COUNTRY UPDATE-Switzerland: AML

Published 29-Oct-2020 by
Bernhard Lötscher and Flavia Widmer, CMS von Erlach Poncet Ltd., Zurich

Member of FATF? Yes

On FATF blacklist? No

Member of Egmont? Yes

Money laundering background in Switzerland

Switzerland is a major international financial centre – a world leader in the cross-border management of private assets holding a market share of approximately 25%.[1]

Ensuring international conformity with international standards in the area of money laundering (ML) is a main objective of the Swiss Federal Council's financial market policy. It is regarded as essential in order to preserve the reputation of Switzerland and the attractiveness of its financial centre.[2]

Swiss authorities thus generally have a high level of understanding of the risks of ML and terrorist financing (TF) and they demonstrate a clear commitment to prevent ML.

Switzerland is actively involved in the efforts of the international community to combat ML and TF. It is a founding member of the Financial Action Task Force (FATF), whose recommendations form the international standards in this area. The FATF regularly checks, within the framework of peer reviews, whether the national legislation of member states complies with its 40 (in 2012 revised and last updated in June 2019) recommendations (FATF Recommendations[3]). The findings of FATF's latest peer review on Switzerland were published in December 2016 (FATF's Fourth Report on Switzerland[4]) and updated with a follow- up report in January 2020 (FATF's Third Enhanced Follow-up Report on Switzerland).[5]

Further, the Swiss financial intelligence unit (FIU), i.e. the Money Laundering Reporting Office Switzerland (MROS), is a member of the Egmont Group, which provides a platform for the secure exchange of expertise and financial intelligence to combat ML and TF. The Egmont Group considers itself as the operational arm of the international anti-money laundering (AML) and counter financing of terrorism (CFT) apparatus.[6]

Overview of country risks

In June 2015, Switzerland published its first ML/TF risk assessment, which made an important contribution to the overall understanding of the risks of ML and TF.[7] This report concludes that Switzerland has a comprehensive and effective set of instruments to combat ML and TF and that the current system responds to the risks in an appropriate manner. Nevertheless, the report proposes certain measures for improvement against the background that Switzerland as a major financial centre remains attractive for laundering the proceeds of crimes committed mainly abroad.

The FATF's Fourth Report on Switzerland makes similar conclusions. While it acknowledges the overall good quality of the Swiss dispositive for combating ML and TF, it holds that Switzerland has to continue its efforts; the technical compliance was assessed as insufficient ("partially compliant") in relation to 9 out of the 40 FATCA Recommendations.

In particular, the following points have met criticism:

The number of suspicious activity reports (SAR) to MROS is insufficient according to FATF, which is why the Swiss Financial Market Supervisory Authority (FINMA) needs to sharpen supervision and sanctions for non-compliance with reporting requirements;

the lack of a general and explicit statutory obligation to a) periodically check the accuracy of customer data and to update if necessary, and to b) verify information concerning the beneficial owner (plausibility testing);
the scope of application of the anti-money laundering law (AMLA) was considered another technical shortcoming: lawyers, notaries and certain fiduciaries (together: Advisors) with regard to non-financial activities (e.g. the establishment, management or administration of companies and trusts) are not subject to the AMLA and are therefore not subject to specific diligence duties to prevent ML/TF;
although measures to enhance the transparency of legal persons have recently been taken, particularly with regard to bearer shares (implementation of shareholder registers), the sanctions for violations are not adequately dissuasive, so that it cannot be ruled out that such legal persons are still being used for ML purposes; and
the effectiveness of MROS co-operation with FIUs of other jurisdictions is considered insufficient because the MROS may only request information from a financial intermediary on behalf of a foreign FIU if the financial intermediary has previously submitted a SAR or is involved with the subject matter of a SAR received by MROS.

Since FATF's Fourth Report on Switzerland, Switzerland is – in spite of achieving a good overall result – in the enhanced follow-up process. The next follow-up report is expected in 2021. Switzerland has since worked to improve the effectiveness of its national framework to combat money laundering and terrorist financing. In January 2020 FATF published the first follow-up report on Switzerland[8] analysing Switzerland's progress in addressing the technical compliance deficiencies identified in the Fourth Report and Switzerland's progress in implementing new requirements relating to FATF Recommendations which have been updated since the last report.

The follow-up report concludes, especially with regards to the criticized points above:

Switzerland has made progress in order to correct the technical compliance deficiencies identified in the FATF's Fourth Report. Therefore, Switzerland has been re-rated in respect of four FATF recommendations. With regard to the remaining recommendations analysed the progress was found insufficient to justify an upgrade of the rating. The FATF has also recognised the planned revision of the AMLA. However, since the revised AMLA has not yet been approved in parliament, the follow-up report could not consider it for rating purposes.
With regard to the lack of a general and explicit statutory obligation to verify information of the originator of a payment order and to indicate the name of the beneficiary, the FATF has recognised the revision of the FINMA anti-money laundering ordinance as sufficient to fill the gap.
In the FATF's Fourth Report on Switzerland, the FATF had critizized that there were no formal requirements to assess risks related to new technologies and pointed out the lack of obligations for non-banking intermediaries to assess risks before using new technologies. Even though Switzerland has taken various steps to implement the new requirements of FATF's recommendation No. 15, these measures have been rated as not sufficient. In particular, the FATF has considered it a critical point that the regulator (FINMA) is not competent to impose (administrative) fines in case of violations of AML rules.
The FINMA anti-money laundering ordinance now contains an express reference to the countries that FATF considers as high-risk or as non-cooperative and in relation to which it calls for increased diligence, and the ordinance imposes a specific duty on financial intermediaries to conduct enhanced inquiries in connection with relationships to persons domiciled in any such country.

In July 2019 Switzerland published a National Risk Assessment focusing on corruption as a predicate offense to money laundering.[9] The report finds that Switzerland is exposed to a significant risk of money laundering in connection with funds involved in foreign corruption.

Legislative framework and key directives

In Switzerland, the following laws and regulations exist in the field of AML:

The AMLA[10], as the most important and primary act in this area of law;
the anti-money laundering ordinance[11];
the FINMA anti-money laundering ordinance[12];
the Federal Gaming Board anti-money laundering ordinance[13];
the Federal Department of Justice and Police anti-money laundering ordinance[14]
ordinance on the MROS[15];
revised agreement on the Swiss banks' code of conduct with regard to the exercise of due diligence, 2020("CDB 20", soft law);
the regulations of the 11 self-regulatory organisations ("SROs"), approved by FINMA (soft law); and
FINMA circular no 2011/1 (rules providing guidance to assess whether or not a certain business activity qualifies as financial intermediation according to AMLA; soft law).

Further, the Penal Code[16] contains provisions relevant in the field of ML/TF (e.g. art. 305bis [money laundering], art. 305ter [insufficient diligence in financial transactions and right to report], art. 260ter [criminal organisation] or art. 260quinquies [financing of terrorism]).

Regulators and monitoring authorities

The financial intermediaries, which form the first operational line of defence in the fight against ML, are supervised by the FINMA.

In addition to direct supervision by FINMA, the AMLA also provides for the possibility of supervision by a SRO for certain financial intermediaries. The SROs, which in turn are subject to the supervision of FINMA, issue regulations specifying how the obligations

arising from the AMLA are to be fulfilled. They are further under a duty to carry out regular audits to ensure that the affiliated financial intermediaries comply with their obligations and, if these obligations are violated, that appropriate sanctions are imposed.

As far as casinos and other gaming houses are concerned, the Federal Gaming Board is responsible for supervision. For major games (inter-cantonal or automated lotteries, sports betting and games of skill; see art. 3 letter of the Federal Act on money games[17]), the inter-cantonal lottery and gaming commission (COMLOT) is responsible for supervision. A new Gambling Convention (GSK) is currently in the process of ratification by the cantons. The Convention will establish a new regulatory body under public law (inter-cantonal gambling authority, GESPA) which will assume the tasks and duties of COMLOT.

With regard to dealers/merchants, which are subject to the due diligence obligations according to art. 8a AMLA (see below), an audit firm, appointed by the dealers/merchants, must verify compliance with the duties under the AMLA (art. 15 AMLA).

Legal requirements for KYC

The legal requirements for KYC due diligence are set out in the laws, ordinances, regulations etc. mentioned above.

As of today, the most important duties of legal entities and individuals subject to AML regulations are the following:

- When establishing a business relationship, the financial intermediary must verify the identity of the contracting partner on the basis of an official document of evidentiary value, e.g. passport, excerpt from the commercial registry or equivalent (art. 3(1) AMLA);
- the financial intermediary must establish the identity of the beneficial owner of assets involved with a business relationship/ transaction (art. 4(1) AMLA);
- if, in the course of the business relationship, doubt arises as to the identity of the contracting partner or of the beneficial owner, the verification of identity or establishment of identity must be repeated (art. 5(1) AMLA);
- the financial intermediary is required to ascertain the nature and purpose of the business relationship. The financial intermediary thereby pursues a so-called risk-based approach (art. 6(1) AMLA; see also FATF's Fourth Report on Switzerland, page 3);
- the financial intermediary must keep records of transactions carried out and of information it is required to obtain under the AMLA (art. 7(1) AMLA); and
- financial intermediaries must take the measures that are required to prevent ML and TF in their field of business. They must in particular ensure that their staff undergoes adequate training and that compliance is monitored (art. 8 AMLA).

The diligence duties of financial intermediaries are further detailed in arts. 9a et seqq. of the FINMA anti-money laundering ordinance and the CDB 20. The diligence duties of dealers/merchants are further detailed in art. 17 et seqq. of the anti-money laundering ordinance.

With the help of computer-based verification systems, financial intermediaries regularly check the names of contracting partners and beneficial owners against databases providing KYC relevant information (e.g. World-Check etc.). In the course of this review procedure, sanction lists of the UN, EU and other international bodies respectively foreign jurisdictions, as well as information on criminal proceedings or convictions are taken into account to assess legal and reputational risks associated with a particular relationship.[18]

As far as dealers/merchants are concerned, art. 8a(1) AMLA states due diligence duties that must be fulfilled in case of cash payments in excess of 100,000 Swiss francs. Art. 8a(2) AMLA further regulates in which cases they must clarify the economic background and purpose of a transaction.

Reporting requirements and obligations

Swiss law provides for differing rules on reporting according to the degree of suspicion. If there is "reasonable suspicion" of ML etc., the financial intermediary must file a SAR based on art. 9 AMLA. If there is only a "simple suspicion", it has a right (but no duty) to file a SAR based on art. 305ter(2) Penal Code.

Reporting obligation according to art. 9 AMLA

Art. 9 AMLA defines the cases in which a financial intermediary must file a report with the MROS.

In particular, it has to do so if it knows or has reasonable grounds to suspect that assets involved in the business relationship (see art. 9(1) letter a AMLA)

- are connected to an offence in terms of art. 260ter (1) Penal Code (participation in or supporting of a criminal organisation) or art. 305bis Penal Code (money laundering) (art. 9(1) letter a number 1 AMLA);
- are the proceeds of a felony or an aggravated tax misdemeanor pursuant to art. 305bis(1bis) Penal Code (art. 9(1) letter a number 2 AMLA);
- are subject to the power of disposal of a criminal organisation (art. 9(1) letter a number 3 AMLA); or
- serve the financing of terrorism (art. 260quinquies(1) Penal Code) (art. 9(1) letter a number 4 AMLA).

This reporting duty also exists if the financial intermediary terminates negotiations aimed at establishing a business relationship because of a reasonable suspicion as outlined above (art. 9(1) letter b AMLA).

A dealer/merchant must file a report with MROS in case he knows or reasonably suspects that the cash funds involved in the transactions meet the criteria as per (i)-(iii) above (art. 9(1bis) AMLA).

The legal concept of "reasonable suspicion" must thereby not be interpreted too narrowly. In practice, the reporting duty is triggered already by likewise vague indicia of ML/TF such as unconfirmed newspaper reports if those indicia cannot be clearly dispelled by the results of further investigations conducted by the financial intermediary or dealer/merchant pursuant to art. 6(2) respectively art. 8a(2) AMLA.

Reporting right according to art. 305ter(2) Penal Code

Under this provision, which already existed before the AMLA entered into force, professionals in the financial sector are entitled to report to the MROS observations that indicate that assets originate from a felony or an aggravated tax misdemeanor in terms of art. 305bis(1bis) Penal Code, notwithstanding any professional secrecy obligations they may be subject to (art. 305ter(2) Penal Code).

What happens after the filing of a SAR to MROS?

Customer orders relating to the reported assets: During the analysis to be carried out by the MROS, the financial intermediary shall execute customer orders relating to the assets reported under art. 9(1) letter a AMLA or art. 305ter(2) Penal Code (art. 9a AMLA). Client orders that relate to significant assets must, however, be executed in a form that allows the transaction to be traced (paper trail) (art. 33 FINMA anti-money laundering ordinance).
Freezing of assets: As soon as the MROS informs the financial intermediary that it has forwarded the report to the prosecution authority, the financial intermediary must freeze the assets involved with the relationship/transaction that is the subject matter of the SAR for up to five business days (arts. 10(1) and 10(2) AMLA).
Prohibition of information: The financial intermediary is prohibited from informing the persons concerned or third parties that it has filed a report under art. 9 AMLA or art. 305ter(2) Penal Code (art. 10a(1) AMLA). The same prohibition applies to the dealer/merchant with regard to a report it has filed under art. 9 AMLA (art. 10a(5) AMLA).
Disclosure of additional information: If the MROS requires additional information for its analysis of the SAR, the financial intermediary making the report must on request provide such information that is in its possession (art. 11a(1) AMLA).
No termination of the relationship: After a report has been submitted to MROS, the relationship with the contracting party must not be terminated (art. 32(3) FINMA anti-money laundering ordinance).

What are the duties if the reporting right was not exercised?

Documenting the reason for its decision: If a financial intermediary decides not to exercise its reporting right according to art. 305ter(2) Penal Code, it must document the reasons for such decision (art. 31FINMA anti-money laundering ordinance).
Close monitoring: If it continues the relationship, it must closely monitor and regularly check such relationship for indications of ML or TF (art. 6 AMLA).
Preservation of the paper trail: In the event of termination of the relationship, the financial intermediary may only permit the withdrawal of significant assets in a form that allows the law enforcement authorities to follow up the transaction if necessary (paper trail) (art. 32(1) FINMA anti-money laundering ordinance).

Offences

The offence of money laundering and its penalties

The offence of money laundering is regulated by art. 305bis Penal Code.

Art. 305bis(1) reads as follows: "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 is liable to a custodial sentence not exceeding three years or to a monetary penalty."[19]

Art. 305bis(1bis) defines the term aggravated tax misdemeanour as follows: "An aggravated tax misdemeanour is any of the offences set out in art. 186 of the Federal Act of 14 December 1990 on Direct Federal Taxation and art. 59(1) clause one of the Federal Act of December 14, 1990 on the Harmonisation of Direct Federal Taxation at Cantonal and Communal Levels, if the tax evaded in any tax period exceeds 300,000 Swiss francs"[20], i.e. tax fraud in a narrow sense.

In serious cases the penalty under art. 305bis(1) Penal Code is to be increased to a custodial sentence not exceeding five years or a monetary penalty (art. 305bis(2) letter a Penal Code). Such a serious case is particularly present when the offender:

acts as a member of a criminal organisation (art. 305bis(2) letter a Penal Code);
acts as a member of a group that has been formed for the purpose of the continued conduct of money laundering activities (art. 305bis(2) letter b Penal Code); or
achieves a large turnover or substantial profit through commercial money laundering (art. 305bis(2) letter c Penal Code).

The offence of forming a criminal organisation and its penalties

The offence of forming a criminal organisation is defined by art. 260ter Penal Code.

Art. 260ter(1) Penal Code reads as follows: "Any person who participates in an organisation, the structure and personal composition of which is kept secret and which pursues the objective of committing crimes of violence or securing a financial gain by criminal means,

any person who supports such an organisation in its criminal activities,
is liable to a custodial sentence not exceeding five years or to a monetary penalty."[21]

The offence of financing terrorism and its penalties

This offence is regulated by art. 260quinquies Penal Code. It constitutes a predicate offence to ML pursuant to art. 9(1) letter a number 4 AMLA.

Art. 260quinquies(1) Penal Code states the following: "Any person who collects or provides funds with a view to financing a violent crime that is intended to intimidate the public or to coerce a state or international organisation into carrying out or not carrying out an act is liable to a custodial sentence not exceeding five years or to a monetary penalty."[22]

However, it is worth noting that if the person merely acknowledges the possibility that the funds may be used to finance terrorism (dolus eventualis), he is not liable to a penalty under this provision (art. 260quinquies(2) Penal Code). Moreover, the law exempts the financing of activities aiming to restore democracy, rule of law or human rights or to fund acts in conformity with international laws on armed conflicts from the prohibition to finance terrorism (art. 260quinquies(3) and (4) Penal Code).

Predicate offences of money laundering

According to art. 305bis(1) Penal Code, only felonies (as opposed to mere misdemeanours) may – in addition to serious tax offences – qualify as predicate offences. A felony is an offence that carries a custodial sentence of more than three years (art. 10(2) Penal Code).

The following offences are generally predestined as predicate offences: Bribery, fraud, computer fraud, embezzlement, criminal mismanagement or forgery of a document.[23]

Various other laws also include potential predicate offences of money laundering, such as the Federal Act on Direct Federal Taxation and the Federal Act on the Harmonisation of Direct Federal Taxation at Cantonal and Communal Levels (both mentioned in art. 305bis(1bis) Penal Code). The Federal Act on Administrative Criminal Law or the Federal Act on Narcotics and Psychotropic Substances are, among others, further bodies of legislation that include such potential predicate offences.

Enforcement of AML regulations and related offences

AML related offences are investigated and prosecuted by the federal prosecutors of the Office of the Attorney General of Switzerland (OAG) or the cantonal prosecutors. The powers of investigation of the prosecutors at both levels are defined by federal law, namely the Criminal Procedure Code.

Further, FINMA being the regulatory body supervising the financial sector ensures compliance within the framework of regulatory enforcement. While FINMA, as opposed to the prosecutors, has no powers to impose penal sanctions such as fines, it may respond to contraventions of regulatory rules by severe administrative measures (see arts. 31 et seqq. of the Financial Market Supervision Act).

Internal procedures and training

Art. 8 AMLA sets out the general obligation of financial intermediaries to ensure, in particular, sufficient staff training and controls to prevent ML and TF.

The FINMA anti-money laundering ordinance provides specific guidance as to the standards which internal procedures and training must meet.

Financial intermediaries must put in place effective monitoring of business relationships and transactions to ensure that increased risks are identified (art. 20(1) FINMA anti-money laundering ordinance). Banks and securities dealers are obliged to operate an IT-based system for transaction monitoring (art. 20(2) FINMA anti-money laundering ordinance).

Furthermore, the financial intermediaries have to designate one or more qualified persons (anti-money laundering unit) to support and advise the line managers and the management in the development and implementation of anti-money laundering policies (art. 24(1) FINMA anti-money laundering ordinance).

The anti-money laundering unit prepares internal directives to combat ML and TF and plans and supervises the internal training (art. 24(2) FINMA anti-money laundering ordinance). The directives must be approved by the board of directors or the highest management body (art. 26(1) FINMA anti-money laundering ordinance).

In addition, the anti-money laundering unit monitors compliance with due diligence obligations to combat ML and TF (art. 25(1) FINMA anti-money laundering ordinance). It also carries out a risk analysis on the fight against ML and TF, which is to be approved and periodically reviewed by the board of directors or the highest management body (art. 25(2) FINMA anti-money laundering ordinance).

Similar provisions are set out in the regulations of the SROs, applying to financial intermediaries that are not subject to direct supervision by FINMA.

Sanctions

As a member of the FATF, Switzerland supports the mission and work of the FATF. On the basis of the results of a review by the International Co-operation Review Group, the FATF has recently confirmed its call on its members to apply counter-measures against the Democratic People's Republic of Korea to protect the international financial system from continuing and substantial ML and TF risks. Further, the FATF has urged members to apply effective counter measures against Iran, given such country's failure to enact the Palermo and Terrorist Financing Conventions in line with the FATF Standards. Iran will remain on the FATF's list of high risk jurisdictions subject to a call for action until the full action plan has been completed.[24]

Swiss AML laws make it encumbent on financial intermediaries to refrain from, or significantly restrict, financial transactions with those jurisdictions.

On the national level, the Swiss government (Federal Council) may enact compulsory measures to implement international sanctions on the basis of the Federal Act on the Implementation of International Sanctions (Embargo Act). There are currently 22 ordinances in effect, each relating to a specific country, such as the Ordinance on Measures against the Islamic Republic of Iran or the Ordinance on Measures against the Democratic People's Republic of Korea.

Several other ordinances relating to organizations or specific persons, or in particular with regard to the restitution of illegally acquired assets and on international trade in rough diamonds also form part of the Swiss legislation in the field of international sanctions.[25]

The Federal Council may decree compulsory measures to implement sanctions that have been ordered by the UN, by the Organisation for Security and Cooperation in Europe (OSCE) or by Switzerland's most significant trading partners, such as the EU (art. 1(1) Embargo Act). Such measures shall aim to securing compliance with principles of international law, notably human rights (art. 1(1) Embargo Act). Compulsory measures may in particular (a) directly or indirectly restrict transactions involving goods and services, payment and capital transfers, and the movement of persons, as well as scientific, technological and cultural exchange, and/or (b) include prohibitions, licensing and reporting obligations as well as other restrictions of rights (art. 1(3) Embargo Act).

While UN sanctions and amendments to the sanctions lists of the UN Security Council become immediately effective in Switzerland, i.e. without incorporation into Swiss law in an administrative process (see art. 25 of the UN Charter)[26], sanctions decreed by individual states or supranational organisations like the USA or the EU would need to be transferred into domestic law in order to become binding on Swiss parties.

As a matter of policy, and namely to preserve Switzerland's status as a recognized neutral power, such foreign sanctions, as a rule, are not adopted by Switzerland. However, Switzerland regularly takes measures to ascertain that EU and/or U.S. sanctions will not be circumvented via the Swiss financial centre or by interposing Swiss parties in a transaction (e.g. the ordinance on measures to prevent the circumvention of international sanctions in relation to the situation in Ukraine)[27].

Switzerland's current financial sanctions against the Democratic People's Republic of Korea consist of, among others, i) blocking of assets and prohibition to provide financing to specified individuals or for purposes related to the development of nuclear weapons, and ii) reporting obligations for blocked assets.[28] As far as Iran is concerned, Switzerland enacted a number of measures (i.a.) concerning the freeze of assets.[29]

CTF – Countering terrorist finance

The remarks and statements above, particularly under "Money laundering background in Switzerland" and "Overview of country risks", also apply to CTF.

ML and TF go hand in hand. Combating TF and ML is thus regulated in one and the same law, i.e. the AMLA.

The specific legal provision qualifying TF as a criminal act is art. 260quinquies(1) Penal Code. For the exact wording, see above under "Offences". From a criminological point of view, the main purpose of TF is to cover up the intention that assets made available should be used for terrorist purposes.[30] The close link with ML is thus evident.

Art. 260quinquies Penal Code ascertains that it is possible for Swiss penal authorities to target terrorists who act alone or in groups that are less well-structured than a criminal organisation (the support of and the participation in a criminal organisation is punishable under art. 260ter Penal Code).

If a financial intermediary subject to AML regulations knows or has reasonable grounds to suspect that assets involved in the business relationship serve the financing of terrorism, it must immediately file a SAR with MROS (art. 9(1) letter a number 4 AMLA; see above under "Reporting requirements and obligations").

Anti-bribery and corruption laws

The relevant legal provisions in the field of anti-bribery and corruption are set out in the Penal Code (arts. 322ter-322decies), in the Federal Act against Unfair Competition (art. 4a) and in the Federal Act on Medicinal Products and Medical Devices (arts. 55, 56 and 86(1) letter h, 87(1) letter h).

The possible offences in the public sector are the following:

- active bribery of Swiss or foreign public officials (arts. 322ter and 322septies(1) Penal Code);
- passive bribery of Swiss or foreign public officials (arts. 322quater and 322septies(2) Penal Code);
- granting an advantage to a Swiss public official (art. 322quinquies Penal Code); and
- accepting an advantage by a Swiss public official (art. 322sexies Penal Code).

The possible offences in the private sector are the following:

- active bribery (art. 322octies Penal Code); and
- passive bribery (art. 322novies Penal Code).

Bribery is any act by which a public official (alternatively: a person in the private sector) is offered, promised or given (in the passive version: demands, secures the promise of, or accepts) an undue advantage for himself or for a third party in order to cause that person

to commit or omit an act in connection with his official activity which is contrary to his duty or dependent on his discretion (alternatively: to commit or omit an act in connection with his professional or business activities that is contrary to his duties or dependent on his discretion).

The legal definition of bribery in art. 4a of the Federal Act against Unfair Competition coincides with the one in arts. 322octies and 322novies Penal Code.

The granting of an advantage is any act by which a Swiss public official is offered, promised or given (in the form of accepting an advantage: demands, secures the promise of, or accepts) an undue advantage for himself or for a third party in order that he carries out his official duties. It is noteworthy that Swiss penal law does not cover the granting respectively accepting of advantages to/by foreign officials.

In the private sector, the mere granting/accepting of an undue advantage is generally not punishable. Art. 55 in conjunction with art. 86(1) letter h of the Federal Act on Medicinal Products and Medical Devices stipulates an exception to this rule with a view to natural persons and entities active in the health sector. Here, the promise/accepting of material benefits is an offence, too. Art. 56 in conjunction with art. 86(1) letter h of the Federal Act on Medicinal Products and Medical Devices imposes a duty of transparency on both the selling and purchasing party of medicinal products. All discounts and rebates granted on purchases of these products must be shown on the receipts and invoices and must be disclosed to the competent authorities on request. This provision allows for enforcement of art. 55 of the Federal Act on Medicinal Products and Medical Devices.

According to art. 322decies(1) Penal Code, advantages are not deemed undue if they are either i) permitted under public employment law (public sector), ii) contractually approved by the employer/principal (private sector), or iii) of minor value in accordance with social custom.

The usual penalty for individuals is imprisonment for up to five years (up to three years in cases of granting/accepting of advantages and in the private sector) or monetary penalty (up to 540,000 Swiss francs). As far as minor cases of bribery in the private sector are concerned, they are only prosecuted on complaint. Companies may be fined up to 5,000,000 Swiss francs. In addition, gains from contracts or transactions that have been awarded as a result of bribery may be confiscated by the court. Individuals moreover run the risk of disqualification from acting as directors or executive officers in certain regulated areas such as the financial sector (e.g. art. 33 Financial Market Supervision Act).

Forthcoming issues/legislation

As already noted above (under "Overview of country risks"), the FATF criticised certain shortcomings in Switzerland's AML regulations. Following the FATF's Fourth Report on Switzerland, the Federal Council instructed the Federal Department of Finance to draw up a bill on the amendment of the AMLA.[31] The National Council however rejected the bill in March 2020 without entering into debate on the specific amendments .[32] The majority was of the view that the existing rules – in contradiction with the FATF's Forth Report on Switzerland (see above "Overview of country risks") – would provide a response sufficiently robust to counter money laundering.

The Council of States, on the other hand, entered into debate in September 2020, but made substantial amendments to the bill[33] (i.a. by abolishing the extension of the personal scope of application of the law to advisors, see below). It remains uncertain, whether or not the National Council will eventually revisit its position and take deliberations on the bill (as amended by the Council of States) at hand.

The key elements of the current legislative initiative are the following[34]:

- Persons who provide services in connection with the establishment, management or administration of companies and trusts (so-called Advisors, see above under "Overview of country risks") shall have to exercise due diligence in accordance with the AMLA (see e.g. added arts. 2(1) letter c, 8b et seqq. and 15 AMLA). As noted above, the Council of States has removed this extension of the personal scope of application from the bill;
- Financial intermediaries shall be under an express duty to verify beneficial owner information; mere reliance on the contracting party's declaration will no longer be admissible (see amended art. 4(1) AMLA);
- Financial intermediaries shall be obliged to regularly check whether client data is still up to date and, if necessary, to update the data (see new art. 7(1bis) AMLA);
- The threshold amounts for precious metal and precious stone dealers to apply due diligence in cash payments in accordance with the AMLA shall be reduced from 100,000 Swiss francs to 15,000 Swiss francs (see new art. 8a(4bis) AMLA). The Council of States has rejected this amendment in September 2020;
- The right to report (art. 305ter(2) Penal Code) will be maintained, contrary to the proposal in the consultation draft.;
- The 20-day deadline for analysis of a SAR by the MROS shall be abolished (see amended art. 23(5) AMLA);
- If, following a report under art. 9(1) letter a AMLA or under Article 305ter(2) Penal Code, the MROS does not inform the financial intermediary within 40 working days that it will transmit the reported information to a prosecution authority, the financial intermediary may terminate the business relationship (see new art. 9b AMLA);
- Associations that run the risk of being misused for TF or ML (i.e. associations that are mainly involved in the collection or distribution of assets abroad for charitable purposes) shall be obliged toregistered in the commercial register (see i.a. new arts. 61(2) number 3, 61a and 69(2) Civil Code). All associations subject to registration shall keep a member list and appoint a representative domiciled in Switzerland; and

The domestic cooperation of bodies and units active in the field of combating ML/TF shall be strengthened by creating a legal basis that enables the SRO to directly exchange information with the MROS (see added art. 29b AMLA).

Further, the FINMA anti-money laundering ordinance was amended to implement the recommendations of the FATF's Fourth Report on Switzerland; the revised ordinance entered into force on January 1, 2020.

On November 1, 2019 the Federal Act on the Implementation of the Recommendations of the Global Forum on Transparency and the Exchange of Information for Tax Purposes entered into force. According to the new law bearer shares will only be permitted if the company has shares listed on a stock exchange or if the bearer shares are issued in the form of intermediated securities (art. 622(1bis) Code of Obligations). No longer admissible bearer shares must be converted into registered shares by May 1, 2021 at the latest; otherwise these shares will be converted ipso iure into registered shares on May 1, 2021 (art. 4 transitional provisions to the Federal Act on the Implementation of the Recommendations of the Global Forum on Transparency and the Exchange of Information for Tax Purposes).

[1] See the Federal Council's Report on international financial and tax matters 2017, accessible at: https://www.sif.admin.ch/sif/de/home/dokumentation/publikationen/bericht-ueber-internationale-finanz--und-steuerfragen.html, page 9 (last visited on October 1, 2020).

[2] See https://www.efd.admin.ch/efd/en/home/dokumentation/nsb-news_list.msg-id-75603.html (last visited on October 1, 2020).

[3] The FATF Recommendations of 2012 (last updated in June 2019) can be accessed at: http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf (last visited on October 1, 2020).

[4] The FATF's Fourth Report on Switzerland is accessible at: https://www.newsd.admin.ch/newsd/message/attachments/46552.pdf (last visited on October 1, 2020).

[5] See https://www.fatf-gafi.org/media/fatf/documents/reports/fur/Follow-Up-Report-Switzerland-2020.pdf (last visited on October 1, 2020).

[6] See https://www.egmontgroup.org/en/content/about (last visited on October 1, 2020).

[7] Report on the national assessment of money laundering and terrorist financing risks in Switzerland, June 2015, accessible at https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-57750.html (last visited on October 1, 2020).

[8] http://www.fatf-gafi.org/media/fatf/documents/reports/fur/Follow-Up-Report-Switzerland-2020.pdf (last visited October 1, 2020).

[9] https://www.efd.admin.ch/efd/en/home/dokumentation/nsb-news_list.msg-id-75816.html (last visited October 1, 2020).

[10] SR 955.0.

[11] SR 955.01.

[12] SR 955.033.0.

[13] SR 955.021.

[14] SR 955.022

[15] SR 955.23.

[16] SR 311.0.

[17] SR 935.51.

[18] See report on the national assessment of money laundering and terrorist financing risks in Switzerland, June 2015, page 60 (see above, footnote 6).

[19] Informal translation of the German original text.

[20] Informal translation of the German original text.

[21] Informal translation of the German original text.

[22] Informal translation of the German original text.

[23] See MROS' annual report of 2017, published in April 2018, accessible at: https://www.fedpol.admin.ch/dam/data/fedpol/kriminalitaet/geldwaescherei/jabe/jb-mros-2017-d.pdf , page 34 et seq. (last visited on October 1, 2020).

[24] See http://www.fatf-gafi.org/publications/high-risk-and-other-monitored-jurisdictions/documents/call-for-action-february-2020.html (last visited on October 1, 2020).

[25] For the SECO's full list of recipients of sanctions, see https://www.seco.admin.ch/seco/de/home/Aussenwirtschaftspolitik_Wirtschaftliche_Zusammenarbeit/Wirtschaftsbeziehungen/exportkontrollen-und-sanktionen/sanktionen-embargos/sanktionsmassnahmen.html > Gegenwärtig bestehen Sanktionen gegen folgende Länder / Personen und Organisationen (current sanctions against the following countries / persons and organisations) (last visited on October 1, 2020).

[26] See Ordinance on the Automatic Adaption of Sanctions Lists of the UN Security Council, accessible at: https://www.admin.ch/opc/de/official-compilation/2016/671.pdf (last visited on 1 October 2020).

[27] SR 946.231.176.72.

[28] See https://www.seco.admin.ch/seco/de/home/Aussenwirtschaftspolitik_Wirtschaftliche_Zusammenarbeit/Wirtschaftsbeziehungen/exportkontrollen-und-sanktionen/sanktionen-embargos/sanktionsmassnahmen/massnahmen-gegenueber-der-demokratischen-volksrepublik-korea--no.html (last visited on 1 October 2020)..

[29] See https://www.seco.admin.ch/seco/de/home/Aussenwirtschaftspolitik_Wirtschaftliche_Zusammenarbeit/Wirtschaftsbeziehungen/exportkontrollen-und-sanktionen/sanktionen-embargos/sanktionsmassnahmen/massnahmen-gegenueber-der-islamischen-republik-iran.html (last visited on 1 October 2020).

[30] Cf. report on the national assessment of money laundering and terrorist financing risks in Switzerland, June 2015, page 12 (see above, footnote 6).

[31] See https://www.newsd.admin.ch/newsd/message/attachments/57535.pdf (last visited on 1 October 2020).

[33] See https://www.parlament.ch/de/ratsbetrieb/amtliches-bulletin/amtliches-bulletin-die-verhandlungen?SubjectId=49802 (last visited on 1 October 2020).

[34] See for the current status on the bill https://www.efd.admin.ch/efd/en/home/dokumentation/nsb-news_list.msg-id-75603.html, and https://www.parlament.ch/de/ratsbetrieb/amtliches-bulletin/amtliches-bulletin-die-verhandlungen?SubjectId=49802 (last visited 1 October 2020).

This country profile is kindly provided by CMS von Erlach Poncet Ltd., Zurich

Complaints Procedure