient of the service (party to an armed conflict, or a dictator), or in the nature of the tasks to be performed by the security personnel (support services for combat or security forces).

Paragraph 1 (b) provides that the competent authority is also to initiate a review procedure where a significant change in the circumstances relating to a declared activity occurs, or has occurred, subsequent to notification pursuant to article 12. This would be the case, for example, where the competent authority obtains knowledge of new facts, or where the situation in the country in which the service is being provided has been fundamentally altered due to the outbreak of an armed conflict.

Pursuant to article 1 (c), a review procedure is also to be initiated where the competent authority becomes aware of the conduct of an activity that has not been declared. In such case, the competent authority will inform the company in question thereof, and allow it an opportunity to submit within ten days a statement in that regard (para. 2). Where called for, it may also demand that the company cooperate in the review procedure and, under certain circumstances, conduct on-site inspections (art. 18 and 19). The duty to forbear, pursuant to article 11, paragraph 1, also applies here, *mutatis mutandis*.

Paragraph 1 (d) provides that the competent authority is also to initiate a review procedure where it becomes aware of a violation of Swiss law (in particular, of a breach of the duty to adhere to the Code of Conduct), or of international law. Punishable acts (e.g., violations of art. 8 or art. 9) are reported by the authority to the Office of the Attorney General (art. 27).

Pursuant to paragraph 3, the competent authority is to consult with the authorities concerned, including the cantonal authorities (e.g., cantonal commercial register offices, debt enforcement offices, and, if circumstances require, also the cantonal security forces).

Pursuant to paragraph 4, the competent authority is to inform the company in question of the outcome of the review procedure within 30 days. This time limit is of

75 SR **172.021**

an indicative nature. The authority may extend the limit as needed, which may be the case where the subject matter is complex, or where activities are involved about which no declaration has been filed. The general legal provisions on procedural denial of justice apply in all cases. Depending on the conclusion it reaches, the competent authority notifies the company that the review procedure has been completed for the time being, or that it has reported the act in question to the Office of the Attorney General (infringement of the statutory prohibitions set forth in art. 8 and art. 9), or it issues a prohibition (art. 14).

The competent authority will charge a fee for the review procedure pursuant to article 17, paragraph 1 (a) of the draft Act. The decision on fees – unlike the outcome of the review procedure – is subject to appeal.

Article 14 Prohibition by the competent authority

Certain activities do not fall within the scope of application of the statutory prohibitions pursuant to articles 8 and 9. They may, however, in individual cases be contrary to the purposes set forth in article 1. Article 14, paragraph 1, accordingly imposes upon the competent authority a duty to prohibit, in full or in part, any activity that conflicts with the safeguarding of the internal and external security of Switzerland (art. 1, letter [a]), the realisation of Switzerland's foreign policy objectives (art. 1, letter [b]), the preservation of Swiss neutrality (art. 1, letter [c]), or the assurance of respect of international law and, in particular of human rights and of international humanitarian law (art. 1, letter [a]). Depending on circumstances, the authority may prohibit only one part of an activity for which a declaration has been filed.

In contrast to the cases to which articles 8 and 9 apply, those foreseen in article 14 are not subject to prohibition by effect of law, but to prohibitions issued by the competent authority on an ad hoc basis. This is a well-reasoned approach, as the risk of a prejudice to the Swiss interests protected under article 1, and as set forth there in general terms, may not in all cases be discernible with sufficient clarity to the companies that are subject to the draft Act. Because infringements are subject to criminal prosecution (art. 22 of the draft Act), conduct that is prohibited must be specified precisely. In construing letters (a)-(c) of article 1, but less so in the construction of letter (d) of that article, the competent authority disposes of a certain degree of latitude in making its determination as to whether an activity is fully or partially in conflict with any of the Act's purposes, as set forth in article 1. Where it determines that such is the case, however, it has a mandatory duty to issue a partial or full prohibition.

Under letters (a)-(f) is given a list of examples, not intended to be exhaustive, of situations in which it is particularly easy for private security companies to find themselves acting counter to the interests protected under article 1 of the draft Act. It is thus incumbent upon the competent authority to direct its particular attention to those types of situations. Where it determines that a conflict exists, it must prohibit the activity in question. The draft Act names the following cases:

– *Letter (a)*: A private security service is provided to persons, companies or foreign institutions in a crisis or conflict zone. The term "crisis or conflict zone" means a region or State, in which an armed conflict is being carried out. The term refers exclusively to regions or States in which the conflict is actually taking place. Where the conflict is between two States, but is

physically being waged only in a single State, only that State's territory is considered as a crisis or conflict zone within the meaning of the present provision. The term "crisis or conflict zone" also encompasses territories affected by internal tensions or disturbances, where the threshold of an armed conflict has not been reached (see art. 1, para. 2, of Additional Protocol II).[76] This can include regions or countries in which separatist movements are active, or States in which the structures of government are not functioning or are severely impaired, as, for example, where the major government institutions, or its armed forces or security forces, are entirely absent or only minimally present. Finally, the term "crisis or conflict zone" also includes regions or States in which human rights are subject to systematic and serious violation. The use of a dual criterion for qualifying human rights violations both quantitatively and qualitatively is intended as a means of ensuring that private security services can be provided even in difficult environments, on condition that the services themselves are not problematic. Human rights violations are considered to be systematic where, for example, a State regularly subjects persons on its territory to torture or to inhuman or degrading treatment (article 3 of the Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms,[77] and article 7 of the International Covenant of 16 December 1966 on Civil and Political Rights),[78] or where it is the practice of a State to impose the death penalty for minor offences. Individual cases of human rights violations are thus not sufficient for qualifying a country as a crisis or conflict zone. Under the terms of letter (a), the competent authority will prohibit the provision of private security services to a State, person, or body that violates sanctions imposed by the UN Security Council. Not covered by this provision, on the other hand, is the provision of private security services to the ICRC, or to Swiss government institutions such as the Swiss embassies or the Cooperation Offices of the Swiss Agency for Development and Cooperation (SDC).

– *Letter (b)*: The security service is provided to institutions or persons to whom they may be of service in the commission of human rights violations. Article 14, paragraph 1 (b), thus supplements the prohibition foreseen in article 9. Article 9 imposes an absolute prohibition by effect of law on the provision of security services where it must be discernible to the service provider that the recipient of those services utilises them in the commission of serious human rights violations. In conformity with article 14, paragraph 1 (b), the competent authority may, in addition thereto, also issue a prohibition on the provision of security services where, having reviewed the case, it arrives at the conclusion that those services could be of use to their recipients in the commission of human rights violations. The scope of application of article 14, paragraph 1 (b), extends to all human rights. As in the case with article 9, here again, it is the recipient of the services, and not the provider thereof, that commits a human rights violation. The authority may, however, reach the conclusion that a security service that is, in and of itself, legitimate, must nevertheless be prohibited where it facilitates the commission of such acts. In contrast with the statutory prohibition imposed

76 SR **0.518.522**
77 SR **0.101**
78 SR **0.103.2**

in article 9, which applies to grievous cases in which the service provider is easily capable of discerning from the outset that a service he has been asked to provide will facilitate the commission of serious human rights violations, the broader prohibition foreseen in article 14, paragraph 1 (b), is contingent in each case upon an individual assessment by the authority. Here, the situation is not always fully clear to the service provider from the outset. An assessment in terms of the Act's purposes, as set forth in article 1, on which the authority's decision must be based, can lead to divergent conclusions depending on the concrete circumstances of the individual cases. While there is no question that the operation, or surveillance by a private company, of a foreign prison in which torture is known to be practised is subject to prohibition under article 9, the admissibility of providing those same services for a prison in which, for example, the freedom of worship or the right to privacy is infringed, would need to be examined by the competent authority pursuant to article 14, paragraph 1 (b). At the same time, the authority will need to exercise a certain degree of restraint in issuing its decisions. Article 14, paragraph 1 (b), is intended to make possible a broader review of the circumstances, beyond the narrow scope of article 9, where Swiss interests are involved. This provision, however, is not intended for the purpose of educating other States in the law or to discourage the private sector from providing services that do not affect Switzerland's interests as a sovereign state. An example that illustrates the importance of a careful weighing of interests in terms of the Act's purposes, as set forth in article 1, would be the provision of surveillance services for a school in which girls are discriminated against, perhaps by the fact that they receive an education of lower quality than do the boys. In the great majority of cases, security services of this nature would have to be tolerated, even where they are provided to institutions in which the educational standards are in no way comparable to our own. Otherwise, it would hardly be possible to safely operate schools in war-torn regions where archaic patriarchal structures still prevail.

– Letter (c): The private security service consists in the provision of operational or logistical support for foreign combat or security forces. The term "operational support" is to be understood as referring, for example, to the furnishing of armed security personnel for the security forces of a foreign State that is confronted with popular demonstrations or other forms of internal unrest. Logistical support includes, for example, assistance with the construction of infrastructures in an emergency situation (arrival of large numbers of refugees in a foreign State), or the maintenance of a foreign army's war material, outside the context of an armed conflict. Where such a service constitutes direct participation in hostilities, it is subject to the statutory prohibition contained in article 8.

– *Letter (d)*: The activity consists in the provision of a service in the domain of military expertise in connection with a private security service. The company in question offers, for example, military or paramilitary training, or furnishes technical personnel drawn from former members of governmental armed forces. The State in which the future services of such technical personnel are to be provided need not already be known.

- *Letter (e)*: The provision of private security services, or of a service in connection therewith, may be of service to terrorist groups or criminal organisations.[79] In this case, the existence of such a risk is sufficient.
- *Letter (f)*: A company intends to establish, base, operate, manage, or control a company that provides such services as are listed under letters (a)-(e).

Paragraph 2 provides that the authority has a duty to issue a prohibition, regardless of whether the activity in question is contrary to the Act's purposes as set forth in article 1, in three specific cases. At issue are forms of conduct with regard to which the legislative intent is to render them categorically inadmissible and, as such, incompatible with the purposes of the Act.

- *Letter (a)*: A company has, in the past, committed serious human rights violations, and has not taken sufficient precautions to ensure that there is no recurrence thereof. The "track record" of a security company with regard to human rights must be taken into account. A party that has behaved without scruple in the past should no longer be permitted to conduct its activities unless it can convincingly make the case that such incidents will not be repeated in the future.
- *Letter (b)*: A company deploys personnel that does not possess the requisite training for the intended activity.
- *Letter (c)*: A company fails to adhere to the provisions of the Code of Conduct (cf. art. 7). The Codex is the result of a Swiss initiative. Because of this, Switzerland has a particular interest in barring activities that could undermine the effectiveness of this instrument.

Paragraph 3: The competent authority is to prohibit companies from subcontracting the providing of a private security service, or other service in connection therewith, to another company where it emerges that the company that is to provide the service fails to comply with the constraints set forth in article 6. In such a case, the competent authority must assume that the selection of the company to which performance was assigned was not made with sufficient diligence.

A prohibition issued by the competent authority pursuant to article 14 must contain a statement of the substantive reasons behind that decision. The company in question must be able to precisely comprehend from which activities it is being debarred under threat of punishment pursuant to article 22. The decision by the competent authority is subject to appeal in accordance with the general provisions on Federal procedure.

Pursuant to article 32, paragraph 1 (a), of the Federal Administrative Court Act of 17 June 2005 (FACA),[80]appeals are not permitted against administrative orders in the domains of internal and external national security, neutrality, diplomatic protection, and the remaining matters of foreign affairs. This provision corresponds to article 83, letter (a), of the Federal Supreme Court Act of 17 June 2005 (FSCA).[81]According to Federal Supreme Court precedent, these exceptions are to be construed restrictively.[82] They include solely what is traditionally referred to as

79 Cf., CGA art. 6, para. 1bis
80 SR **173.32**
81 SR **173.110**
82 BGE **137** I 371

"actes de gouvernement", that is, measures of a distinctly political nature. It is true that decisions issued pursuant to article 14 are taken with reference to Switzerland's interests in the domains of security or foreign policy. Nevertheless, because the primary purpose of those decisions is to fully or partially prohibit a company from conducting an activity, their nature is not distinctly political, but pertains more to the legal domain. In consequence, article 32, paragraph 1 (a) of the FACA, and article 83, letter (a), of the FSCA do not apply.

Infringements of a prohibition issued by the authority are subject to punishment (art. 22).

Article 15 Exceptions

Pursuant to article 15, paragraph 1, the Federal Council may, by way of exception, authorise activities to which articles 8 and 9 do not apply, but which would, in principle, be subject to prohibition under article 14. It may do so in order to protect a high national interest. That interest must manifestly take precedence over the interest that exists in applying article 14 of the draft Act. The Federal Council must not make an exception under the terms of article 15 without serious reflection. Under no circumstances is a departure from the statutory prohibitions foreseen in article 8 (direct participation in hostilities) and article 9 (serious violations of human rights) to be permitted.

Because of the political implications of such exceptions, decision-making authority is transferred to the Federal Council (article 47 of the Federal Government and Administration Organisation Act of 21 March 1997 [GOA]).[83] The subject matter of article 15 are activities that the competent authority has a duty to prohibit pursuant to the terms of article 14, because those activities are in conflict with the purposes set forth in article 1 of the draft Act and are thus contrary to Switzerland's interests. In reviewing the facts, the authority bases itself on legal criteria. In individual cases, however, matters of state may also be involved. In such cases, the draft Act grants the Federal Council a limited margin of latitude to permit, by way of exception, activities that the competent authority would be obliged to prohibit under the terms of article 14.

The exceptional circumstances need not always be of a dramatic nature. An occasion could arise, for example, in which it is deemed appropriate, for reasons of state, to make an exception and to authorise provision of an urgently needed security service in a remote region, despite the fact that the personnel being deployed by the private company does not (yet) possess the requisite training as demanded under the terms of article 14, paragraph 2 (b). The Federal Council could also consider exceptionally granting special authorisation, for example, where countries with which Switzerland is on friendly terms wish to avail themselves of the services of private security companies subject to the Act for a hostage rescue operation abroad, which could conceivably entail a slightly higher security risk for Switzerland or for Swiss interests abroad.

High national interests that take precedence over article 14 and thus lead to the exceptional granting of special authorisation by the Federal Council could also exist where the UN or another supranational or international organisation contracts with a company subject to the draft Act in the context of a peacekeeping mission in

83 SR **172.010**

keeping with Chapter VII of the UN Charter, and the Federal Council does not wish to stand in the way of this undertaking.

Pursuant to paragraph 2, the competent authority may submit to the Federal Council those cases that require a ruling on its part. Conversely, the security companies are not entitled to petition the Federal Council for special authorisation under the terms of article 15.

The exceptional grant of authorisation is made in the form of an administrative order, against which no appeal may be made. The existence of a "high national interest" that can justify the exceptional grant of special authorisation by the Federal Council is to be understood as a political determination concerning the country's internal and external national security, within the meaning of article 32, paragraph 1 (a) of the FACA[84] and article 83, letter (a) of the FSCA,[85] and is thus not subject to judicial review.

Where the Federal Council reaches the conclusion, in a given case, that there is no sufficiently high national interest that manifestly takes precedence to justify the granting of special authorisation, it refers the matter back to the competent authority. That authority will then issue an administrative prohibition pursuant to article 14, against which appeal may be made.

The Federal Council will determine ad hoc the measures of control required in exceptional cases (para. 3).

Article 16 Coordination

The WMA,[86] the CGA,[87] and the EmbA[88] foresee, respectively, a system of dual authorisation, licensing, or coercive measures that could, in certain cases, be applicable in parallel to the regime foreseen in the draft Act. The reality of the security services market is that certain companies do not simply provide private security services, but are also exporters of war material. Which of these activities is considered to be predominant will differ from one case to the next. For example, where there is a contract for the surveillance of military installations, which also calls for the furnishing of war material in the performance of this protection task, it is the private security service aspect that predominates. Conversely, the export of war material will be considered predominant in a contract in which that service is the principal subject matter, with surveillance of the material included only as an ancillary obligation. In other cases, the private security service and the export of war material may each constitute an entirely independent element of the agreement, with neither taking precedence over the other, as, for example, in an agreement calling for the delivery of war material and for the training of armed forces personnel in the use of the exported material.

In order to deal with such issues, paragraph 1 provides that the authorities concerned are to determine which authority will coordinate the procedure. Where disagreements arise, the common oversight authority or, by default, the Federal Council will rule on the question. The authority charged with coordination of the procedure has an obligation to ensure that it is conducted in as simple a manner as

84 SR **173.32**
85 SR **173.110**
86 SR **514.51**
87 SR **946.202**
88 SR **946.231**

possible. That authority will also serve as the authority with which the company communicates. It is to take all necessary measures in order to make certain that the company is informed as to all of its rights and duties within the time limits foreseen by the laws applicable in the given case. Where appropriate, the coordination authority will determine whether the various procedures can be joined so that a single decision can be rendered in the matter.

Article 17 Fees

This provision foresees that the competent authority will charge fees: for the review procedure pursuant to article 13, for the issuance of prohibitions pursuant to article 14, and for measures of oversight pursuant to article 19. In keeping with article 38, paragraph 1 (b), the Federal Council will fix the fee schedule. For the rest, the General Ordinance on Fees of 8 September 2004[89] will apply.

The rules governing the determination of fees by the Federal Council are found in article 46a of the GOA[90]. Paragraph 1 of the draft Act imposes two further conditions. First, the Federal Council may foresee fees only for the official acts enumerated in paragraph 1; second, the amounts of the fees must be fixed in such a manner that they cover the costs entailed by those acts. There is thus no intention to finance the entirety of the authority's activities by the charging of fees, but only to recover the entirety of the costs generated by the acts mentioned in paragraph 1.

2.4 Oversight

Article 18 Duty of cooperation

The companies to which article 2, paragraphs 1-3, apply have a duty to furnish the competent authority with all information required for the review of activities governed by the draft Act. This duty of cooperation conforms with the principle of proportionality, as only information relating to the activities under review must be furnished to the authority.

Infringements of the duty to cooperate are subject to punishment (art. 24).

Article 19 Oversight powers of the authority

Paragraph 1 imposes certain conditions on the authority's exercise of its oversight powers, so as to ensure that any impairment of the economic liberty of the companies subject to the draft law conforms with the principle of proportionality. Where a company attempts to influence the competent authority or fails to satisfy its duty of cooperation, and where all efforts on the part of the competent authority to obtain the necessary information and documents remain fruitless, the competent authority may, in the cases foreseen in article 13, paragraph 1, proceed with specific oversight enforcement measures.

The three measures foreseen are set forth in paragraph 1, under letters (a)-(c). The authority has the power (a) to conduct unannounced on-site inspections at the

89 SR **172.041.1**
90 SR **172.010**

premises of the company in question; it may (b) examine all relevant documents, i.e., the documents needed for a review of the activities subject to the draft Act; and it may (c) seize material.

Paragraph 2 provides that the competent authority may call in other Federal authorities as well as cantonal and municipal police officials.

Such measures are justified in domains that require a regime of more stringent oversight, as has already been introduced in the law on the export of war material and in that on the control of goods. The competent authority is in any case to be subject to the rules on official secrecy.

This article implements the Montreux Document's recommended Good Practice 68.

Article 20 Processing of personal data

The competent authority, in the performance of its legally assigned tasks, will be authorised to process personal data and data of particular sensitivity in connection with administrative or criminal prosecution and penalties, in accordance with the Federal Act of 19 June 1992 on Data Protection (FADP).[91]

In conformity with article 57*h* of the GOA,[92] it may also operate an automated data processing system for the management of its records. Only members of the competent authority's personnel will have access to personal data, and only insofar as such data are necessary to the performance of their tasks. The general rules governing data protection will apply. The Federal Council will enact implementation provisions setting forth, in particular, the categories of personal data to be processed and their retention periods.

2.5 Sanctions

Article 21 Infringements of legal prohibitions

Article 21 renders any infringement of the prohibitions set forth in articles 8 and 9 a criminal offence and fixes the punishments to which such infringements are subject. These offences fall under the category of misdemeanours, within the meaning of article 10, paragraph 3 of the SCC, and are subject to punishment by imprisonment for a term of six months to a maximum of three years. Imprisonment may be combined with a fine of up to CHF 1,080,000 (SCC art. 34, para. 1 and 2), in particular, where the offence was primarily motivated by the pursuit of financial gain or committed in the conduct of commercial activities. The seriousness of the offence is comparable to that of the offences proscribed under SCC art. 271 (1) (unlawful acts on behalf of a foreign state), SCC art. 299 (violation of foreign territorial sovereignty), SCC art. 301 (military espionage against a foreign state), and MCC art. 94 (foreign military service). These provisions foresee a punitive sentence of no more than three years. Article 264*i* of the SCC (violation of a truce or peace agreement), and SCC article 264*j* (other violations of international humanitarian

91 SR **235**
92 SR **172.010**

law) foresee sentences of the same nature. There are, accordingly, good grounds for imposing a punitive sentence of the same kind in article 21 of the draft Act.

The offence defined in article 21, paragraph 1, can be committed only with intent, as is the case, for example, with the offences of genocide and crimes against humanity (SCC art. 264 and art. 264a). As defined in article 12, paragraph 2, of the SCC, the perpetrator of an offence acts intentionally in the commission of a felony or a misdemeanour where he acts with knowledge and volition, or where he is aware of the possibility that he may be committing an offence and willingly accepts this. Conversely, the draft Act does not render punishable direct participation in hostilities through negligence.

The constitutive elements of the offence proscribed under article 21, paragraph 1, were commented upon above, in the notes to article 4, letter (c), and article 8.

Considered as an offender may be not only the individual who himself participates directly in hostilities, but also the head of the company and any other person of responsibility who engages in any of the activities named in article 8, paragraph 1, that is, any person who, for example, establishes, managers or operates a business that furnishes personnel for direct participation in hostilities.

The perpetrator of the offence can be prosecuted in Switzerland, provided that the criteria for applicability, as foreseen in article 8 of the draft Act, are fulfilled and the criminal jurisdiction the Swiss courts is established, in keeping with the terms of SCC articles 6 and 7. This would be the case, for example, where recruitment activities carried out over the Internet or using other communications technology are organised, in the main, from Switzerland, that is, where the advertisements are uploaded from Switzerland, or are addressed (also) to persons domiciled in Switzerland. Where such advertisements fail to elicit a response, the perpetrator could be charged, at a minimum, with criminal attempt.

Paragraph 2 renders subject to punishment any person who conducts an activity of which it may be assumed that it will be utilised by the recipient or recipients in the commission of serious human rights violations (see the notes to article 9). The offence foreseen in paragraph 2 is committed with intent. Here again, the offence can be committed by the head of a company or by any person in a position of responsibility within a company that provides a security service of which it must be assumed that the recipient will utilise it in the commission of serious human rights violations.

Paragraph 3 deals with the relationship between article 21 and offences under the SCC and the MCC. It states that an offender may be subject to prosecution under both article 21 and the aforementioned Codes where his acts fall within the scope of those Codes and the degree of their seriousness is not covered by article 21. Article 3 thus resolves the issue of duplicity of charges that could arise between those laws and article 21.

This article implements the Montreux Document's recommended Good Practice 69.

Article 22 Infringements of prohibitions by public authorities

Article 22 renders contraventions of article 14 subject to punishment by imprisonment for up to one year, or by fine. As mentioned in the notes to article 14, the prohibition issued by the authority must include a statement of reasons, such that

the persons concerned (e.g., persons of responsibility within the company) will be in a position to identify precisely the activities from which they have been prohibited under penalty of criminal prosecution under the terms of article 22. It is not for the criminal authorities to determine whether an offender has committed an act contrary to the purposes set forth in article 1, but only to reach a decision as to whether said offender has infringed a prohibition that was issued by the competent authority, that is whether the offender has conducted any or all of the activities from which he was debarred. It is thus of primordial importance that the statement of reasons accompanying the prohibition decision be as complete as possible, in order to enable the criminal authorities to apply article 22.

This article implements the Montreux Document's recommended Good Practice 69.

Article 23 Infringements of the duty to declare or the duty to forbear

Article 23 renders contraventions of articles 10, 11, or 39, paragraph 2, subject to punishment by imprisonment for up to one year, or by fine. If the contravention was the result of negligence, the offender may be sentenced only to a fine.

This article implements the Montreux Document's recommended Good Practice 69.

Article 24 Infringements of the duty of cooperation

Article 24 foresees a penalty to a maximum amount of CHF 100,000 for any person who refuses to furnish information or documents, or to grant access to premises, in keeping with the terms of article 18 and article 19, paragraph 1, or who makes false statements. Where the offender commits the act through negligence, the maximum fine is CHF 40,000. This provision corresponds to the type of punishment foreseen in article 36, paragraph 1 (a) of the WMA.[93]

This article implements the Montreux Document's recommended Good Practice 69.

Article 25 Infringements within a business undertaking

Modelled on the legislation in the matter of war material, article 25, paragraph 1, of the draft Act provides that article 6 of the Federal Act of 22 March 1974 on Administrative Criminal Law (ACLA)[94] is to apply in cases of infringements committed within a business undertaking. Under this provision, where an offence is committed through the management of a business, regardless of whether or not that business has legal personality, or in any other manner, in the conduct of an activity on behalf of a third party, the criminal provisions are to apply to the natural persons who have committed the act in question (para. 1). In addition, the head of a business, an employer, a principal, or a party being represented, who, either intentionally or through negligence, and in breach of a legal duty, fails to prevent an offence from being committed by a subordinate, an agent or a representative, or fails to remedy the effects of the commission of such an offence, is subject to the criminal provisions applicable to a perpetrator who has acted either intentionally or through negligence (para. 2). Where the head of a business, employer, principal or party being represented is itself a business, with or without legal personality, paragraph 2 applies to the company's executive and management bodies and their members, to managing partners, actual managers, and liquidators guilty of wrongdoing (para. 3).

93 SR **514.51**
94 SR **313.0**

Paragraph 2 is modelled on article 49 of the Federal Act of 22 June 2007 on the Swiss Financial Market Supervisory Authority,[95] and constitutes a lex specialis to article 7 of the ACLA. Under ACLA art. 7 (infringements committed within a business undertaking), a business undertaking may be subject to punishment where the penalty that comes into consideration does not exceed CHF 5000 and where the identification of persons liable for punishment (ACLA art. 6) would necessitate investigative measures that would be disproportionate to the punishment incurred. In view of the sanctions foreseen by the present draft Act, it would appear reasonable to raise the penalty threshold for infringements committed within a business undertaking, within the meaning of ACLA art. 7, to CHF 20,000.

Under the terms of paragraph 2, the competent criminal authority has a duty to carry out investigative measures in order to identify the persons or company bodies that are liable for punishment. It is only in the event that the identification of those persons or bodies could not be achieved without deploying a series of time-consuming and laborious measures that the procedure against them may be abandoned and that the business enterprise itself will be sentenced to payment of the penalty. Further, application of article 25, paragraph 2, enters into consideration only for infringements foreseen by the draft Act, that is, for infringements of the duty of cooperation (art. 24). The amount of the penalty may not exceed CHF 20,000.

Article 25, paragraph 2, should not be confused with the provision governing corporate responsibility as set forth in SCC art. 102. The purpose of article 25, paragraph 2, is, indeed, not to punish companies for organisational deficiencies, but rather to allow the possibility of acting in the interest of greater economy of process. In addition, SCC art. 102 is applicable exclusively to misdemeanours and felonies, while article 25, paragraph 2, of the draft Act may be applied only to administrative contraventions.

Jurisdiction for the imposition of penalties pursuant to article 25, paragraph 2, lies with the Federal judicial authorities, as foreseen in article 27.

Article 26 Dissolution et liquidation

Pursuant to paragraph 1, the competent authority may order, in conformity with the Federal Act of 11 April 1889 on Debt Enforcement and Bankruptcy (DEBA),[96] the dissolution and liquidation of a legal person, or of a general or a limited partnership that conducts an activity in violation of a prohibition by the law or by a public authority. No duty to do so is imposed. The authority is thus afforded a certain degree of discretion. It must examine in each individual case whether such measures are justified and, in particular, whether they are in keeping with the principle of proportionality. Before ordering the dissolution and liquidation of a business undertaking, it must review whether other sanctions enter into consideration. The procedure for initiating bankruptcy proceedings is governed by the DEBA.

Pursuant to paragraph 2, the competent authority is also authorised, in the cases foreseen in paragraph 1, to order the liquidation of the business assets of a sole proprietorship and, as the case may be, its deletion from the Commercial Register. Paragraph 3 foresees, further, that the authority may confiscate any balance resulting from the liquidation.

95 SR **956.1**
96 SR **281.1**

This article implements the Montreux Document's recommended Good Practice 69.

Article 27 Jurisdiction and duty to report

While legislative authority in matters of criminal justice and criminal procedure lies with the Federal government, the administration of justice normally lies within the purview of the cantons, unless otherwise provided by law.[97] The offences here in question have a strong international element and may be characterised by a high degree of complexity. Taking into account the applicable legal provisions, it therefore appears reasonable to make the prosecution and adjudication of those offences subject to Federal jurisdiction. The fact that the authority competent for enforcement of the draft Act will be a Federal authority also speaks in favour of this alternative.

Paragraph 2 foresees a duty on the part of the authorities competent for the implementation of the draft Act to report to the Office of the Attorney General any infringements of which they obtain knowledge in the course of performing their official functions. For example, where the competent authority notes that an activity for which a company has filed a declaration, could constitute an infringement within the meaning of article 21, it will report this to the Office of the Attorney General.

This article implements the Montreux Document's recommended Good Practices 19 and 71.

2.6 Mutual administrative assistance

Article 28 Mutual administrative assistance within Switzerland

This provision sets forth the rules governing mutual administrative assistance between the competent authority and other Federal and cantonal authorities. Pursuant to paragraph 1, those other public authorities have a duty to provide the competent authority with the information and personal data required for the enforcement of the draft Act.

Paragraph 2 provides that the competent authority is to disclose to the following public authorities the information and personal data they required for the performance of their legal tasks: the Federal and cantonal public authorities responsible for the enforcement of the draft Act (e.g., Commercial Register or Debt Enforcement Offices); the public authorities responsible for enforcement of the WMA,[98] the CGA,[99] and the EmbA;[100] the criminal authorities, insofar as the prosecution of crimes or misdemeanours is at issue; the Federal and cantonal authorities competent for the maintenance of internal security; the Federal authorities competent in the domains of foreign affairs and the maintenance of external security; and the cantonal authorities competent for the licensing and oversight of private security services.

97 On the issue of Federal jurisdiction, see art. 23 and 24 of the Code of Criminal Procedure (SR 312.0) and, e.g., art. 40 of the WMA (SR 514.51).
98 SR **514.51**
99 SR **946.202**
100 SR **946.231**

The disclosures referred to in paragraph 1 and 2 may be made by the competent authority of its own accord, or upon request.

Article 29 Mutual administrative assistance between Swiss and foreign authorities

Article 29, paragraph 1, provides that the competent authority may request mutual administrative assistance from foreign authorities. The authorities in question could for example, be those at the place where the private security service is provided, or again those where a foreign company that has been hired to provide private security services abroad is domiciled. For the purpose of obtaining mutual administrative assistance, the competent authority may disclose to the foreign authority certain particulars corresponding to the information furnished by the company in question when the declaration was filed (article 10).

Article 29, paragraph 2, sets forth the rules governing the granting of mutual administrative assistance by Switzerland to a foreign authority. Adherence to the principle of reciprocity between Switzerland and the foreign State must be assured. The exchange of information under the rules of international mutual administrative assistance is carried out on an ad hoc basis and, in principle, both expeditiously and without great formality. The competent authority may grant mutual administrative assistance to a foreign authority only on condition that the latter makes use of the information transmitted for purposes that are consistent with those of the draft Act, and that the conditions set forth in article 6 of the FADP[101] are respected. The foreign authority is not permitted to make use of the information disclosed by the competent Swiss authority for enforcing provisions of tax or criminal law. In the event that the information disclosed is required at a later point in time in connection with criminal proceedings, the provisions governing international legal assistance in criminal matters will apply. The disclosure of information may be made by the competent authority of its own accord or upon request by the foreign State.

The disclosure of information must result from an administrative decision subject to appeal (APA art. 5 or 25*a*).[102]

This article implements the Montreux Document's recommended Good Practice 73.

2.7 Contracting of security companies by Federal authorities

Article 30 Tasks of protection

As a general rule, the task of protecting Swiss representations and staff residences abroad is assumed by the authorities of the host country.[103] In certain exceptional cases, the Confederation hires private security companies to perform specific tasks

101 SR **235**
102 SR **172.021**
103 See the Federal Council's Report of 2 December 2005 on Private Security and Military Companies, BBl 2006 631, at 3.4.2.

of protection,[104] but it may also deploy troops for the protection of persons or property particularly worthy of protection abroad where the safeguarding of Swiss interests so demands (see article 69, paragraph 2 of the Federal Act of 3 February 1995 on the Army and Military Administration,[105] and the Ordinance of 3 May 2006 on the Deployment of Troops for the Protection of Persons and Property Abroad).[106]

Article 30, paragraph 1, establishes the principle that the Confederation is authorised to contract with a private security company for the performance abroad of the protection tasks set forth under letters (a) and (b), that is, for the protection of persons and the guarding and surveillance of goods and properties. As indicated in the notes to article 2, paragraph 3, the term "contract with" refers not only to cases in which a Federal authority fully delegates a task of protection, but also to those in which it avails itself of the services of a security company for assistance in the performance of its mandate (e.g., for the secure transport of documents to be destroyed).

Article 30 constitutes a formal statutory basis for the delegation of a task of protection that falls within the competence of the Federal authorities (e.g., the protection of buildings belonging to the Confederation pursuant to articles 22ff. of the ISA).[107] The delegation of public security tasks to private security companies is in conformity with the SFC. Article 178, paragraph 3, of the SFC provides explicitly that the law may delegate administrative tasks to public or private entities or persons that are not part of the Federal administration. The delegation of public tasks is authorised only subject to fulfilment of the following conditions attaching, pursuant to article 5, paragraphs 1 and 2, of the SFC, to any government act, and pursuant to article 36, paragraphs 1 to 3, of the SFC, to any act restricting basic rights: delegation must rest upon a sufficient statutory basis, it must be in keeping with the public interest, and it must be in conformity with the principle of proportionality.[108]

The list of protection tasks set forth in article 30, paragraph 1, of the draft Act is exhaustive. They are those named in article 4, letter (a) (1) and (2), in the definition of private security services.

The Federal authority that contracts with a private company is referred to by the term "contracting authority". Paragraph 2 foresees a duty on the part of the contracting authority to consult with the competent authority concerning the reliability of the security company with which it intends to contract. The contracting authority must also consult with the DDPS in order to ascertain whether members of the Army can be deployed, should the need arise, for the protection of persons or property abroad.

Article 30 implements the Montreux Document's recommended Good Practice 1.

Article 31 Requirements with regard to the company

104 See the response of the Federal Council dated 22 February 2002 to the Interpellation no. 11.4172, of 23 December 2011, by National Councillor Allemann, "Private Security Services under the Mandate of the Confederation".
105 SR **510.10**
106 SR **513.76**
107 SR **120**
108 BBl **2006** 623, at 4.4

Prior to contracting with a company, the contracting authority must make certain that the company in question meets certain requirements. This provision applies not only to companies domiciled in Switzerland, but also to foreign companies that are not subject to the draft Act, such as local security companies abroad.

The conditions foreseen in article 31 are cumulative in nature. Reductions in the effort and costs involved in recruiting must not be achieved at the expense of compliance with the requirements set forth in article 31.

Paragraph 1 (a) provides that the company in question must provide the requisite guarantees concerning the recruitment, training, and oversight of the personnel being furnished to the contracting authority. Specifically, it must be in a position to guarantee that the security personnel have been or are recruited with all due care and diligence with regard, in particular, to their age, good repute, and physical and mental capacity to perform the tasks with which they are to be entrusted. The contracting authority must insist expressly that the company take pains to verify that the personnel it intends to recruit has no criminal record, so as to ensure that it does not hire individuals who have been implicated in criminal activities or have taken part in the commission of human rights violations. The security company must also provide a certain number of guarantees concerning the training and oversight of the personnel furnished to the contracting authority.

Paragraph 1 (b) provides that the contracting authority must make certain that the good repute and irreproachable conduct in business of the security company have been attested to. Specifically, the company must be a Signatory to the Code of Conduct and in compliance with its provisions. Field experience, references, or membership in a professional association of high standing (particularly in terms of the strictness of its standards and its oversight requirements) can also serve as credentials attesting to the good repute and trustworthiness of a company (paragraph 1 [a] [2]-[4]). If references are available concerning the company's clientele, these can also serve as useful indicators for the contracting authority that intends to avail itself of the services of a foreign company. If that company's clients include European countries, other democratic States, or international organisations, this may be an additional indication of the company's dependability.

Pursuant to paragraph 1 (c), the contracting authority must make certain that the company in question is solvent. To his end, the authority may request of the company that it provide information on which to base an assessment of its financial situation, including such documents as a statement from the competent Debt Enforcement Office, or bank statements indicating the status of the company's accounts.

Paragraph 1 (d) provides that the company in question must possess an adequate internal control system for guaranteeing the compliance of its personnel with established standards of conduct and the imposition of disciplinary measures where misconduct occurs. In companies of a certain size, such internal controls are often the responsibility of a so-called "compliance division".

Pursuant to paragraph 1 (e), the company must be authorised under applicable law to conduct activities in the domain of private security services. In certain cases, the applicable law requires only that the company or members of its personnel who are assigned to security tasks be announced with the declaration. In ascertaining that this condition has been met, the contracting authority must do so in a pragmatic fashion, by requesting, for example, that the company submit copies of the necessary

authorisations, other documents attesting to the existence of such authorisations, or a written statement certifying that it is in possession of all authorisations required by law. Special attention should be paid to ascertaining that there is compliance with the applicable laws in the State where the contract is to be performed. Where the foreign laws make the provision of private security services subject to authorisation, copies of the required authorisations must be produced.

Pursuant to paragraph 1 (f), the company must possess liability insurance coverage. Such coverage must be in an amount that corresponds to the risk incurred. Determining whether or not this condition has been fulfilled will depend on the circumstances of each individual case. This provision thus allows the contracting authority a certain margin of discretion.

Paragraph 2 foresees an exemption from the requirement imposed in paragraph 1 (f). The contracting authority may, by way of exception, contract with a security company that does not possess liability insurance coverage where purchasing such coverage would engender disproportionate costs to the company and where the liability risk borne by the Confederation and the amount of any compensatory damages to be paid may be assessed as low. The contracting authority may apply this provision only in exceptional circumstances. This exemption has been added in order account for the fact that in certain countries the protection of persons, or the guarding of buildings, can be assured only by local security companies, which may have neither the means nor the opportunity to purchase such liability insurance, and that there may be no available option for assigning performance of the protection task in conformity with the terms of paragraph 1 (f).

This article implements the Montreux Document's recommended Good Practices 2, 5-8, and 12.

Article 32 Training of personnel

Proper training of personnel is an essential condition for guaranteeing correct performance of a protection task that has been entrusted by a Federal authority to a security company. For this reason, article 32 imposes, in paragraph 1, the requirement that security personnel receive adequate training, commensurate to the task of protection that has been assigned to them, and in accordance with applicable international and national law governing a certain number of issues, which are then enumerated in paragraph 2.

The training must cover the subjects of basic rights, protection of personality rights, and procedural law (para. 2 [a]). In order to respond appropriately when acting in self-defence or in emergency situations, security personnel must be trained in the use of physical force and weapons (para. 2 [b]). In addition, they must be trained to conduct themselves properly when dealing with persons offering resistance, when assessing health risks, and when providing first aid. Finally, training of personnel must also address the issue of combating corruption (para. 2 [f]).

The list contained in paragraph 2 is not exhaustive. In each individual case, it is the duty of the contracting authority to determine whether the training of the security personnel must be supplemented to accommodate the particular circumstances, given the nature of the protection task to be performed and the situation prevailing at the place of performance.

Under the terms of article 32, paragraphs 1 and 2, the contracting authority is granted a certain discretionary power in making certain that the security personnel has been adequately trained. As a rule, the solution proposed in the draft Act will make it possible for the authority to contract with companies abroad that fulfil the conditions set forth in article 32. Nevertheless, the possibility cannot be excluded that in some rare cases, there will not be any company that is able to fulfil these conditions, as, for example, in a situation where a local company has a monopoly over the security services market there. It is for this reason that an exemption has been foreseen in paragraph 3, allowing the contracting authority, by way of exception, to contract with a company that does not fully meet the requirements set forth in paragraphs 1 and 2, provided that there is no other company able to satisfy those requirements at the place at which the service is to be provided and that the task of protection cannot otherwise be accomplished. In such case, the duration of the contract may not exceed 6 months (para. 4, 1st sentence). The authority must, at the same time, make an effort to remedy this situation and take measures to ensure that the company meets the requirements set forth in paragraphs 1 and 2 within as short a time as possible. The measures to be taken must be explicitly stipulated in the agreement with the security company. As a party to that agreement, the company will undertake to implement the measures imposed by the authority.

This article implements the Montreux Document's recommended Good Practice 10.

Article 33 Identification of personnel

The personnel must be identifiable when exercising their functions and, accordingly, be able to show under whose authority they are acting. The requirement that the personnel be identifiable implies, in particular, that they must be dressed in such a manner that they cannot be confused with the staff of a governmental authority, or with the members of a foreign State's armed forces or security forces. Security personnel may nevertheless performs certain tasks of protection in "civilian" dress in individual cases, where circumstances so demand.

This article implements the Montreux Document's recommended Good Practice 16.

Article 34 Arming of personnel

In performing any of the tasks of protection foreseen in article 30 on behalf of the Confederation, the personnel of a private security company will, as a general rule, be unarmed.

However, where the situation abroad makes it necessary that the personnel carry weapons so as to be able to react in self-defence or emergency situations, the contracting authority has a duty to stipulate this in the contract (para. 2). The term "weapons" includes firearms or other weapons such as truncheons, self-defence batons, or irritants. Self-defence and emergency situations, as defined in articles 15 and 17 of the SCC, refers to specific instances in which a person is under attack or under imminent threat of attack. The intent here is to allow security personnel to assure their own defence or that of others in the face of aggression.

Such personnel must be in possession of the requisite authorisations under applicable law (para. 3). In addition, the weapons legislation applicable in the place at which the task of protection is to be performed will apply.

This article implements the Montreux Document's recommended Good Practices 11 and 18.

Article 35 Use of force and other police measures

As a rule, the personnel of a security company with which the Confederation contracts will not be authorised to use force or other police measures as defined in the UFA.[109] The use of force may take the form of bodily force, the use of auxiliary means (such as handcuffs, other restraints, or police dogs), or the use of arms. The term "police measures" refers to the detention of individuals for limited periods of time, the searching of persons, premises, and vehicles, and the seizure of goods. Nevertheless, where a given task of protection cannot be performed otherwise, the Federal Council may, by way of exception, grand special authorisation, even in situations other than those of self-defence or emergency.

Any application of this provision must be in conformity with the principle of subsidiarity. Such an exception to the general rule could, for example, be necessary where the authorities of the host country are unable to assume the task of protection, or in an emergency situation. Unforeseen situations can present themselves quite suddenly for Swiss representations or SDC offices; a crisis that at first seemed minor, can degenerate to the point of placing the entire staff and infrastructure in peril (as, for example, following the arrest in Switzerland of a high-ranking member of a terrorist organisation, which could put Swiss embassies at risk of attack). The need to adopt immediate, preventive measures of protection can be necessary, for example, in order to assure the rapid and orderly evacuation of personnel without the need to wait until the threat of attack becomes imminent and the situation can be qualified as one of self-defence or emergency.

In order to grant such special authorisation, the Federal Council must first ascertain that the security personnel have received the necessary training (para. 2). It must also take into account the applicable law at the place where the protection task is to be performed (para. 3). The requirements set forth in article 31, and the obligation to accede to the Code of Conduct (art. 7) also apply.

Article 36 Subcontracting

Pursuant to this provision, it is prohibited for security companies with which the Confederation contracts to subcontract tasks of protection without the prior written consent of the contracting authority. This provision ensures that tasks of protection will not be performed by third parties that do not meet the requirements of the draft Act.

This article implements the Montreux Document's recommended Good Practice 15.

2.8 Reporting

Article 37

[109] SR **364**

The competent authority is required to address to the Federal Council a written report on its activities on an annual basis. The implementation ordinance may, if deemed necessary, specify the content of the report, which could include, for example, information on the activities of the persons and companies subject to the draft Act, on violations and statutory prohibitions, on prohibitions issued by the competent authority, on oversight measures that have been carried out, and on contracts awarded to security companies by the Confederation for the performance of tasks of protection abroad.

The competent authority has a duty to make public the report on its activities, possibly, for example, by making it available on its Internet site. In this way the obligation to ensure that the public is informed will be fulfilled.

This article implements the Montreux Document's recommended Good Practices 4 and 59.

2.9 Final provisions

Article 38 Implementation provisions

Pursuant to paragraph 1, the Federal Council will enact provisions for the implementation of the draft Act. Specifically, it is called upon to determine the specifics of the declaration filing procedure (letter [a]), the list of particularly sensitive personal data and the categories of data to be processed, and their retention dates (letter [b]). It will also determine the required terms and conditions of contracts by a Federal authority for the services of a company (letter [c]). The specifics relating to certain aspects of the Good Practices recommended in the Montreux Document could also be included in the ordinance to be enacted.[110]

Article 38, paragraph 2, provides that the Federal Council is to appoint the competent authority. In accordance with its decision of 29 August 2012, that authority will be a unit within the FDFA.

Article 39 Transitional provision

Paragraph 1 provides that any activity subject to declaration under the draft Act, and which is being conducted at the time of the Act's entry into force, must be declared to the competent authority within three months from the date of the Act's entry into force. The competent authority will make notification as foreseen in article 12 and, where appropriate, initiate a review procedure.

Where the competent authority concludes that a review procedure is to be initiated, it will also inform the company as to whether it must provisionally forbear, in full or in part, from conduct of the activity for which a declaration has been filed (para. 2).

Where the competent authority intends to prohibit an activity that is being conducted at the time of the Act's entry into force, and of which continued conduct is foreseen, the authority may grant the company a reasonable period of grace for achieving compliance with the provisions of the draft Act (para. 3).

110 See, for example, the Montreux Document's Good Practice 14.

The statutory prohibitions foreseen under articles 8 and 9 will apply as of the date of the Act's entry into force, and accordingly also to activities already being conducted at that time to which those prohibitions apply. It will be incumbent upon the companies concerned to determine whether their activities are unlawful and, where appropriate, to take the measures necessary to achieve compliance with the draft Act. Should they fail to do so, the criminal provisions will apply.

3 Projected effects

3.1 Financial consequences and personnel requirements for the Confederation

Implementation of the draft Act will not necessitate the establishment of a new authority. An existing unit of the FDFA will be able to assume the new tasks. The draft Act will nevertheless have some effects in terms of personnel requirements for the Confederation.

As currently estimated, the additional workload for the FDFA will necessitate, first, the creation of 2.5 additional full-time positions for a limited duration in order to get the new service up and running. After that, the on-going operations of the new service will necessitate the creation of five to seven new positions, representing additional personnel costs in the amount of approximately CHF 1,000,000 per year. In addition to those costs, allowance must be made for material costs (furniture, office space, computer equipment) and the general resource expenditure entailed. Further, costs in the amount of approximately CHF 50,000 will need to be budgeted for the training of the new personnel.

Further, a number of both one-time and periodic investments must be anticipated for the creation and operation of the new service, in particular, in connection with the computer infrastructure. The present estimate is that a one-time investment of approximately CHF 350,000 will be needed. Annual operating costs should be in the amount of approximately CHF 100,000, while the periodic investments required should amount to approximately CHF 100,000 every five or six years. In order to assure implementation within the time limits foreseen, a part of the costs would have to be budgeted before the Act enters into effect. From a practical point of view, the authority will need to be operational at once, since article 39, paragraph 1, of the draft Act imposes an obligation on companies to file a declaration of any activity subject to the draft Act that is already being conducted at the time of the Act's entry into force. That date is not likely to be before 2015.

The new positions to be created within the FDFA will be needed for performance of the following tasks: direction of the new service, research activities for the development of a new administrative practice, reporting and communications, and conduct of the administrative procedure (processing of declaration filings, notification of the companies concerned, decisions on prohibitions, and conduct of oversight enforcement measures), referral of cases to the Federal criminal authorities, monitoring of and participation in international developments, and administrative support activities.

In conformity with article 17, the competent authority will charge fees, in keeping with the principle of cost recovery, for certain acts relating to the review and oversight of the activities of the companies concerned. This notwithstanding, the fees charged will suffice to finance only a part of the costs generated by the new statutory tasks. Thus, the acts relating to the review and oversight activities conducted with regard to a specific case will be financed by the charging of fees. Nevertheless, the establishment of a regulatory regime for companies that provide private security services abroad is a matter that also belongs to the realm of foreign policy. By establishing such a regime, Switzerland will be positioning itself internationally at the vanguard of efforts to strengthen international law and, in particular, to develop and implement rules and good practices for private military and security companies. In exercising their functions, the new personnel will also contribute to this objective. The tasks they perform in connection therewith cannot, however, be financed through fees. In part, to be sure, they are already assumed by the FDFA today.

The prosecution of infringements of the draft Act will fall within the jurisdiction of the Federal justice system. Even if it is not to be anticipated that there will be a large number of cases, this new expansion of the scope of Federal jurisdiction will constitute a new task for the criminal authorities of the Confederation. Should the new tasks engender a considerable increase in the amount of resources required by those authorities, a budget increase would need to be requested from Parliament at the proper time.

3.2 Consequences for the cantons and municipalities

The cantonal authorities will be called upon to perform certain acts pursuant to the provisions of the draft Act (e.g., deletion of companies from the commercial register, or initiation of bankruptcy proceedings). As concerns the municipalities, the draft Act foresees that the competent authority may call upon the local police forces for assistance in carrying out measures of control.

3.3 Effects on the general economy

The general economic effects will be limited, since the number of companies concerned by the draft Act is not at present very large. Given the restrictive nature of the regime for which the draft Act provides, the possibility cannot be excluded that the market in private security services furnished abroad from Switzerland will experience a decline once the law is introduced, and that certain international companies will leave the country.

3.4 Effects on public health and social issues

No direct effects on public health or social issues in Switzerland are to be anticipated.

In other countries, the draft Act could, to a certain extent, have a positive effect for the local populations in terms of public health and social concerns. In practice, prohibiting security companies from conducting certain activities contrary to Switzerland's interests, such as direct participation in hostilities abroad, will constitute an effective contribution towards respect of the local populations' human rights.

3.5 Effects on the environment

The draft Act will have no direct effect on the environment in Switzerland.

3.6 Other effects

In contributing towards realisation of the purposes set forth in article 1, the draft Act will have the effect of enhancing the credibility of Switzerland's foreign policy.

4 Inclusion in the legislative programme and the national strategies of the Federal Council

The draft Act is included in the Message of the Federal Council of 25 January 2012 on the legislative programme for the 2011 to 2015 term, and in the Act of the Federal Parliament of 15 June 2012 relative thereto.[111]

111 BBl **2012** 481 and 7155

5 Legal considerations

5.1 Constitutionality and consistency with existing legislation

5.1.1 Constitutionality

Constitutional basis

The Federal Constitution contains a number of dispositions vesting in the Confederation the power to legislate in the matter of private security services provided abroad.

Article 95, paragraph 1, of the SFC provides that the Confederation may legislate on the exercise of economic pursuits in the private sector by enacting regulatory measures. These measures must nevertheless respect both the right of economic liberty as guaranteed in article 27 of the SFC, and the principles governing the economic order as set forth in article 94, paragraph 1, of the SFC. The legislative powers vested in the Confederation exist concurrently with those of the cantons. As of the present date, the cantons have not yet exercised their powers to legislate on this issue.

Article 54, paragraph 1, of the SFC invests the Confederation with comprehensive authority in matters of foreign affairs. In applying this constitutional provision, the Confederation may, in particular, enact normative instruments on domestic matters insofar as they relate to "foreign affairs". The term "foreign affairs" refers to the foreign policy of a country, that is, its policy vis-à-vis the international community and other States, and their populations.[112] Insofar as the draft Act is concerned, the link between the issue of private security services furnished abroad from Switzerland and the foreign policy of our country is of a fundamental nature.

The provisions governing the contracting of private security companies by Federal authorities find their basis in article 173, paragraph 2, of the SFC, which provides that the Federal Assembly is to deal with all matters that fall within the scope of the Confederation's authority and the responsibility for which has not been conferred upon another Federal authority. Within their own domains, the Federal authorities are authorised to organise themselves as they see fit and to choose the structure best suited to allow them to properly perform their statutory tasks.

Consistency with basic rights

Article 27 of the SFC contains a guarantee of economic liberty, which comprises, in particular, freedom of access to economic pursuits in the private sector and the right to freely exercise such pursuits. The right of free access to economic pursuits is intended to protect private citizens against government measures restricting access to a given economic pursuit in the private sector by such means as imposing authorisation requirements. At the same time, however, economic liberty is not absolute. It may be made subject to restrictions under the conditions set forth in article 36 of the SFC.

112 Jean-François Aubert and Pascal Mahon, Petit Commentaire de la Constitution fédérale de la Confédération suisse du 18 avril 1999, art. 54, p. 459, Zurich, 2003.

The regulatory regime instituted by the draft Act will place limits on the economic liberty of the companies and other persons subject to the draft Act. The requirements imposed by article 36 of the SFC are satisfied.

a) Statutory basis

The draft Act constitutes a statutory basis allowing for the imposition of restrictions on the economic liberty of the companies and other persons concerned.

b) Public interest

The system of oversight established by the draft Act is justified by a public interest, namely, the safeguarding of the internal and external security of Switzerland, the realisation of Switzerland's foreign policy objectives, the preservation of Swiss neutrality, and the assurance of respect of international law.

c) Proportionality

The draft Act is in conformity with the requirements set forth in article 36, paragraph 3, of the SFC, which provides that any restriction of a basic right must be proportionate to the intended objective.

The regime foreseen, under which the prohibition of certain activities is coupled with a prophylactic ad hoc declaration requirement is a suitable measure, as it allows the Confederation to exercise oversight over the services and activities at issue. In addition, such a system constitutes a regulatory regime that is less invasive on the part of the government then a system based on a general registration or licensing requirement. It does not impose a regime of absolute prohibitions, but prohibits only certain services and activities. Finally, it does not prevent the parties concerned from conducting those activities that are not considered problematic.

d) Equal treatment of direct competitors

According to judicial precedent, any restriction of economic liberty must also respect the principle of equal treatment of direct competitors. A difference in the treatment of two direct competitors can be justified only by the existence of serious and particularly weighty grounds. Considered as direct competitors are economic actors belonging to the same branch, who address themselves to the same public, with offers of the same kind, for satisfying the same needs.

The draft Act does not apply to security services that furnish private security services exclusively on Swiss territory; these continue to be subject to cantonal and intercantonal law. This does not, however, create a situation of unequal treatment for security companies operating abroad out of Switzerland, which will, for their part, be subject to the law. Such companies are not, in fact, direct competitors, since they do not offer the same services, they do not have the same clientele, and they do not satisfy the same security needs. Moreover, it remains the case that a security company active in Switzerland that intends to extend its activities to other countries would also be required to comply with the requirements of the draft Act.

5.1.2 Consistency with existing legislation

The draft Act does not require any amendments to existing Federal laws.

5.2 Compatibility with Switzerland's international obligations

5.2.1 Legal instruments of the European Union

The draft Act is in conformity with the agreements on the free movement of persons concluded with the European Union and its Member States and with the States of the EFTA. The draft proposal is in compliance, in particular, with the principle of the free provision of services as recognised in those agreements (see article 3 and the notes thereto).

5.2.2 Other international instruments

The draft Act is compatible with article 4 of the Convention of 18 October 1907 Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land,[113] and with article 47 of Protocol I.[114]

Other than that, Switzerland has not concluded any international treaty applicable to the providing of private security services abroad.

5.3 Form of enactment

Article 164, paragraph 1, of the SFC foresees that all important legal provisions that impose statutory rules and, in particular, those that impinge upon constitutional rights must be enacted in the form of a Federal law. The draft Act foresees restrictions on economic liberty and contains criminal provisions. This calls for the enactment of a formal law by the legislature. It is advisable that this be done in a separate piece of legislation, as the draft Act foresees a system of oversight that diverges considerably from other regulatory regimes already in place, in particular, in the domain of the export of war material, where a dual authorisation system has been instituted.

113 SR **0.515.21**
114 SR **0.518.521**

5.4 Spending brake

The draft Act will not entail any expenditures that would be subject to the spending brake foreseen in article 159, paragraph 3 (b) of the SFC.

5.5 Conformity with the Subsidies Act

The draft Act does not foresee the according of any financial assistance or subsidies.

5.6 Delegation of legislative authority

The draft Act foresees a delegation of legislative authority to the Federal Department to which the competent authority is subordinated. That Department will have the power to determine that an amendment to the Code of Conduct will be applicable to subject matters governed by the Act, subject to the condition that such amendment is not contrary to the provisions of the Act (art. 7, para. 2).

5.7 Conformity with data protection law

The draft Act is in conformity with the requirements set forth in the legislation on data protection. Article 20 constitutes a formal statutory basis, within the meaning of article 17, paragraphs 1 and 2, of the FADP, which allows the competent authority to process personal data in the performance of its legally assigned tasks. The authority will operate its data processing system pursuant to the terms of article 57*h* of the GOA.

Articles 28 and 29 constitute the formal statutory basis for the disclosure of personal data in conformity with the requirements set forth in article 19 of the FADP. They ensure the possibility of identifying the person in charge of the file, the purpose and the addressees of the disclosure and, in article 29, the data disclosed.

The Federal Council will determine in an ordinance the categories of data to be processed pursuant to articles 20 and 28, and the retention periods for such data.