UPDATES ON MONEY LAUNDERING AND ASSET RECOVERY IN SWITZERLAND

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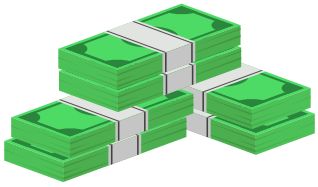
The Swiss Financial Market Supervisory Authority (FINMA) states[1] that the Swiss apparatus for combating money laundering is based on two pillars:

- Article 305bis of the Swiss Penal Code (PC), which punishes money laundering[2];
- the Federal Act on Combating Money Laundering and Terrorist Financing in the Financial Sector (AMLA).

In asset recovery, these legal provisions are very often at the centre of disputes.

Indeed, acts of money laundering or the failure to comply with anti-money laundering regulations, particularly in terms of monitoring high risk transactions, may be causes of action for victims of crimes against banks or other financial intermediaries (as will be seen below, breaches of Article 305bis may be a cause of action for tort liability, while breaches of AMLA may be a cause of action for breach of contract or an action for performance).

Thus, the role of the Swiss legislation to combat money laundering in civil disputes as well as the various changes that the AMLA has undergone these last years are key to asset recovery.



I. The anti-money laundering legislation in asset recovery disputes

Contractual liability

First, it is important to emphasize that the acts of a financial intermediary, such as banks, can be challenged by the client based on the existing contractual relationship.

In recent years, the Swiss Federal Supreme Court has developed a large body of decisions on banking disputes. Whether a bank employee carried out transactions without the client's consent, whether he misappropriated the client's funds, or whether he executed a fraudulent order given by a third party (such a hacker), the legal basis and the issues at stake may be very different.

In all these cases, the violation of the anti-money laundering legislation never creates as such a basis for the bank's liability towards its client. Nevertheless, these violations help to prove the fault or the bad faith of the bank, conditions which will be examined by the courts in an action for breach of contract or an action for performance.

Tort liability

A tort claim is also available against financial intermediaries, where an unlawful act can be proved.

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1 https://www.finma.ch/en/supervision/cross-sector-issues/combating-money-laundering/

2 « 1. Any person who carries out an act that is aimed at frustrating the identification of the origin, the tracing or the forfeiture of assets which he knows or must assume originate from a felony or aggravated tax misdemeanour shall be liable to a custodial sentence not exceeding three years or to a monetary penalty.
1bis. An aggravated tax misdemeanour is any of the offences set out in Article 186 of the Federal Act of 14 December 1990 on Direct Federal Taxation and Article 59 paragraph 1 clause one of the Federal Act of 14 December 1990 on the Harmonisation of Direct Federal Taxation at Cantonal and Communal Levels, if the tax evaded in any tax period exceeds 300 000 francs.
2. In serious cases, the penalty is a custodial sentence not exceeding five years or a monetary penalty. A custodial sentence is combined with a monetary penalty not exceeding 500 daily penalty units.
A serious case is constituted, in particular, where the offender:
a.acts as a member of a criminal or terrorist organisation;
b.acts as a member of a group that has been formed for the purpose of the continued conduct of money laundering activities; or
c.achieves a large turnover or substantial profit through commercial money laundering.
3. The offender is also liable to the foregoing penalties where the main offence was committed abroad, provided such an offence is also liable to prosecution at the place of commission. »

Under Swiss case law, the breach of anti-money laundering regulations (AMLA and Article 305ter PC) is not an unlawful act triggering tort liability, since those provisions are not meant to protect the public but to protect the integrity of the Swiss financial market.

However, a violation of Article 305bis PC, which punishes money laundering may lead to tort liability towards the victim of the predicate offenses as the acts of concealment make the recovery more difficult.

When analyzing Article 305bis PC, the judge can take into consideration anti-money laundering rules, in particular the AMLA, in the following way:

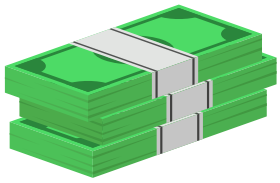
- the duties arising from the AMLA create a specific obligation to monitor business relationships and, if necessary, to report them to the Money Laundering Reporting Office-Switzerland (MROS);
- this legal obligation leads to the fact that the passive behaviour of a financial intermediary can itself constitute a violation of Article 305bis PC, at least by recklessness;
- the intentional nature of the violation of Article 305bis PC (negligence is not punishable) can be established by relying, among other factors, on the seriousness of the violation of the AMLA duties.

It should also be noted that a bank can be held responsible in tort for the acts and omissions of its employees in the performance of their work (Article 55 of the Swiss Code of Obligations).

In 2020, the Geneva Court of Justice issued an interesting decision on this issue[3].

Investors had transferred their funds to accounts held by a third party (an independent asset manager) and by a company. In the bank forms, the asset manager had falsely declared that he was the beneficial owner of these assets while he was actually using these accounts to defraud the investors.

In its analysis, the court pointed to the bank's passivity with respect to suspicious transactions that were indicative of money laundering, in breach of its AMLA obligations. The court found that the conditions of Article 305bis PC were met (even though the criminal proceedings had not resulted in a conviction because of the statute of limitations). As a result, the bank was held liable in tort for the damage caused to these investors (the victims of the predicate offense).



II. Entry into force of the revised AMLA on 1 January 2023

Following the fourth review of Switzerland conducted by the Financial Action Task Force (FATF) in 2016, the AMLA was amended in order to comply with the FATF recommendations.

On 19 March 2021, the Parliament approved the revision of the AMLA.

A first part of these changes came into force on 1 January 2022 but the main part will apply from 1 January 2023.

Generally speaking, most of these changes reflect already existing practices within financial intermediaries, in particular within banks.

These are some of the most important amendments:

- **verification of the identity of the beneficial owner:** the amended AMLA explicitly states that financial intermediaries have not only the duty to identify the beneficial owner of a bank account but they also have the obligation to verify the identity of the person designated as a beneficial owner, in order to confirm its plausibility (Article 4 para. 1 AMLA).

- **updating of client data:** the new AMLA also provides that financial intermediaries must periodically check whether the required documents are up-to-date and update them if necessary. The obligation to update applies to all the business relationships and is not limited to increased risk clients (Article 7 para. 1bis AMLA).
- **definition of a "well-founded suspicion":** According to Article 9 para. 1 AMLA, financial intermediaries must file a report to the MROS if he knows or has "well-founded suspicion" that the assets involved in the business relationship are connected to any of the offences listed such as money-laundering.

The revised law defines the concept of "well-founded suspicion", i.e. when the financial intermediary has a concrete indication or several elements suggesting that the assets involved in the business relationship are linked to an illegal activity and further clarifications do not dispel the suspicion (Article 9 al. 1quater AMLA). In fact, this amendment uses the definition developed by the Swiss Federal Supreme Court.

In other words, as soon as the financial intermediary becomes suspicious, he must continue his investigations until he knows what is going on: either the transaction that appeared suspicious is regular, or his suspicions were well-founded and he must report the relationship to MROS.

3 See Geneva High Court decision ACJC/1202/2020, dated 1 September 2020.