ANTI-MONEY LAUNDERING

Tax fraud and Big Crime

Financial intermediaries take centre stage as Swiss anti-organised crime measures are updated

By Dr Christoph K Graber, partner (top), and Martin Zaugg, counsel, both at Prager Dreifuss

When, some 30 years ago, many countries – including Switzerland – started combating money laundering by introducing specific penal provisions, the declared purpose was the fight against international organised crime in general and drug trafficking in particular.

One of the consequences of this line of attack was that a prohibition was imposed on banks and other financial intermediaries against accepting funds originating from a crime. So far so good. But where are we today? Has the fight against organised crime and drug trafficking been successful?

The answer is no – there is no evidence that the business of the drugs cartels has been substantially affected by anti-money laundering legislation. The criminal organisations have adapted to the new regulatory framework and their business appears to work as well as ever.

Today, few speak about organised and drug-related crime in the context of anti-money laundering legislation. In fact, in Switzerland, as in many other countries, the penal provisions against money laundering have turned into a convenient catch-all clause for the prosecution authorities and have made financial intermediaries virtually auxiliary persons of the prosecution authorities for all sort of offences against property.

Updated legislation

In light of the above it will come as no surprise that the anti-money laundering provision in article 305bis of the Swiss Criminal Code (SCC) has been amended in the course of drafting a new law (namely the Federal Act for Implementing the revised FATF Recommendations 2012 of 12 December 2014), making severe violations of tax law predicate offences to money laundering.

The present version of article 305bis par. 1 SCC requires a predicate offence to be a felony – ie. an offence punishable by more than three years imprisonment, which is not the case for tax offences under Swiss law as a matter of principle.

According to the definition in the new article 305bis par. 1bis SCC a "severe violation of tax law" requires the fulfilment of two conditions:
(a) the committing of a tax fraud – ie. the evasion of taxes by use of forged documents or through the deliberate and malicious deception of the tax authorities, and
(b) an amount of evaded taxes in excess of CHF 300,000 (£210,000) per tax period.

It should be noted that a criminal offence committed abroad also qualifies as a predicate offence in case it is also subject to prosecution abroad.

Accordingly, article 305bis par. 1bis SCC might also be fulfilled in case of severe violations of foreign tax law.

Pressure on financial intermediaries

In line with the amended article 305bis SCC, article 9 par. 1 letter a cypher 2 of the Swiss Money Laundering Act (MLA) has likewise been amended and will impose an additional reporting duty on financial intermediaries.

A financial intermediary will have to immediately file a report with the Money Laundering Reporting Office Switzerland (MROS) if it knows or has reasonable grounds to suspect that the assets involved in the business relationship originate from a severe violation of tax law pursuant to article 305bis par. 1bis SCC.

The same will apply according to article 9 par. 1 letter b MLA if the financial intermediary terminates negotiations aimed at establishing a business relationship because of such a reasonable suspicion.

When the new legislation comes into force any disposal and/or transfer of untaxed assets by a financial intermediary is at risk of being considered a money laundering activity pursuant to article 305bis SCC if the aforementioned conditions of article 305bis par. 1bis SCC are met.

Accordingly, the individual employee acting for the financial intermediary (and, in the event of organisational negligence, the financial intermediary – ie. the company as such) may be subject to criminal liability or, at least, the risk of criminal prosecution for a violation of the reporting obligation under the MLA.

The amended SCC and MLA are likely to come into force on 1 January 2016. After this date tax fraud will be a core scope of application of the Swiss anti-money laundering legislation, and financial intermediaries will have become a long arm not only of the criminal prosecution authorities but also of the Swiss (and foreign!) tax authorities.

PRAGER DREIFUSS
ATTORNEYS AT LAW

Prager Dreifuss AG
Mühlebachstrasse 6, CH-8008 Zürich
Tel: +41 44 254 55 55
Fax: +41 44 254 55 99
Email: christoph.graber@prager-dreifuss.com; martin.zaugg@prager-dreifuss.com
Web: www.prager-dreifuss.com