

June 2008 -

Money laundering laws

In June 2003 the Financial Action Task Force on Money Laundering (FATF) passed 40 revised recommendations, including nine special recommendations following the 9/11 disaster. Currently the Swiss Parliament oversees the implementation of the FATF recommendations into Swiss law. The revised provisions mainly concentrate on the following measures.

According to the adapted Federal Act on Combating Money Laundering in the Financial Sector (draft AMLA) financial intermediaries (FIs) can be prosecuted if they collect or transfer assets when their client has a clear intention to finance terrorism. FIs cannot be charged if such financing by the client is only a possibility.

The revised Article 3 draft AMLA requires FIs not only to verify the identity of a legal entity but also the identity of any person acting in the name or on behalf of the legal entity. Article 6 draft AMLA forces the FI to clarify the nature and purpose of any desired business relation and to keep records. While until now an FI focused mainly on the origin of a client's collected or transferred assets, the business purpose of collected assets (deriving from a lawful origin) and the background of intended transfers will increasingly be subject to due diligence by FIs.

Unlike the provisions currently in force, every suspicious transaction shall be reported to the Money Laundering Reporting Office Switzerland (MROS) only. State prosecutors are no longer involved at this stage. On the other hand the scope of the reporting duty shall be widened. FIs are now also obliged to report to MROS if their negotiations with a client are abandoned due to suspicions that the FI develops.

Smuggling committed by criminal organisations, counterfeiting of goods, product piracy, insider trading and price manipulation shall constitute new predicate offences. Any person, not just an FI, can be prosecuted if involved in a transaction of assets that derives from such an offence. The communication ban between FI's regarding confidential client information that exists today shall not be applicable in specific cases – namely if an FI is unable to freeze assets involved in a reporting case.

A complete implementation of the FATF recommendations would have widened the catalogue of new branches that fall under the money laundering provisions, to include commercial trades in the field of fine arts, precious metals, jewels and real estate. In the current draft AMLA, that extension was dropped.

A discussion is currently also in progress in Switzerland relating to the question whether the infringement of the money laundering provision (Article 305 bis Swiss Criminal Code) can constitute a civil liability of the accused FI or third person to the prosecuting state or to other third persons (not the client) according to Article 41 of the Swiss Code of Obligations (*Schutznorm-Frage*). In a recent money laundering case the Swiss Supreme Court neither approved nor rejected the possibility of coherent liability claims, but made it clear that in any case the FI or third person would have to be criminally convicted of money laundering before civil liability could be examined. Mere negligence on the part of an FI or a third person involved in a money laundering case never constitutes a civil liability. There are however considerable reasons why under Swiss law there is no room for liability claims based on involvement of an FI or a third person in a money laundering transaction.

Dr. Karel Kohlik