Money laundering by omission – a landmark decision by the Swiss Federal Tribunal

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A recent judgment by the Swiss Federal Tribunal,[1] acting as highest instance in criminal matters, has sent reverberations through the Swiss legal and banking communities.

The Federal Tribunal had to decide an appeal lodged by an employee of a Swiss bank who had been sentenced to 486 days' imprisonment (on probation) and a fine by the Federal Penal Tribunal in May 2009 on charges of money laundering. The appeal was dismissed by the Federal Tribunal in November 2010. In an extensive judgment, the highest court confirmed the ruling by the lower instance. For the first time since the inception of the money laundering provision (added to the Swiss Criminal Code by amendment in 1990), the court had to consider whether money laundering could be perpetrated by omission. Four other bank employees filed appeals in the same matter, all of which were dismissed based on the grounds discussed here.

Facts of the case

In 1999, the state of Rio de Janeiro in Brazil established a new government authority charged with the tax supervision of large commercial companies. The authority was to perform tax audits and detect and collect evaded taxes. The structure was responsible for some 80 per cent of the tax revenues collected in the state of Rio de Janeiro. Three tax agents in the employ of the authority soon drew up a bribery scheme headed by A, by which they would visit companies and request the production of various documents under threat of penalties and within unreasonably short time periods. The accumulated fines forced companies to accept the solution offered by the agents, which consisted in the payment of a bribe against the discontinuation of the investigation. The sums generated were transferred by the agents to accounts at a Zurich based branch office of a bank headquartered in Geneva.

The accused X, the local director of the Zurich branch office, and complainant in the appeals proceedings, had been aware of the fact that there existed conflicting information on file with regard to the occupation of A as early as May 2000. Between the accounts of three tax agents several internal transactions occurred and substantial amounts were involved. At its meeting of 4 August 2000, the compliance committee of the bank ordered X to investigate the compatibility of A's public office with his holding of accounts at the bank. X was to submit a report on his findings. During its meeting of 9 February 2001, the Directors Committee of the Zurich branch took note of a table drawn up by a bank employee, which detailed the substantial increases in the accounts of the three agents between January 2000 and February 2001 (eg increases of 330 per cent up to US$6 million and 257 per cent up to US$10 million, respectively). This information by itself was, in hindsight (in the view of the Federal Tribunal and the lower court), sufficient to suspect that the means deposited by the agents were of criminal origin.

The local Directors Committee of the Zurich branch ordered an employee to contact the local representative in Rio de Janeiro in order to find out more about the agent. The next four meetings of the Directors Committee passed without any further deliberations on the Brazilian accounts. At the meeting of 13 March 2001, the Directors Committee noted that they had not received the additionally requested information. However, instead of notifying the General Directors Committee as should have been the case, in order for it to decide whether the statutory Money Laundering Report Office (MROS) should be contacted, the matter was left unattended and the matter remained unsolved until the bank was merged with another bank in June 2002, at which point the matter came to light again.

Eventually, in 2007, an appellate court in Rio de Janeiro found A and the other two tax agents guilty of passive bribery.

Committing money laundering by omission

The Federal Tribunal first examined whether money laundering according to the Swiss Criminal Code (SCC) could be committed by means of omission. The provision on money laundering reads: '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 believe originate from a felony, shall be liable to a custodial sentence not exceeding three years or to a monetary penalty'.[2]

In principle, any felony or misdemeanour may also be committed by a failure to comply with a duty to act (art 11 subsection 1 SCC). The Federal Tribunal stated that not every obligation could constitute such a duty to act and went on to examine the duties of the indicted senior bank officers in the case at hand.

Money laundering in Swiss legal doctrine

The Federal Tribunal set out by ascertaining that money laundering was considered an abstract endangerment crime (*abstraktes Gefährdungsdelikt*) in Swiss legal doctrine. This is in contrast to the so-called result crimes (*Erfolgsdelikt*), which presupposed a certain legally defined outcome in order to be punishable. As such, aggravating the prosecuting authorities' attempts at securing criminal assets and ascertaining the link between the crime and the asset is considered sufficient in Switzerland in order to be convicted of the felony of money laundering. There is no need for such actions to actually ensure the success of such frustration attempts.

The Federal Tribunal analysed the various scholarly opinions, which in the majority are opposed to the idea that money laundering could be perpetrated by a bank employee by simple omission. The question has been discussed controversially in Switzerland ever since the coming into force of the Federal Act against Money Laundering and Terrorism Financing in the Finance Sector of 1998 (Money Laundering Act).

Applicable regulations

Banking employees have several duties, ie a duty of care in dealings with clients, the duty to report cases of suspected money laundering and identification duties with regard to purpose and background of the business relationship. The Money Laundering Act also requires financial intermediaries to set up internal safeguards aimed at preventing money laundering and orders them to report suspected cases of money laundering to MROS as well as blocking assets pending an investigation by the prosecuting authorities.

The above obligations were underlined by the directive on the prevention of money laundering issued by the Federal Banking Commission (FBC) in 1998, the state regulatory body at the time (currently the Swiss Financial Markets Supervisory Authority / FINMA). The directive provides that financial intermediaries are prohibited from accepting funds of criminal origin and can render themselves culpable of money laundering if they accept, keep or help place funds of which they have fair reason to assume that they are the fruits of a crime, in particular when dealing with money that could stem from corruption or the misappropriation of public funds. Special care must be applied when entering into business relationships with persons exercising public offices or related parties. Financial intermediaries are held to investigate the economic background and the goal of a transaction if it seems unusual or if they come across signs that the funds might originate from a crime or might be held by a criminal organisation.

In addition, the internal regulations set up by the bank itself, dealing with politically exposed persons and special mechanisms applicable for such clients, supported the same aim and attributed specific obligations to clearly designated managing directors.

Intervention duty

According to the Federal Tribunal, ever since the coming into force of the Money Laundering Act, financial intermediaries are in a particular legal position that requires them to investigate the economic background and aim of a business relationship if they suspect that the involved funds were the result of a crime. They are obliged to address the statutory office with their suspicions. The statutory provisions had thus created a new legal environment for financial intermediaries requiring them to cooperate with the prosecuting authorities within certain limits. These legal obligations constitute an intervention duty / duty of care

(*Garantenstellung*) as prescribed by art 11 subsection 2 SCC. With a view to the case at hand, the court found that the complainant X had been subject to such an intervention duty in his position as director of the local branch in Zurich and as member of the local Directors Committee. The duties derived clearly from the statutory duties under the Money Laundering Act, the FCB directive as well as the internal regulations of the bank and his personal duties under his employment contract.

Scope of the intervention duty

Regarding the scope of the intervention duty, the court noted that particularly in instances where there were signs of abnormal transactions or where false information had been provided to the bank, or where subsequent information requests by the bank were not complied with satisfactorily, the risk of money laundering was great. In such situations, the financial intermediary urgently needs to follow up and obtain information that could verify the financial background of the business relationship. A critical examination of the explanations supplied by the client was necessary. These duties had – as described above – not been adhered to by X.

Causality

The complainant X argued that there was no causality between his own omission and the fact that the Brazilian agents were able to make use of the bank's facilities as the members of the General Committee as well as the compliance committee were equally aware of the situation and did not intervene either.

The Federal Tribunal found that for the link of causality to be broken by other events, such as the complainant was averring, these events had to be so unexpected and so unforeseeable so as to totally force into the background any other contributing factors such as the behaviour of the complainant. It found this not to be the case but rather held that under normal circumstances, had X followed the required route of informing the General Committee as set out in the internal rules, the latter would have, in all likelihood and based on everyday experience, submitted a report to MROS with its suspicions and blocked the assets on the affected accounts. The omission of X was deemed to be adequately causative for the failure of the notification to the statutory office.

Intent

Lastly, the Federal Tribunal dealt with the argument by the complainant that he lacked intent in committing the crime and analysed the marginal differences between gross negligence and *dolus eventualis*.

The court came to the conclusion that despite the prevalent signs since 2000 that the funds deposited by the tax agents had an illicit origin, X, although being charged with a special duty of care, remained complacent and did not inform his superiors as would have been required. He chose to remain silent, even though by his own admission, he found the situation to be highly problematic. Not acting dutifully under such evident circumstances could not be viewed otherwise than wilfully taking into account money laundering.

Analysis

Until the Federal Tribunal's decision of November 2010, the majority of legal scholars in Switzerland held that money laundering according to art 305bis SCC could not be perpetrated by bank employees by means of omission, save for certain isolated instances where superiors did not intervene against money laundering actions by their subordinates upon becoming directly aware of such transgressions. Despite the fact that there seemed general consensus as to the abstract possibility that money laundering could be perpetrated by omission (eg by members of the police force, judicial officers, tax or customs inspectors who were bound by statutory law to act against such behaviour), the pertinent question as to whether this also applied to financial intermediaries was generally negated. The general view up to that point was that ordinary bank staff generally were not in a position subject to a duty of care (*Garantenstellung*), which was necessary to fall under the provision. Since the enaction of the Money Laundering Act there has been a perceptible shift in this legal position. The two authors quoted by the Federal Tribunal in its verdict had advocated a different view with regard to the duties of financial intermediaries. The new act had, in their view, altered the situation such persons found themselves in to the extent that they were now bound to assist the prosecuting authorities in their crime fighting attempts at least in as far as their employment position charged them with the supervision of anti-

money laundering regulations. Where such responsibility was entrusted to employees, along with it came a heightened duty of care.

The revision of the general provisions of the SCC in 2002 might also have added to the altered stance as it codified the hitherto existing jurisprudence under which circumstances crimes could be viewed as having been committed by omission. This culmination of new statutory law, together with the passing of industry-own standards (FBC directive) and the internal regulations and employee duties in the particular case at hand, gave the Federal Tribunal enough reasons to decide the case against the prevailing majority opinion.

Conclusion

The judgment by the Federal Tribunal sets aside any doubts remaining to date as to whether money laundering can be committed by omission. The fact that all appealing managers of the bank were sentenced is a clear sign that the court wanted to set an end to the thereto encountered problem at banks that one person would blame another for not adhering to the internal regulations. The ruling puts an end to the hitherto practice of sacrificing a pawn (in the form of a compliance officer) in order to save the directors of the bank. The verdict also strengthens the position of compliance officers in banks while at the same time adding to their responsibility.

The strict stance taken by the highest court in Switzerland may be interpreted as a sign of the times. Switzerland has undertaken several legislative efforts to combat money laundering and tax evasion, concluding a multitude of double taxation treaties according to the OECD standard, as well as passing a new law on the restitution of unlawful assets of politically exposed persons in the recent past. The new decision by the Federal Tribunal complements these endeavours on the side of jurisprudence.

(Endnotes)

1 Decision 6B_908/2009 of the Swiss Federal Tribunal, dated 3 November 2010.

2 Article 305bis subsection 1 SCC.