

September 2018

Proposed Amendment to the Anti-Money Laundering Act: Abolition of the Right to Report (art. 305^{ter} para. 2 Swiss Criminal Code)

1. Introduction

On 1 June 2018, the Swiss Federal Council initiated the consultation process on amendments to the Federal Act on Combating Money Laundering and Terrorist Financing (AMLA) (see Explanatory Report on the consultation draft of 1 June 2018¹). The draft legislation is expected to be debated in parliament in 2019.²

The amendment of the AMLA has been proposed against the background of the fourth FATF (Financial Action Task Force / Groupe d'action financière) country report of Switzerland.³ The FATF has, among other things, criticized the Swiss money laundering reporting system which has so far been based on a dualistic approach (right to report / duty to report).⁴ The consultation draft is supposed to address this criticism and suggests abolishing the right to report – whether this will lead to more legal certainty, is, however, questionable.

2. Dualistic System: Right to Report and Duty to Report

Switzerland's current Money Laundering Reporting System provides for a duty to report (under art. 9 AMLA) on the one hand, and a right to report under art. 305^{ter} para. 2 Swiss Criminal Code (SCC) on the other hand. The scope of application of these two reporting "vehicles" can be distinguished based on a qualitative assessment of the facts and the underlying suspicion resulting therefrom: The duty to report is triggered if there are "reasonable grounds" for suspicion that the involved assets are connected to money laundering or another felony or aggravated tax misdemeanour stated in art. 9 AMLA (see wording of art. 9 AMLA) while a right to report applies if "observations" "suggest that assets in question might be originated from a felony or an aggravated tax misdemeanour" in terms of art. 305^{bis} number 1^{bis} SCC (see wording of art. 305^{ter} para. 2 SCC). The right to report provides financial intermediaries with a legal justification (art. 14 SCC) protecting them from criminal liability that would result from a breach of professional confidentiality when reporting suspicious cases.⁵

¹ *Schweizerische Eidgenossenschaft, Änderung des Bundesgesetzes über die Geldwäscherei und Terrorismusfinanzierung, Erläuternder Bericht zur Vernehmlassungsvorlage, 1. Juni 2018* ("Explanatory Report").

² Media release of the Federal Council of 1 June 2018, "Federal Council initiates consultation on amendments to the Anti-Money Laundering Act".

³ In 2016, Switzerland underwent a fourth country evaluation by the FATF where certain weaknesses in Switzerland's anti-money laundering and terrorist financing system have been identified. The current legislative proposal is based on Switzerland's follow-up work to the fourth FATF country report. Switzerland will undergo a follow-up FATF evaluation in 2021; see Explanatory Report, p. 4 et seqq.

⁴ FATF (2016), Anti-money laundering and counter-terrorist financing measures – Switzerland, Fourth Round Mutual Evaluation Report, FATF, Paris ("FATF Mutual Evaluation Report Switzerland"), p. 195.

⁵ BSK StGB II-Pieth, 3. A. 2013, Art. 305^{ter} N 39; Explanatory Report, p. 16.

The relevant criteria for differentiating between the two reporting vehicles were originally described as follows in the Federal Council's Dispatch to the AMLA (1996):

The suspicion [under Article 9 AMLA] does not have to be almost certain. [...] A suspicion is reasonable if it is based on a specific indication or several indications which give reason to fear that the assets may be of criminal origin. [...]

The right to report pursuant to article 305^{ter} paragraph 2 SCC and the duty to report pursuant to article 9 AMLA are to be understood as different gradations within the same gradation scale. The duty to report presupposes the knowledge or reasonable grounds to suspect that a criminal offence pursuant to article 305^{bis} SCC has actually been committed, while the right to report provides a criminal justification for the reporting of indications that assets may be of criminal origin [...].⁶

3. Decreasing Importance of the Right to Report based on Recent Case Law?

The "suspicion threshold" of the duty to report, as described above, has been gradually lowered by case law: The decision of the Federal Supreme Court of 27 November 2008 already pointed in this direction holding that a financial intermediary has a duty to report based on a simple suspicion ("simple doute") that the assets may be of criminal origin.⁷ The tendency to broadly interpret the term "reasonable grounds" was adopted by the Federal Criminal Court.⁸ The Federal Supreme Court confirmed this tendency in its recent decision of 31 March 2018 holding that even a "simple suspicion" triggers a duty to report: Even a simple suspicion ["simple doute"] triggers the duty to report. The likelihood of an existing predicate offence does not have to be very high. In case of doubt, a suspicion report must be filed [...]. If a suspicion cannot be cleared through clarifications in the sense of art. 6 para. 2 AMLA [...], it is to be regarded as "reasonable".⁹

This tendency in case law led (at least in theory) to an overlap of the scopes of application of the two reporting vehicles and appears to have blurred the line between the scopes of application of the right to report and the duty to report, i.e. it created grey zones. In the evaluation report the FATF criticized the coexistence between the right to report and the duty to report arguing that it would increase legal uncertainty among financial intermediaries – assumingly, the FATF referred to these grey zones.¹⁰

The proposed amendment of the AMLA is supposed to address this criticism. In abolishing the right to report, it aims at creating more legal certainty (see below for a critical assessment of this argument). The proposal is based on the main argument that, based on the current case law which lowered the threshold for the duty to report by applying a broad definition of "reasonable grounds", there would no longer be any room for the application of the right to report.¹¹

⁶ Translated from German to English, see *Botschaft GwG* (AMLA Dispatch), BBI 1996 1101, 1130 et seq.

⁷ BGer 4A_313/2008 of 27 November 2008, E. 4.2.2.3.

⁸ Swiss Federal Criminal Court SK.2014.14 of 18 March 2015, E. 4.5.1.1.

⁹ Swiss Federal Supreme Court 1B_433/2017 of 21 March 2018, E. 4.9: *"Bereits ein "simple doute" löst grundsätzlich eine Meldepflicht aus. Die verbrecherische Vortat muss nicht mit grosser Wahrscheinlichkeit vorliegen. Im Zweifel hat eine Verdachtsmeldung zu erfolgen. [...] Wenn im Rahmen von Hintergrundabklärungen nach Art. 6 Abs. 2 GwG [...] der Verdacht nicht ausgeräumt werden kann, so gilt er als begründet."*; see also Swiss Federal Criminal Court SK.2014.14 of 18 March 2015, E. 4.5.1.1.

¹⁰ See FATF Mutual Evaluation Report Switzerland, p. 195.

¹¹ Explanatory Report, p. 18.

4. No Definition of "reasonable grounds" in the Explanatory Report

The Explanatory Report proposes that the term "reasonable grounds" be defined in the Anti-Money Laundering Ordinance (AMLO)¹² "in an analogous manner" as for traders in art. 20 para. 1 AMLO, arguing that this would increase legal certainty.¹³ However, the Explanatory Report lacks a proposal on a concrete wording of such definition. Moreover, it does not clarify what "in an analogous manner" means, i.e. whether the idea would be to copy the wording of art. 20 para. 1 AMLO (reasonable grounds which give rise to a duty to report pursuant to article 9 paragraph 1^{bis} AMLA exist if they are based on a concrete indication or several indications [...]).¹⁴

Against the background of above mentioned case law, it is questionable whether it is appropriate not to incorporate the terminology developed by the recent case law ("even a "simple suspicion" triggers a duty to report"¹⁵) into the new AMLA/AMLO. Absent such definition, there might be the risk that one of the core objectives of the revision – namely creating more legal certainty in the money laundering reporting system – would remain unachieved.

5. Comments

As the statistics published by the Money Laundering Reporting Office Switzerland (MROS) show, the number of suspicion reports which have been filed based on the right to report has not substantially decreased since 2015¹⁶ (after the Federal Criminal Court's decision regarding a broad interpretation of the duty to report). It is therefore questionable whether the abolition of the right to report can be justified based on the development of recent case law as argued in the Explanatory Report.

In light of the above, there still seems to be a need of the right to report. Even the Explanatory Report seems to have certain doubts regarding the proposed abolition and seems to still see (limited) room for the application of the right to report when stating: [...] against this background and under governing law there is hardly any room for application of the right to report according to art. 305^{ter} para. 2 SCC. Furthermore: In view of the case law, the situations to which the right to report is applied are already largely covered by the scope of the duty to report pursuant to art. 9 AMLA.¹⁷

¹² Anti-Money Laundering and Terrorist Financing Ordinance (AMLO) of 11 November 2015, SR 955.01.

¹³ Explanatory Report, p. 18.

¹⁴ Wording of art. 20 para. 1 AMLO (original version in German): *"Ein begründeter Verdacht, der eine Meldepflicht nach Artikel 9 Absatz 1^{bis} GwG auslöst, liegt vor, wenn er auf einem konkreten Hinweis oder mehreren Anhaltspunkten beruht, die eine Herkunft der Barzahlungsmittel aus einer strafbaren Handlung vermuten lassen, und er sich trotz zusätzlicher Abklärungen nach Artikel 19 nicht ausräumen lässt."*

¹⁵ BGer 1B_433/2017 of 21 March 2018, E. 4.9.

¹⁶ See MROS Annual Reports 2015-2017, p.10.

¹⁷ *"Vor diesem Hintergrund bleibt nach geltendem Recht für das Melderecht nach Artikel 305^{ter} Absatz 2 StGB kaum mehr ein Anwendungsbereich. Der Sachverhalt, auf den das Melderecht abzielt, fällt mit Blick auf die Rechtsprechung schon weitestgehend unter die Meldepflicht von Artikel 9 GwG."* [highlights added] Explanatory Report, p. 17.

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