EXIT A.D.M.D. *Suisse romande*

Association pour le Droit de Mourir dans la Dignité

Assisted dying in Switzerland

Introduction

In Switzerland, contrary to most European countries, assisted suicide is not *per se* illegal. But direct active euthanasia is a crime.

Private right-to-die organizations offer to assist people who want to commit suicide, within the framework of the law. One of them, Dignitas, extends its offer even to people not residing in Switzerland, which has prompted a so-called “death tourism” in the last years from countries such as the United Kingdom towards Zurich. As long as those organizations can show that they do not have any self-serving motive, they are not criminally punishable under Swiss law. But strong reactions abroad as well as within the country have resurrected the political debate on regulating more tightly assisted suicide and euthanasia.

In this short paper, we will explain the scope of the criminal provisions about assisted suicide and euthanasia, present the stand of the political debate and sketch future perspectives.

1. Criminal law and assisted dying

First, it is important to highlight the meaning given in Switzerland to a number of concept sometimes falling in other countries under the general heading “euthanasia”.

Passive euthanasia is defined as the renunciation or discontinuation of life-prolonging measures (e.g. a life-support machine is switched off or antibiotics are not administered). In such cases, death is not specifically caused by the act of non-initiating or stopping life-prolonging measures but by the underlying illness. The Swiss Penal Code (hereafter SPC) does not deal with passive euthanasia.

In the Swiss legal literature, active euthanasia is itself separated into two forms: indirect and direct active euthanasia.

Indirect active euthanasia is defined as the use of means to relieve suffering (e.g. morphine) which may have as a side effect to shorten a patient’s lifetime. The possibility that death might occur earlier than it would otherwise has been recognized and accepted by the person administering the pain relievers who, however, acts with a view to relieve suffering and not to kill. The Swiss Penal Code does not deal either with indirect active euthanasia.

Direct active euthanasia is defined as the deliberate killing of another person in order to shorten his or her suffering. For instance, a doctor or any third party deliberately injects a lethal substance into the veins of the suffering person, thus directly causing his or her death. The death causing act is not made by the suffering person but by the mercy-killer. Direct active euthanasia is a crime punishable under article 114 Swiss Penal Code (Killing on request). Depending on the circumstances of the case, it might even be punished under article 111 (murder), article 112 (aggravated murder) or 113 (Manslaughter) of SPC.

Assisted suicide is defined as any action taken to encourage or help somebody to kill oneself. It may consist of providing a lethal substance or any other means to the person planning to commit suicide. The final gesture (e.g. taking and swallowing the pills) must be made freely by the person committing suicide. Under article 115 SPC, assisted suicide is not prohibited as long as it is not made for selfish reasons.

EXIT A.D.M.D. Suisse romande 56, rue de Lausanne CH-1202 Genève
Tél. +41 22 735 77 60 Fax : +41 22 735 77 65 www.exit-geneve.ch
info@exit-geneve.ch

2. Assisted suicide

2.1. Article 115 of the Swiss Penal Code (SPC)

Inciting and assisting someone to commit suicide, article 115 SPC provides:

> **"A person who, for selfish reasons, incites someone to commit suicide or who assists that person in doing so will, if the suicide was carried out or attempted, be sentenced up to five years of imprisonment or to a fine."**

2.1.1. Historical background

The traditional legal and societal view condemning suicide was challenged during the 18th and 19th century. The idea that suicide was always a sin and a form of murder started to be disputed. Swiss criminal law reflects this evolution in mentality. During the elaboration of the Swiss Penal Code in the beginning of the 20th (before that time each canton had its own criminal code), the impunity of suicide was not challenged.

By contrast, assistance to suicide was widely considered as a crime. But in 1918, a comment by Federal Council (the government) stated: " In modern penal law, suicide is not a crime… Aiding and abetting suicide can themselves be inspired by altruistic motives. This is why the project incriminates them only if the author has been moved by selfish reasons ". Consequently, article 102 of the draft Penal Code submitted to the Parliament in 1918 provided that: " Every person who shall, driven by selfish motives, encourage or assist another person to commit suicide shall be liable to imprisonment for a term not exceeding five years if the suicide was carried out."

The draft provision was almost undisputed in Parliament who approved it without material changes. It became article 115 of the SPC of December 21, 1937, in force since January 1, 1942. Article 115 has almost been left unchanged since then.

It is worth noting and stressing that the whole discussion at that time did not envisage assisted suicide from a medical perspective at all. Instead, it was inspired by romantic stories about people committing suicide in defense of their own, or their family's honour and about suicides committed by rejected lovers…

2.1.2. The scope the article

Article 115 is an intermediate solution, halfway between total impunity and blunt criminalization. From the criminal law perspective, assisted suicide is a crime only when four elements can be shown: a suicide was committed or attempted; a third party encouraged or helped in the suicide; the third party acted on selfish grounds; the third party acted deliberately. The first two items are "objective elements" of the crime and the last two are so-called "subjective elements".

2.2. Assisted suicide and Right-to-die organizations

For about ten years, within the framework of the law, private right-to-die organizations have been offering to assist people who want to commit suicide. Assisted suicide was legitimized from a political point of view during a session in the National Council (one of the two Chambers of the Swiss Parliament) in December 2001 (see under 3.3.).

EXIT A.D.M.D. Suisse romande is one of them. Our association currently (2017)has around 26'000 members in the French speaking part of Switzerland. That is about 1.0% of the population of that area. Our members' average age is 72. 66% are women.

In 2017, 455 members asked us to help them die, and 286 went through with their request. On the 286 members who committed suicide with our help, 157 were women and 129 men. The average age of these people was 79. The youngest member we helped was aged 35 and the oldest 101. We helped with 30 suicides in medico-social institutions and six in a hospital.

Cancer is the pathology most frequently behind requests for suicide assistance (115 cases, 40%). Neurological disease, cardiovascular/respiratory disease responsible for 90 requests .

Exit said yes to an extension of assisted suicide to people suffering from age-related polypathologies in 2015. They were 83 cases (30%).

Our association responds favourably to requests for suicide assistance if patients meet the following conditions:

- Discernment;
- Repeated serious request;
- Incurable illness;
- Intolerable physical or psychological suffering;
- Terminal prognosis or serious disability;
- Suffering from multiple chronic diseases due to old age;
- Have a settlement permit in Switzerland.

It is important, at that point, to specify the role of physicians. As assisted suicide is practiced in Switzerland, the physician's role lies in the setting up of the diagnostics, the prognosis and, if the conditions of the guidelines are met, the prescription of sodium pentobarbital.

2.3. The contemporary debate on article 115 SPC

The current debate about assisted dying has been prompted by a series of developments: the increase in right-to-die organizations' assisted suicides; the perceived abuses in the practice of these organizations; the requests by mentally ill patients for assisted suicide; the assisted suicide in hospitals and old people's homes; the so-called death tourism (the well-known right-to-die organization Dignitas having increasingly been offering suicide assistance for people coming from abroad, especially from U-K.); role of physicians and carers; revision efforts and legislative projects on palliative medicine and euthanasia.

2.3.1. Position of the SAMS (Swiss Academy of Medical Sciences)

(These medico-ethical guidelines are currently under revision).

In 1995, SAMS published its *Medical-ethical guidelines for the medical care of dying persons and severely brain-damaged patients*. The Guidelines accepted passive euthanasia as well as indirect active euthanasia, provided they were not against the patient's will. They clearly rejected direct euthanasia and further stated that "Assisted suicide is not part of a physician's activity."

Criticism addressed to the latter Guidelines has prompted SAMS to revise them. In 2004 *Medical-ethical guidelines for the care of patients in the end of life* were adopted. The Guidelines reaffirm SAMS acceptance of passive and indirect active euthanasia, rejection of direct active euthanasia but they differ significantly on the issue of assisted-suicide. The revised text recognizes that a patient requesting assisting suicide puts the carer in a very difficult position and therefore adopts a more balanced position on the participation of physicians in suicide:

> " In the final phase of life, when the situation becomes intolerable for the patient he or she may ask for help in committing suicide and may persist in this wish.
>
> In this borderline situation a very difficult conflict of interests can arise for the doctor. On the one hand assisted suicide is not part of a doctor's task, because this contradicts the aims of medicine. On the other hand, consideration of the patient's wishes is fundamental for the doctor-patient relationship. This dilemma requires a personal decision of conscience on the part of the doctor. The decision to provide assistance in suicide must be respected as such. In any case, the doctor has the right to refuse help in committing suicide. If he decides to assist a person to commit suicide, it is his responsibility to check the following preconditions:
>
> - The patient's disease justifies the assumption that he is approaching the end of life.
> - Alternative possibilities for providing assistance have been discussed and, if desired, have been implemented.
> - The patient is capable of making the decision, his wish has been well thought out, without external pressure, and he persists in this wish. This has been checked by a third person, who is not necessarily a doctor.
>
> The final action in the process leading to death must always be taken by the patient himself. "

2.3.2. Position of the Swiss Advisory Commission on Biomedical Ethics

In 2004, the Swiss Government asked the Swiss National Advisory Commission on Biomedical Ethics (hereafter the Advisory Commission) to prepare a global report on euthanasia and assisted suicide. In 2005, the Advisory Commission issued an important report on “Assisted suicide”. It assessed that:

> “ In ethical terms, assisting a suicide should be distinguished from terminating life on request, even though these acts may be similar in practice. The Commission supports, on ethical grounds, the existing liberal approach enshrined in Art. 115 Swiss Penal Code, under which assisted suicide is legal as long as the act is not prompted by self-seeking motives. It does not recommend any change to the provisions of criminal law in this respect, but identifies a need for action in other areas of the law. The Commission takes the view that, in order to address the problems that have arisen as a result of the emergence of right-to-die organizations, such bodies need to be subjected to state supervision. This would ensure that decisions on assisted suicide are arrived at in compliance with quality criteria. ”

In 2006, in an additional report, *Duty-of-care criteria for the management of assisted suicide*, the Advisory Commission made its recommendations concerning assessment of people contemplating suicide. According to its opinion, for assisted suicide to be permissible from an ethical perspective, the following requirements need to be reviewed and documented:

> “ 1. Mental capacity exists in relation to the decision to end one’s life with the aid of a third party.
> 2. The desire for suicide has arisen from severe, illness-related suffering.
> 3. Assisted suicide is not to be provided in cases where suicidality is a manifestation or symptom of mental illness.
> 4. The wish to die is enduring and consistent. It has not arisen impulsively or from a crisis of a temporary nature.
> 5. The desire for suicide has arisen in the absence of external pressure.
> 6. All the other options have been explored, considered and reviewed with the person requesting suicide, and exhausted in accordance with the individual’s wishes.
> 7. Repeated personal contacts and intensive discussions are indispensable. An assessment cannot be made on the basis of a single meeting or correspondence.
> 8. An independent second opinion reaches the same conclusion. ”

2.4. Proposition for a new legal regulation

In October 2009, the Federal Council wished to lay down specific regulations for organized assisted suicide. It proposed two options that would change Swiss criminal law: the determination in the SPCP of clear duties of care for employees of assisted suicide organizations, or a complete ban on organized assisted suicide per se. The two propositions of the Swiss Government were submitted for consultations until March 2010. All the actors affected by the new law were consulted.

2.4.1. Propositions of the Federal Council

Option 1: Strict duties of care

> “ 1. Anyone who, for selfish reasons, incites a person to suicide or provides him/her with assistance with a view to suicide will, if the suicide is carried out or attempted, be sentenced to a maximum of five years imprisonment or a fine.
>
> 2. Anyone who, under the auspices of an assisted suicide organisation, provides assistance to a person considering suicide (companion) will, if the suicide is carried out or attempted, be sentenced to a maximum of five years imprisonment or a fine, unless the following conditions are met:
>
> a. the decision to commit suicide has been taken and expressed freely, has been given a great deal of thought, and remains consistent;
>
> b. a doctor who is independent of the organisation attests that the person wishing to commit suicide is capable of judgement with regard to his/her decision to commit suicide;
>
> c. a second doctor who is independent of the organisation attests that the person wishing to commit suicide is suffering from an incurable disease, as a result of which death is imminent;
>
> d. alternative treatments have been discussed with the person wishing to commit suicide; insofar as he/she has requested this, the necessary steps have been taken and the alternative implemented;
>
> e. the method used is subject to medical prescription;

f. the companion is not motivated by profit;

g. the organisation and the companion jointly provide full documentation with regard to the case in question.

3. The representative of the assisted suicide organisation will incur the penalty referred to within sub-paragraph 1 if:

a. the companion, in agreement with him/her, provides assistance to a person considering suicide when not all of the conditions set out within sub-paragraph 2 have been met, or

b. the organisation receives an appreciable amount of money from the person wishing to commit suicide or from his/her close relatives, with the exception of membership fees and donations paid less than one year prior to death or assigned during the same timeframe.

4. He/she will be sentenced to a maximum of three years imprisonment or a fine if:

a. he/she intentionally fails in his/her duty of care with regard to the choice, instruction or supervision of the companion, and

b. with his/her knowledge, the companion provides assistance to a person considering suicide when not all of the conditions set out within sub-paragraph 2 have been met.

5. If he/she has acted negligently in the case referred to within sub-paragraph 4, he/she will be sentenced to a maximum of one year of imprisonment or a fine."

Option 2: Ban on organized assisted suicide

"Anyone who, for selfish reasons, or acting under the auspices of an assisted suicide organisation, incites a person to suicide or provides him/her with assistance with a view to suicide will, if the suicide is carried out or attempted, be sentenced to a maximum of five years imprisonment or a fine."

2.4.2. Consultation procedure

The proposals have been widely criticized, not only by the right-to-die organizations. All political parties represented in the Government, with the exception of the centre-right Christian Democratic People's Party, have said the existing law allowing assisted suicide is sufficient.

The Swiss Academy of Medical Sciences and the Swiss National Advisory Commission on Biomedical Ethics have rejected the proposition of banning organized assisted suicide and strongly criticized the proposal of strict duties of care. They both fear that in Switzerland physicians would have too important a role to play in assisted dying. Not surprisingly, religious authorities and pro-life associations have expressed their total support to the project of banning assisted suicide.

Justice Minister Eveline Widmer-Schlumpf has taken account of the critics. In that legislative process, she will now have to thoroughly rethink its project to tighten legislation on assisted suicide.

As the consultation procedure showed irreconcilable differences of opinion, the proposal for new federal legislation was dropped.

However, two cantons (Vaud and Neuchâtel) have amended their health legislation to regulate assisted suicide (especially in homes and hospitals).

3. Direct active euthanasia

3.1. Article 114 of the Swiss Penal Code (SPC)

Killing on request, article 114 SPC provides:

"A person who, for decent reasons, especially compassion, kills a person on the basis of his or her serious and insistent request, will be sentenced up to three years of imprisonment or to a fine."

3.2. Difference between article 114 and article 115 SPC

According to Olivier Guillod, a law teacher in the University of Neuchâtel and a member of the Swiss National Advisory Commission on Biomedical Ethics:

> " The difference between mercy killing on request (art. 114 SPC) and assisted suicide (art. 115) is not always clear. For instance, administering intravenously a lethal substance to end somebody's intolerable pain is regarded as mercy killing on request. On the contrary, putting the same person on a drip and letting him or her open the tap is considered as assisted suicide and would not be punished as long as selfish grounds are not established. In both cases, the intent of the author is however the same.
>
> In other words, Swiss law does not treat equally helping a person who is able to carry out himself or herself the final deed or helping a person who, although fully competent, is unable to do it (because he or she is paralyzed for instance). In the first situation, no criminal offense would be committed whereas in the second situation, the behavior would be regarded as mercy killing on request and therefore be punished ".

3.3. Proposition for a new article 114 (2) SPC

The political debate about direct active euthanasia originated with a motion of Member of Parliament Ruffy. In 1994, he called for decriminalizing that offence, by introducing a new provision in the SPC. The Ruffy proposal prompted the Swiss government to ask a multidisciplinary working group to write a report on euthanasia and assisted suicide. The report, called "Assistance to death" was published 1999. The experts agreed on the following five points:

> "1. Palliative measures can improve life quality of terminally ill or dying people and take away their desire to die. Consequently, they must be developed.
>
> 2. Passive euthanasia, indirect active euthanasia as well as assistance to suicide based on non-selfish grounds should remain unpunished.
>
> 3. Passive euthanasia and indirect active euthanasia ought to be specifically regulated by the law.
>
> 4. Active direct euthanasia should remain prohibited and a criminal offense. If active direct euthanasia were to be legalized, it should never entail for physicians a duty to practice this kind of assistance to death.
>
> 5. Cost should never be a consideration in the issue of euthanasia."

The experts disagreed on one important point dealing with direct active euthanasia. This stipulation - which constitutes murder with attenuating circumstances - implies, on the part of the perpetrator, an honourable motive and on the part of the victim, a serious wish to die. However, this disposition was not conceived for the case of an individual who kills another person with an incurable serious illness, that will lead to death in the near future and who is experiencing intolerable physical and mental suffering.

3.3.1. Arguments for new regulations

Both the majority and the minority of the work group recognised and were in agreement as to the intangibility of human life which is at the core of the SPC as is also the case in most foreign legislation. So it fully adheres to the two cardinal principles in relation to the penal protection of life which require:

> - That the consent of the victim does not render legal an act, which terminates a human life;
> - That the penal code must afford its protection to every human life, notwithstanding the quality of that life.

Moreover, the majority of the work group could not ignore the fact that the absolute protection of human life could, in certain exceptional cases, be transformed into an unbearable burden for the person who benefits from this protection. Cases, difficult to define in terms of numbers, of persons who are seriously ill and at the point of death, whose intolerable sufferings cannot be alleviated adequately, were borne in mind. When a human being requests death in such situations, the imposition of a penalty on the person who commits an act of human compassion, who relieves the other person whose life is but useless suffering, presented a problem for the majority of the work group. These are, without a doubt, extreme and dramatic cases which rarely appear in practice. Moreover, in an area as essential as that of the protection of life and human dignity, every case must be taken into consideration in an appropriate manner even if it seems exceptional.

The majority of the work group, as well as the minority, do not intend to question the fundamental illegality of such acts but it wishes to insure the impunity of the person who helps another person, in the situation described, by an act of direct active euthanasia.

Consequently, the majority of the work group suggested completing article 114 of the SPC (murder at the request of the victim) with a new paragraph 2 in the following terms:

> **"If the perpetrator helps a person, who is in the final stages of an incurable illness, to die to bring to an end insupportable and incurable suffering, the competent authority will not proceed against this person, will not force him to appear before a court nor inflict a penalty."**

3.3.2. Commentary

The proposed disposition establishes a penalty exemption clause which aims, in particular, at the cases of offences contrary to article 114 SPC which is presently in force, the article which would become the first paragraph of the revised article 114, with no modification as to the essential features. It follows that the application of the proposed article 114 paragraph 2 will only enter into consideration if all the constitutive elements of the present article 114 are realised; the perpetrator must have helped a person to die when seriously and urgently requested to do so, this presupposes that the person was capable of discernment and the perpetrator must have an honourable motive, notably that of compassion.

The new proposed paragraph adds to these constitutive elements special elements that show that the guilt of the perpetrator is strongly mitigated, as opposed to the guilt of the perpetrator aimed at in the basic case of the first paragraph. The supplementary elements are the existence of incurable, fatal, health impairment and the fact that the perpetrator acted in order to bring to end unbearable and incurable suffering.

The notion of health impairment deals with sickness and other impairments, both physical and mental, which occur as a result of an accident, are inflicted by another person, or are due to a suicide attempt. This impairment must be incurable, leading to the death of the patient. In addition the patient must be in the final stage of the illness, a phase which could last days or even weeks.

Article 114 paragraph 2, intentionally, does not express any particular requirements as to the profession of the perpetrator. The majority of the work group decided against, in particular, reserving the application of the punishment exemption clause to the representatives of the medical profession only. Indeed, the situation of personal distress of someone suffering who wishes to die, can also be shared by the persons close to them who, if they carry out the wish of the patient, deserve to be exempted from the penalty just as a doctor would be, their fault is not greater than that of a doctor acting in the same circumstances.

Moreover, limiting the advantage of article 114, paragraph 2 to physicians only would lead to unbearable results in the case of such participation. Indeed, the proposed article is not a justificatory fact, which renders the act legal. Let us suppose that active direct euthanasia was carried out by a physician in the presence of, or with the agreement of, someone who was not a physician; the latter would risk being accused of being an accessory to murder at the request of the victim, while the physician would benefit from the penalty exemption clause. The clause must also benefit all those who participate in the offence with the same aim. Therefore, limiting the exemption clause to physicians only would create the impression that the act was a medical act and therefore a legal act.

From a subjective angle, article 114 paragraph 2, supposes that the perpetrator helped the patient to die in order to bring to an end his unbearable physical and mental suffering, which cannot be alleviated by palliative care. As suffering is subjective, it cannot be precisely quantified. Moreover, the suffering felt must be very great and the palliative measures must be shown to be ineffective in order to understand the act of the perpetrator, in bringing this suffering to an end.

When the elements described in article 114 paragraph 2 are united, the guilt of the perpetrator is so slight and his reasons are so understandable that the infliction of a penalty would not appear to be a social necessity. The application of the penalty exemption clause leads the competent authority to renounce proceedings, referrals, or penalties.

The proposal of the majority of the federal work group is more restrictive than that requested in the “Ruffy motion”. It certainly maintains the fundamental illegality of direct active euthanasia, but it recognizes the exceptional circumstances that require exemption from penalty.

Dr Jérôme Sobel, The President of *EXIT A.D.M.D. Suisse romande*, was a member of that commission. Needless to note that he keenly supported a change of legislation…

3.4. A trial in Neuchâtel: an opportunity to reinitiate the debate

In its 2000 Report, the Federal Council agreed with the minority position of the working group, attempting to freeze the proposal of decriminalization of direct active euthanasia. To prevent this dilatory manoeuvre, the Member of Parliament Cavalli, submitted a parliamentary initiative.

In December 2001, The Parliament rejected the "Cavalli Initiative" which proposed to put the recommendation of the majority of the working group into practice. In the same session, the Parliament also rejected the "Vallender Initiative" which would have restricted assistance in suicide performed by right-to-die organizations and prohibited doctors from prescribing lethal drugs. This was the first time the Swiss Parliament had explicitly approved of the existing practice of assisted suicide involving right-to-die societies. Since then, the focus of debate has largely shifted from euthanasia to assisted suicide and where its legal borders should lie.

The debate about direct euthanasia might well be relauched very shortly. In Neuchâtel, two assistants of our association did what they should not have done... On 10 September 2009, they assisted to die a 42 year old woman, victim of a severe and tragic neurological disease. That woman was perfectly competent, but had waited too long to be really able to perform the decisive gesture by herself. So, in a kind of state of necessity, after a physician had put her on a drip, they open the tap of the bottle containing the lethal preparation. One of these two assistants is charged with the offense of killing on request by the Public Prosecutor of the canton of Neuchâtel. The trial will take place on 2 November 2010. Whatever the court decision will be*, a (light) sentence or an acquittal, the members of the board of *EXIT. A.D.M.D. Suisse romande* have already decided to use that regrettable situation to reinitiate the public debate about the necessity of changing the law about direct active euthanasia.

On December 6th 2010, the Police Court of Boudry (county of Neuchâtel) cleared the doctor of the prevention of murder at the request of the victim.

Conclusion

The involvement of physicians is usually considered a necessary safeguard in assisted suicide and direct active euthanasia. In Europe, legislation in Netherlands, Belgium and Luxembourg all require it. Physicians are trusted not to misuse these practices. Along with pharmacists they are also in control of prescription drugs. Switzerland has an unusual position about assisted dying. Assisted suicide is legally condoned and can be performed by non-physicians. Active direct euthanasia is illegal, but there is a debate about decriminalization that also discusses participation by non-physician.

All right-to-die organizations strongly defend the current state of law about assisted suicide. And as Dr Jérôme Sobel stated it in 2002 already: " Our Association, EXIT, is nevertheless going to continue to campaign for the decriminalization of direct active euthanasia in the future, since it would provide the possibility of being able to help an incurable patient who is no longer capable of self-deliverance, and who has clearly established advance directives in this regard."

On September 2, 2010, an important Zurich University survey into public attitudes on these issues, the first of its kind in the country was presented to the press. A poll of around 1'500 people was made by the University's Criminology Institutes. According to the study author C. Schwarzenegger: "The main finding is that the Swiss population is rather oriented towards autonomy in end-of-life decisions and rather against strict regulations in this field". And he adds: "A surprising fact was that active forms of euthanasia were accepted by the majority."

In the years to come, in their fight for that just cause, dying in dignity, these organizations will, without any doubt, use the rights of referendum and initiative, two political rights that make Switzerland one of the rare countries that enjoy direct democracy at a national level.

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Jean-Jacques Bise et Pierre Beck

EXIT A.D.M.D. Suisse romande