Swiss parliament amends the anti-money laundering act and (inadvertently?) Introduces new compliance duties

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OVERVIEW

In 2019, the Swiss Federal Government proposed a revision of the Anti-Money Laundering Act (AMLA), aimed at implementing recent Financial Action Task Force (FATF) recommendations.[1] On 19 March 2021, the Swiss Parliament adopted the revised AMLA.[2] Absent public referendum,[3] which at this stage seems unlikely, the revised AMLA is expected to enter into force in the coming months.

The AMLA applies to financial intermediaries and dealers that accept payments in cash. Financial intermediaries are, inter alia, banks, asset managers, trustees, investment companies with variable capital, etc.[4] Originally, lawyers and notaries would have also been subject to the AMLA duties under the draft revision.[5] However, this proposed amendment was ultimately rejected by the Swiss Parliament in order to protect the attorney-client privilege.[6]

One important revision of the AMLA concerns the duty imposed under Art. 9 on financial intermediaries to report suspicious activities to the Money Laundering Reporting Office of Switzerland (MROS, the Swiss Financial Intelligence Unit). Under the current act, financial intermediaries must immediately file a suspicious activity report (SAR) in cases of "actual knowledge of or reasonable grounds to suspect" a criminal origin of assets.[7] However, according to case law, a simple suspicion (*"un simple doute"*) triggers the statutory duty to file a SAR.[8] The threshold for the duty to file a SAR is thus minimal.

Under the revised AMLA, Art. 9 has been amended by a new paragraph 1 ^{quater}, as follows:[9]

In the cases under paragraph 1, there shall be a reasonable ground to suspect if the financial intermediary has a concrete indicium or several indicia that paragraph 1 letter a) may be fulfilled in respect of the assets involved in the business relationship and this suspicion cannot be rebutted on the basis of additional verifications pursuant to Article 6.

The newly introduced paragraph 1^{quater} clarifies the meaning of "reasonable grounds to suspect" money laundering in paragraph 1 and therefore, technically, does not introduce a new SAR threshold. However, it clarifies that a duty to report exists when at least one concrete indicium or several (i.e. two or more simple) indicia give reason to suspect money laundering and additional clarifications under Art. 6 AMLA fail to rebut the suspicion.

RATIONALE FOR THE REVISED ARTICLE 9

The Council of States proposed the amendment of Art. 9 AMLA. During the parliamentary sessions, it was argued that the low *"un simple doute"* threshold created legal uncertainty and led to a high number of SARs and a backlog at MROS.[10] Furthermore, the Swiss Parliament noted that the violation of the duty to report can result in harsh sanctions, e.g. fines of up to CHF 500,000 and/or a professional ban, therefore requiring more legal certainty.[11] Consequently, financial intermediaries tend to err on the safe side and file reports in cases where a slight doubt exists as to the origin of funds.

This uncertainty was likely a factor in the steady increase in SARs, which has resulted (for different reasons) in the current SAR backlog at MROS. As of end 2019, more than 6,000 reports remain unprocessed.[12]

While – at first glance – the above rationale appears convincing for a tentative "tightening" of the SAR threshold, the Swiss Parliament did not debate the pros and cons of the amendment in detail.[13] Furthermore, the practical compliance duties under the new rebuttal process on intermediaries remain unclear.

In our view, the effect of the additional clarification is that a simple reasonable suspicion (*"un simple doute"*) in itself no longer directly triggers a duty to report but rather a duty to conduct additional verifications under Art. 6 AMLA. These verifications address, amongst other aspects, the background and the purpose of the transaction or the business relationship. These additional verifications serve as the basis for the intermediary's decision as to whether or not a duty to file a SAR exists.

CONCLUSION AND OUTLOOK

The revision of Art. 9 AMLA may relieve MROS to some degree of "loose" SARs. However, this revision will most likely increase the compliance workload of intermediaries and their exposure to sanctions given their new obligations to conduct additional verifications in cases of doubt of money laundering before determining whether to file a SAR. As with any business decision, these determinations will need to be reasoned and documented.

In summary, and on the SAR threshold, one can say that *plus ça change, plus ça reste la même chose*: We do not expect MROS to receive significantly less SARs, but we would expect those reports filed will be more substantiated as a result of the expanded duties on intermediaries. This de facto shift from the state to the (financial) intermediaries to
(pre-) investigate suspicious activities also raises the question of the sharing of responsibility for the fight against money laundering. To what extent should a state outsource its AML investigative duties and how does it credibly and timely follow-up on the numerous resulting reports it receives from intermediaries?

References

[1]cf. Mutual Evaluation Report of the FATF on Switzerland of December 2016, ‹https://www.fatf-gafi.org/media/fatf/content/images/mer-switzerland-2016.pdf›; last consulted on 7 May 2021; cf. the Draft Dispatch of the Federal Council for the Revision of the AMLA of 26 June 2019, pp. 2, 7 et seqq. ‹https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-75603.html›; last consulted on 7 May 2021.

[2] Federal Decree of 19 March 2021, published in the Federal Gazette on 30 March 2021, BBl 2021 668, ‹https://www.fedlex.admin.ch/eli/fga/2021/668/de›; last consulted on 7 May 2021.

[3] The deadline for calling for a referendum lapses on 8 July 2021; cf. Federal Decree of 19 March 2021, published in the Federal Gazette on 30 March 2021, BBl 2021 668 (fn 2).

[4] cf. Art. 2 paras.1 and 2 AMLA, of which para. 2 letters a^{bis} and g will be revised, cf. the revision as published in the Federal Gazette on 30 March 2021, BBl 2021 668 (fn 2).

[5] AMLA Legislative Bill of the Federal Council, published in the Federal Gazette on 26 June 2019, BBl 2019 5555, pp. 5555, 5564,

‹https://www.fedlex.admin.ch/eli/fga/2019/1933/de››; last consulted on 7 May 2021.

[6] cf. the parliamentary debate and voting on the revised AMLA, National Council, Session of 2 March 2020, ‹https://www.parlament.ch/de/ratsbetrieb/amtliches-bulletin/amtliches-bulletin-die-verhandlungen?SubjectId=48463›; last consulted on 7 May 2021.

[7] Art. 9 para.1^{quater} AMLA, cf. the revision as published in the Federal Gazette on 30 March 2021, BBl 2021 668 (fn 2).

[8] Even a "*simple doute*" triggers a duty to report. In case of doubt, the suspicious activity must be reported, cf. Swiss Federal Supreme Court decision BGer 4A_313/2008 of 27 November 2008, consid. 4.2.2.3; further confirmed by Swiss Federal Supreme Court decision BGer 1B_433/2017 of 21 March 2018, consid. 4.9 and Swiss Federal Supreme Court decision BGer 6B_786/2020 of 11 January 2021, consid. 2.2.

[9] Non-official translation.

[10] Statement by Barbara Steinemann on behalf of the Legal Affairs Committee, National Council, Session of 1 March 2021, ‹https://www.parlament.ch/de/ratsbetrieb/amtliches-bulletin/amtliches-bulletin-die-verhandlungen?SubjectId=51792›; last consulted on 7 May 2021.

[11] Statement by Barbara Steinemann on behalf of the Legal Affairs Committee, National Council, Session of 1 March 2021 (fn 10); for the sanctions cf. Art. 37 AMLA, Art. 33 Financial Market Supervision Act (FINMASA), Art. 33a FINMASA.

[12] Annual Report MROS 2019, p. 7, ‹https://www.fedpol.admin.ch/fedpol/en/home/kriminalitaet/geldwaescherei/jb.html›; last consulted on 7 May 2021; cf. Statement by Barbara Steinemann on behalf of the Legal Affairs Committee, National Council, Session of 1 March 2021 (fn 10).

[13] cf. the parliamentary debate and voting on the three different proposals for a revised Art. 9 AMLA, National Council, Session of 1 March 2021, ‹https://www.parlament.ch/de/ratsbetrieb/amtliches-bulletin/amtliches-bulletin-die-verhandlungen?SubjectId=51792›; last consulted on 7 May 2021.