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Preface

In applying the AML in its everyday work, replying to certain questions the Money Laundering Reporting Office is sometimes prompted to interpret the law. Questions refer to both formal and material aspects of the suspicious transaction reports. Irrelevant of the specific financial intermediary having made an inquiry, it frequently happens that MROS' reply would equally apply to other financial intermediaries. MROS compiles these questions in order to address them e.g. in the presentations MROS gives. They are also published in the annual reports of MROS in the chapter entitled "MROS' code of practice".

This chapter on « MROS' code of practice » has been published in the annual report for a number of years. With time it has become more difficult for the financial intermediaries to remember which report a particular issue was addressed in. As a consequence MROS finds that questions are revolving around the same subjects. Another difficulty is that in case MROS has rectified a previous position a financial intermediary must be able to identify not only the first report the issue was addressed but also the rectification.

For all of these reasons the Money Laundering Reporting Office has decided to compile all its contributions to "MROS' practice code" previously published in its annual reports in the present single document. Thus it will no longer be necessary to search several documents for a particular issue.

This compilation will be updated by MROS on a regular basis in order to include the latest publications of its practice code of the future annual reports.

Stiliano Ordolli
Head MROS

1 Practice 2014

1.1 Federal Act on Implementation of Revised FATF Recommendations

In the last two annual reports, MROS gave a status update on the draft bill on implementation of revised FATF recommendations. On 12 December 2014, the Swiss Parliament adopted this bill. MROS is directly affected by the amendments made since the system used for submission of SARs has changed substantially. The spectrum of tax-related predicate offences has been enlarged and now includes direct taxation. Finally, Swiss lawmakers have included the obligation that merchants submit SARs.

1.1.1 New system for the submission of SARs

New aspects have been added to the system established for the submission of SARs. We would like to point out, first of all, that the initial proposal, included in the draft bill that MROS presented in its annual reports in 2012 and 2013, was partially rejected by the Swiss Parliament during the summer session of 2014 in favour of a new variant. The new changes to the system include the following: separation of the act of submitting a SAR from the act of freezing assets for SARs submitted under Article 9 AMLA (currently, the amount of time in which assets are frozen leaves MROS with very little time to process the SAR); special handling of SARs on the basis of lists of terrorists; the new mechanism for the freezing of assets involved in a given business relationship; and the requirement that clients never be notified of the existence of a SAR.

a) Separation of the act of submitting a SAR from the act of freezing assets

The new system separates the act of submitting a SAR from the act of freezing assets. With the current system, financial intermediaries who submit a SAR by virtue of Article 9 AMLA must immediately freeze the assets for that business relationship. The freezing of assets remains in place until the prosecution authorities have reached a decision but no longer than five working days following the date when the SAR is submitted (Art. 10 para. 2 AMLA). Once this period has elapsed without any news from the authorities, the financial intermediaries are free to decide whether they wish to continue the business relationship (Art. 28 AMLO-FINMA).

The five-day period in which assets remain frozen is used not only for an MROS analysis but also for initial analysis and decision by a prosecution authority. This normally amounts to about three days of analysis by MROS and about two days for the prosecution authorities. This amount of time is too short to carry out in-depth analysis, including information from different sources – namely from foreign homologues. By separating the SAR from the freezing of assets, the new system directly helps to reinforce MROS' analytical capabilities. Indeed, from the

moment when this legal amendment comes into force, financial intermediaries will no longer have to automatically freeze assets when submitting a SAR to MROS. This relieves the pressure of having to analyse in- formation within a very short timeframe. Assets will there- fore only be frozen from the moment when MROS decides to forward the SAR to a prosecution authority (new Art. 10 para. 1 AMLA) – the exception being cases involving clients mentioned on the list of terrorists. In addition, not only does the law no longer require assets to be frozen, it requires financial intermediaries to execute client orders while MROS carries out its analysis. This obligation provided under the new Article 9a is aimed at preventing a client from being indirectly informed that a SAR has been sent to MROS. In- deed, apart from leaving MROS with very little time to ana- lyse the SAR, the five-day freezing of assets period in which the client is unable to carry out transactions could tip him/ her off to the fact that a SAR has been sent to MROS. Any prolongation of this automatic freezing of assets would in- crease the likelihood of the client becoming aware of the situation. For this reason, this option was discarded by the working group tasked with changing the system.

Certain financial market actors have already contacted MROS to request clarification of the obligation under Article 9a n-AMLA in view of Article 305bis of the Swiss Criminal Code (SCC). The question asked is whether the financial intermediary makes him or herself complicit in money laundering under Article 305bis SCC by executing transactions that already seem suspicious (because they are part of the business relationship reported to MROS).According to MROS, financial intermediaries that fulfil their obligation under Article 9a n-AMLA to carry out the client‘s orders do not violate Article 305bis SCC. Indeed, AMLA is a special law dealing with specific situations. In this sense, there is no conflict with the provisions of the Swiss Criminal Code. As already stated earlier, the aim of lawmakers was to prevent clients from becoming aware of the fact that a SAR has been sent to MROS. It was certainly not the intention of lawmakers to create an obligation that could force financial intermediaries to incriminate themselves. In this specific situation, the financial intermediary must satisfy the role given to it by lawmakers within the system that has been put in place. This opinion is shared by the Office of the Attorney General of Switzerland – which is a member of the working group that set up this new system.

Article 9a n-AMLA will be applied only for the period in which MROS is conducting its analysis. Under Article 23 paragraph 5 n-AMLA, the period of analysis of SARs per- formed on the basis of Article 9 paragraph 1 letter a has now been extended to a maximum of twenty days. The current situation – i.e. no legal limit on processing of SARs by MROS – shall remain in place for SARs submitted by virtue of Article 305ter paragraph 2 SCC. During analysis by MROS, the financial intermediary will be asked to pay particular attention to the traceability (paper trail) of transactions that are carried out in relation to the obligation set forth in Article

9a n-AMLA. Indeed, the financial intermediary must be willing to forward this information to MROS at any time upon request. The international network of financial intelligence units created by the Egmont Group will be able to keep track of these funds even if they are transferred abroad.

b) The specific case of the new Article 9 paragraph 1 letter c AMLA

Article 9 paragraph 1 letter c n-AMLA is a specific situation with respect to SARs that do not involve the freezing of assets. Based on this provision, the financial intermediary notifies MROS by virtue of the new Article 22a paragraph 2 AMLA of business dealings concerning persons or organisations mentioned on a list of terrorists. In such cases, assets are immediately frozen for a period of five working days starting from the date in which the SAR is received by MROS. The lists in question are based on UN Security Council Resolution 1373 (2001) (Art. 22a para. 1 AMLA). It is the Federal Department of Finance that provides these lists to supervisory authorities after consultation with the Federal Department of Foreign Affairs, the Federal Department of Justice and Police, the Federal Department of Defence, Civil Protection and Sport and the Federal Department of Economic Affairs, Education and Research (Art. 22a para. 4 AMLA)[1] FINMA sends these lists to financial intermediaries, which are directly subject to FINMA supervision as well as to Swiss self-regulatory organisations – which then send these lists to member financial intermediaries. The Federal Gaming Board also sends these lists to the financial intermediaries subject to its supervision (Art. 22a para. 3 AMLA).

c) New mechanism for the freezing of assets

The revised Federal Act now separates the act of submitting a SAR from the act of freezing assets. As already mentioned earlier, financial intermediaries will now submit SARs with- out freezing assets and will apply Article 9a n-AMLA until they receive further notification from MROS. However, the Federal Act does not suppress the freezing of assets. Also, Article 10 n-AMLA draws a distinction be- tween two situations:

– The first relates to SARs for which there is a suspicion of money laundering and/or terrorist financing under Article 9 paragraph 1 letter a AMLA or Article 305ter paragraph 2 SCC. In such cases, under Article 10 paragraph 1 n-AMLA, the financial intermediary will not freeze the assets until it receives notification from MROS that the SAR has been forwarded to the prosecution authorities. The freezing provided for by the Federal Act is automatic and therefore not ordered by MROS. Moreover, the freezing of assets is postponed with respect to the current situation[2].The prosecution authorities will therefore have five working days in which the assets will remain frozen. This will give them more time than is currently the case to carry out an initial analysis of the SAR and, if necessary, to take action. Financial intermediaries must therefore pay close attention to the notification that they receive from MROS. Indeed, if the SAR has

[1] Federal Council Dispatch on Implementation of the Recommendations of the Financial Action Task Force (FATF), revised in 2012, FF 2014, pp. 669-671 (German).

[2] Ibid, p. 668

been forwarded to a prosecution authority, it is vital that the MROS notification reach the persons who have the power to order an immediate freezing of assets.
– The second situation concerns SARs based on a list of terrorists under Article 9 paragraph 1 letter c n-AMLA which, as indicated earlier, is a specific case. Indeed, according to Article 10 paragraph 1bis n-AMLA, when MROS receives these SARs, it is the current system that remains in place. Financial intermediaries immediately freeze the assets involved for a period of five working days (Art. 10 para. 2 n-AMLA).

d) **Requirement that clients never be notified of the existence of a SAR** under the new Article 10a paragraph 1 AMLA. The Federal Act supresses the time limit in relation to when a client may be informed of a SAR. Indeed, in its current form Article 10a paragraph 1 AMLA requires financial intermediaries not to inform the client referred to in a SAR during the period in which assets remain frozen under Article 10 AMLA. This means that the requirement not to inform the client remains valid only for the five-day period in which assets are automatically frozen. Moreover, by referring only to the freezing of assets, Article 10a paragraph 1 AMLA does not cover SARs that do not involve the freezing of assets, i.e. those based on the right to report. That said, MROS has always explained to financial intermediaries that a teleological interpretation of the law would require them not to inform their clients under Article 10a paragraph 1 AMLA including for SARs submitted under Article 305ter paragraph 2 SCC. This situation is nevertheless unsatisfactory since MROS' handling of SARs submitted under the right to report generally take longer than the five-day period in which assets remain frozen (Art. 10a para. 1 AMLA). By introducing a requirement that clients never be informed of a SAR, the situation becomes much clearer and also facilitates implementation of this requirement in cases where a financial intermediary is contacted by MROS by virtue of Article 11a AMLA. Reference to Article 11a paragraph 4 AMLA no longer raises any difficulties of interpretation with regards to the duration of the freezing of assets in relation to the main SAR[3]. In addition, suppression of the limit that clients not be in- formed until after the five-day period has elapsed corresponds to FATF recommendation 21(b), which does not stipulate a period of time for this interdiction.

A new paragraph 6 has been added to Article 10a AMLA. It refers to an exceptional situation in which the requirement not to inform the client is lifted. The purpose of this provision is to give the financial intermediary the possibility to defend itself in the event that a lawsuit is filed against it under civil, criminal or administrative law. The existence of such a lawsuit is therefore an important factor in application of this provi- sion. The requirement not to inform the client,

[3] In its 2013 annual report, MROS had recommended that financial intermediaries adopt a teleological interpretation of the law. The inten- tion of lawmakers was that the client not be informed and therefore the requirement not to inform the client must also apply to Art. 11a AMLA. Since financial intermediaries who are contacted by MROS have no way of knowing when and for how long assets are frozen in relation to a given SAR, MROS recommended that financial intermediaries never inform their clients of the existence of a SAR pursuant to Art. 11a paragraph 4 to Art. 10a paragraph 1 AMLA (MROS Annual Report 2013, p. 57).

however, cannot be lifted within the framework of preliminary discussions between the financial intermediary and its client (e.g. aimed at avoiding a court case under civil, criminal or administrative law).

1.1.2 New tax-related predicate offences

For several years now, the Swiss legal system has included the notion of tax-related predicate offences to money laundering. All of the cases considered relate to indirect taxation. One example is organised contraband of goods under Article 14 paragraph 4 of the Federal Act on Administrative Criminal Law (ACLA, SR 313.0). Another example is value-added tax fraud, which jurisprudence has placed under the scope of Article 146 SCC.
The Federal Act on Implementation of the Revised FATF Recommendations now enlarges the scope of application of Article 14 paragraph 4 ACLA to all taxes and duties. The Federal Act introduces the notion of harm to pecuniary interests and other rights of public authorities both in the area of income tax and customs duties.

The introduction of tax-related predicate offences in the area of direct taxation is new not only in terms of the scope of application, but also in the manner in which predicate offences to money laundering are perceived under Swiss law. Currently, Article 305bis SCC stipulates that only assets derived from a felony may constitute a predicate offence to money laundering. The revised Article 305bis paragraph 1 SCC now adds the concept of qualified tax offences which is a misdemeanour. It is therefore important to bear in mind that from the moment when this provision comes into effect, felonies will no longer be the only predicate offences to money laundering in Switzerland.

In order for a tax offence to be considered as qualified, the conditions set forth in Article 186 of the Federal Act on Direct Federal Taxation or the conditions set forth in Article 59 paragraph 1 of the Federal Act on the Harmonisation of Direct Taxation at Cantonal and Communal Levels must be met. These two provisions are aimed at suppressing the use of forged, falsified or inexact documents intended to mislead the tax authorities. This would be an infraction intentionally committed under Article 12 paragraph 2 SCC, where the individual commits the act knowingly and wilfully, or considers that the act may constitute an infraction and accepts the consequences if such is the case[4]. In order to prevent minor cases resulting in a massive influx of SARs to MROS, lawmakers have established a threshold amount of CHF 300,000 in evaded taxes per fiscal period.

According to the Federal Council, this threshold in the Federal Act “also represents the point at which financial intermediaries must fulfil their heightened due diligence obligations in relation to this tax-related predicate offence, and in the case of suspicion de money laundering, send

[4] Federal Council Dispatch on Implementation of the Recommendations of the Financial Action Task Force (FATF), revised in 2012, FG 2014, p. 669 (German).

a SAR to MROS." Aware of the difficulties that financial intermediaries may encounter in determining whether this threshold has been reached, the Federal Council has also stated that "the financial intermediary does not have to prove that the tax-related predicate offence has occurred nor does it have to calculate the exact amount of the taxes that were evaded. It must merely have reasonable grounds for suspicion to justify a SAR."[5]

1.1.3 The duty to report to MROS by merchants

The duty to report to MROS by merchants Article 2 paragraph 1 letter b n-AMLA enlarges the scope of this Federal Act to include "natural persons or legal entities that, in a professional capacity, market goods and receive cash payments (merchants)." First of all, it should be pointed out that here we are not referring to securities brokers, who already are subject to AMLA provisions by virtue of Article 2 paragraph 2 letter d AMLA. Rather, the merchants referred to are natural persons or legal entities whose activity does not match the definition of financial intermediary established in the current Article 2 AMLA. These are professionals who sell both movable and immovable property. For these merchants, Article 8a n-AMLA establishes due diligence obligations that are applicable as soon as the merchants receive more than CHF 100,000 in cash (even in several instalments) for a given transaction. There is no need for any due diligence on their part if the portion of the payment exceeding CHF 100,000 goes through a financial intermediary.

Under Article 9 paragraph 1bis AMLA, merchants have a duty to report to MROS if they know or presume, on the basis of reasonable grounds for suspicion, that the cash used for payment has to do with infractions mentioned in Article 260ter number 1 or Article 305bis SCC; that the cash comes from a felony or a qualified tax offence under Article 305bis number 1bis SCC; or that the cash in question is at the disposal of a criminal organisation. This list is the same one provided in Article 9 paragraph 1 letter a n-AMLA, except with regards to the financing of terrorism, which is not taken into account for merchants.

MROS wishes to clarify that merchants have a duty to report if they are faced with reasonable grounds for suspicion. However, reasonable grounds for suspicion requires a certain level of knowledge about the client. This knowledge may be acquired after having carried out due diligence required under Article 8a n-AMLA. However, this latter provision only applies if the payment exceeds CHF 100‘000. It logically ensues that the only SARs to be received from merchants are those relating to amounts exceeding CHF 100‘000 and for which there are reasonable grounds for suspicion after due diligence has been carried out. In terms of execution, interpretation of this provision leaves several as yet unanswered questions. Under Article 8a para. 5 n-AMLA, the Federal Council must prepare a corresponding Ordinance to address these questions.

[5] Ibid.

1.2 National Risk Assessment (NRA)

Within the framework of the FATF country evaluation to be conducted in 2016 and implementation of the revised FATF Recommendations, the Federal Council decided at the end of 2013 to commission a National Risk Assessment (NRA) on Swiss efforts to combat money laundering and terrorist financing. In so doing, the Federal Council is implementing revised FATF Recommendations 1 and 2, which encourage countries to carry out an NRA to fight against money laundering and terrorist financing more efficiently. Switzerland is among the first countries to introduce such a control instrument. The aim is to gain a more precise understanding of money laundering and terrorist financing in Switzerland, to establish priorities, to take targeted countermeasures, and to verify efficiency at regular intervals. For this purpose, a new permanent body needs to be created to continuously monitor money laundering and terrorist financing risks at the national level and provide the government with regular updates on risk trends and the efficiency of counter- measures. The Federal Council has therefore established an interdepartmental working group. Acting under the aegis of the Federal Department of Finance (FDF), and more specifically the State Secretariat for International Financial Matters (SIF), this new interdepartmental working group is responsible for the process and for drafting the very first report on the results of the NRA. The interdepartmental working group has created a Risk Analysis Sub-commit- tee tasked with preparing the NRA. This sub-committee is headed by MROS and includes representatives of the competent federal authorities concerned as well as cantonal prosecution authorities. The sub-committee is responsible for gathering statistics on SARs and the outcome of criminal investigations and proceedings. As such, it maintains close contact with all of the authorities involved as well as with the financial intermediaries that are subject to AMLA. By working with other analytical bodies within fedpol, the „Risk Analysis“ subcommittee is able to provide the inter- departmental working group with the strategic analytical capacities needed to conduct an NRA and to effectively mobilise these capacities in conjunction with the other authorities involved.

1.3 Court judgments

1.3.1 Criminal mismanagement

On 21 February 2014, the Federal Supreme Court (FSC) rendered judgment 6B_967/2013 in which it underscored that anyone entrusted with the management of property, within the meaning of Article 158 SCC, acts with a sufficient degree of independence and has the power to dispose of all or part of the pecuniary interests of others, including the means of production and the employees of a company. The FSC furthermore explained that in order to conclude that criminal mismanagement has occurred, there needs to be evidence that the manager in question has violated his/ her obligations in relation to the given mandate. The man- ager must refrain from taking any actions that would cause prejudice to his/her client. An asset manager, for instance, may not make useless investments for the sole purpose of having his/her client

pay more in commissions for the transactions made (a practice referred to as churning). Such a practice, which seriously harms the client‘s interests, was considered as falling under the scope of Article 158 SCC. Moreover, in the court ruling in question, the FSC confirmed that the person acting as an intermediary between the client investor and the investment broker hiself/herself acts as a manager if he/she is authorised by the client investor to give buy and sell orders to the investment broker, even if the funds to be managed do not pass through the intermediary. In the case at hand, it was established that the clients had authorised the plaintiffs (self-employed asset managers) to carry out transactions on derivative products, which are by nature highly speculative, and that they had signed the documents explaining how commissions were calculated. The FSC pointed out that there was no evidence that the plaintiffs had carried out a very large number of unjustified transactions. They were therefore not being accused of having churned their client‘s assets. However, given market volatility, they had adapted their strategy on a regular basis, producing a large number of transactions that resulted in commissions that were disproportionate to the capital invested. The FSC felt that by following short-term investment strategies with little regard to the significant increase in commissions, the plaintiffs had failed in their obligation to safeguard their clients‘ interests. Therefore, this behaviour constituted criminal mismanagement.

The FSC also pointed out that even if the clients approved the account statements in relation to each transaction, they had no way of seeing the full picture of all of the financial transactions carried out. Moreover, the actions taken by the plaintiffs had resulted in a reduction in the client‘s invested capital, thereby meeting the conditions set forth in Article 158 SCC. Finally, the FSC stated that the losses incurred were not caused by stock market fluctuations nor by inco- herent or unjustified transactions but rather by the fact that the plaintiffs had not adapted their system of commissions to take the market volatility into account.

1.3.2 Money laundering – subjective element

On 18 July 2013, the Federal Supreme Court FSC rendered judgment 6B_627/2012 in relation to a plaintiff (X) who had received CHF 15,000 from a third party (Y) and a woman (A) whom he did not know. X then had this amount exchanged at three different banks on the same day and gave the money back to A in return for a payment of CHF 100. The FSC felt that X was guilty of money laundering. Whether X was aware or not that the CHF 15,000 had come from drug trafficking was irrelevant to the court since all that was needed was for the transaction to be considered suspicious. The FSC felt that the complicated modus operandi and the instructions received from Y should have prompted the plaintiff to ask himself questions about the origin of the money. A further clue should have been the fact that he had received the money from a woman who was unknown to him. The lower court had not claimed that X was absolutely certain that the money came from cocaine trafficking run by an organised group, nor that he had acted wilfully. Nevertheless, according to his own testimony, X was a long-time friend of Y. He knew that Y was active in the prostitution scene and that foreign women worked without a permit in his massage parlours. In such a context, it was not plausible that Y would hide from

X the reasons why he wanted the money to be exchanged if the real rea- sons were merely to evade taxation. Based on the various elements in the case, X should have sought more ample verifications. However, X refrained from obtaining these clarifications and the FSC felt that, when push came to shove, X really didn‘t care about the origin of the funds. His actions were therefore equivalent to intentionally turning a blind eye to the circumstances. The fact that he received a payment of CHF 100 should have raised his suspicions even further. Indeed, when it comes to money laundering, wilful intent is enough. In this case, it was sufficient that X had been aware of the suspicious circumstances surrounding acts that legally constituted a felony and that he had accepted that these acts had occurred.

2 Practice 2013

2.1 Legislative amendment of 21 June 2013 and new powers given to MROS in the area of money laundering

Adopted by the Swiss Parliament on 21 June 2013, the amendment of the Money Laundering Act did not prompt calls for a referendum. The revised act came into effect on 1 November 2013. The amendment grants three main powers to MROS: the power to exchange financial data with foreign FIUs; the power to obtain information from financial intermediaries that have not submitted a SAR; and the power to sign memorandums of understanding (MoU) directly with foreign FIUs.

Since 1 November 2013, MROS has exchanged financial data with foreign FIUs. This data is used only for information purposes. With prior authorisation from MROS, foreign FIUs may also provide this financial data to the prosecution authorities in their country. In order to give this authorisation, MROS refers to Article 30 paragraph 4 and paragraph 5 AMLA, which establishes the conditions under which this information may be transferred.

The revised AMLA also authorises MROS to negotiate and sign memorandums of understanding (MoU) directly with foreign FIUs. These are purely technical arrangements, which only establish the terms for the exchange of information. Since this legislative amendment entered into force, MROS has not signed any such MoUs. It has nevertheless received various offers that it is currently considering. It is worth remembering that domestic legislation requires some countries in the Egmont Group to sign an MoU before they can exchange information with a foreign FIU. It is therefore in the interest of both MROS and foreign FIUs to conclude MoUs.

2.1.1 New Article 11a AMLA

Since 1 November 2013, MROS has been authorised to formally request information both from financial intermediaries that have submitted a SAR (to obtain additional details) as well as from financial intermediaries that have not submitted such a SAR. The new Article 11a AMLA addresses certain difficulties encountered by MROS investigators seeking to shed light on money laundering and terrorism financing.

Article 11a paragraph 1 only formalises existing MROS practices, establishing a legal basis for MROS to request additional information from financial intermediaries that have submitted a SAR. Application of this provision should not be overly difficult.

2.1.2 Gathering information from third-party financial intermediaries

By virtue of Article 11a paragraph 2 AMLA, MROS may also contact financial intermediaries that have not submitted an SAR. When analysing incoming SARs, MROS often finds that transactions converge towards one or more financial intermediaries. Before 1 November 2013 (i.e. the date when Art. 11a came into effect), MROS did not have the authority to contact these other financial intermediaries. Its analysis was limited exclusively to the transactions concerning the financial intermediary that had submitted the SAR. When forwarding SARs to the corresponding public prosecutor's office, MROS drew attention to the transactions involving other financial intermediaries. Moreover, if MROS felt that there were sufficiently clear indications that other financial intermediaries were under an obligation to submit a SAR, the matter would be reported to FINMA. This spontaneous reporting, provided for under Article 10 paragraph 2 MROSO, remains in force.

MROS is only authorised to contact a third-party financial intermediary to obtain documents (i.e. making use of its new power) if this request is based on information provided in a SAR submitted by another Swiss financial intermediary. In other words, MROS can request additional information only if it has received an SAR requiring in-depth analysis and additional information from other financial intermediaries.

In order to obtain this additional information, MROS uses suitable forms based on Article 11a paragraph 1 or paragraph 2. These forms indicate the list of documents to be provided. MROS selects those that are deemed relevant to the case under analysis.

2.1.3 First questions on application

Since this legislative amendment came into effect on 1 November 2013, the first cases of application of Article 11a paragraph 2 AMLA have given rise to a few practical questions that should be addressed.

a) The first question relates to the status of the MROS request. Could one consider that the MROS request form submitted by virtue of Article 11a paragraph 2 AMLA constitutes adequate grounds for suspicion and therefore automatically triggers submission of a SAR by virtue of Article 9 AMLA? The question is a legitimate one: after all, the request for information has come directly from Switzerland's own FIU, which is responsible for analysing cases of money laundering, its predicate offences and financing of terrorism. Can't the financial intermediary merely provide the requested information without submitting an SAR?

MROS wishes to clarify that the information request form alone does not constitute adequate grounds for suspicion. As it happens, the original SAR may have been triggered by the existence of a simple suspicion by virtue of Article 305ter paragraph 2 SCC, i.e. the right to report. In addition, the system of SARs established by Swiss lawmakers in 1998 is intended to avoid the automatic submission of SARs. In order to submit a SAR to MROS, the financial intermediary must itself have specific reasons justifying this suspicion on the basis of elements at its disposal. We can therefore affirm that an MROS request made by virtue of Article 11a paragraph 2 AMLA must not automatically trigger a SAR.

Nevertheless, the financial intermediary cannot ignore the fact that its client is the subject of an information request made by Switzerland's FIU and that this information request, in turn, arose in relation to an SAR submitted by another financial intermediary. The third-party financial intermediary is therefore required to carry out clarifications under Article 6 paragraph 1 AMLA, to determine whether it also has specific grounds for suspicion. If such is the case, then it will send a SAR to MROS (by virtue of either Art. 9 AMLA or 305ter para. 2 SCC), including the documents that MROS has requested by virtue of Article 11a paragraph 2 AMLA. If there are no specific grounds for suspicion, then the financial intermediary will merely provide MROS with the information requested by virtue of the aforementioned provision.

b) Another question of application relates to the requirement placed on financial intermediaries not to inform their client. This gag order applies to MROS information requests made by virtue of Article 11a paragraph 4 in relation to mandatory SARs submitted under Article 10a paragraph 1 AMLA. The latter provision states that financial intermediaries must not inform the persons concerned or any third parties that it has submitted a SAR to MROS. This gag order remains in place for as long as the assets remain frozen. Here we find that application of this gag order becomes difficult within the framework of MROS information requests made under Article 11a paragraph 2. Third-party financial intermediaries have no way of knowing whether the original SAR that prompted the MROS information request was a mandatory SAR based on Article 9 AMLA or a voluntary SAR based on Article 305ter paragraph 2 SCC. It therefore does not know whether the assets in question have been frozen and if so, from when to when.

   How long does a gag order associated with MROS information requests made under Article 11a paragraph 4 AMLA remain in effect? One possible interpretation would be to consider that the five-day period begins from the moment when the financial intermediary sends the documentation requested by MROS (without submitting an SAR). However, MROS will not inform the third-party financial intermediary of subsequent action taken in relation to the original SAR because this right to be informed is only enjoyed by the financial intermediaries that submitted the original SAR.

This interpretation is unsatisfactory in many respects. First of all, how does the gag order apply during the timeframe that MROS has given the financial intermediary to prepare the documentation? What about after the five-day period that starts from the moment when the financial intermediary provides MROS with the requested information? It is possible that after this five-day period, MROS is still in the process of analysing the case (e.g. when the original SAR is based on Art. 305ter para. 2 SCC). Informing the client before or after the five-day period would not only put MROS's analysis at risk but also any subsequent criminal proceedings that might follow.

The solution to these questions is provided in a draft bill on implementation of the FATF Recommendations[6]. The new Article 10a paragraph 1 AMLA provides for a perpetual gag order. Applied to Article 11a paragraph 4, this would mean that the third-party financial intermediary that receives an information request from MROS would be under an absolute requirement to never inform its client that MROS has asked for information concerning this client. This perpetual gag order would apply from the moment in which the MROS information request is received. Adopted by the Federal Council in its 13 December 2013 session, this provision reflects the general aims of lawmakers in relation to AMLA: namely to provide financial intermediaries, MROS and the prosecution authorities with optimal legal conditions that enable them to identify, carry out in-depth analysis and prosecute money laundering and terrorist financing cases. Informing the client of an MROS information request would not only be superfluous, it might also create problems for MROS analysis and for any subsequent criminal investigation. We should also point out that MROS information requests are based on suspicion, not on hard evidence. Once the proposed amendment contained in the Federal Council's draft bill is adopted, the client must never be informed by the financial intermediary. He/she may only be informed if MROS forwards the case to the prosecution authorities and in that case it is the prosecution authorities that will contact the client.

Based on the general wishes of lawmakers, MROS recommends that financial intermediaries not notify their client when MROS makes an information request.

[6] Federal Act on Implementation of the Recommendations of the Financial Action Task Force (FATF), revised in 2012, FF 2014, 685, p. 698.

2.2 New securities violations considered as predicate offences to money laundering

On 1 May 2013, a major amendment to the Stock Exchange Act (SESTA, SR 954.1 came into effect. Two violations, namely insider trading and price manipulation became felonies – i.e. predicate offences to money laundering – if the aggravating circumstance of a profit exceeding CHF 1 million applies.

In 2013, MROS received seven SARs relating to these two infractions. Among these, six concerned cases in which insider trading and price manipulation were the presumed predicate offences. Of these cases, four were forwarded to the corresponding prosecution authorities. According to the new Article 44 SESTA, the Office of the Attorney General of Switzerland now has the exclusive authority to investigate such matters.

Questions were raised by financial intermediaries in relation to these types of situations. What happens, for example, if the CHF 1 million threshold is not reached by a client with one financial intermediary but the latter is aware of the existence of other accounts held by its client with other financial intermediaries (without knowing the exact amount of the assets deposited)? How should one apply in practice the requirement that a security be listed on a Swiss stock exchange or entity similar to a stock exchange if the security in question is actually listed on a foreign stock exchange?

Financial intermediaries that raised the question concerning the CHF 1 million threshold decided to send a voluntary SAR to MROS by virtue of the right to report (Art. 305ter para. 2 SCC). It is indeed difficult for a financial intermediary to turn a blind eye to the fact that its client has deposited funds with other financial intermediaries. In such cases, MROS has often made use of the new power given to it by Artcile 11a paragraph 2 AMLA to request information from third-party financial intermediaries that had not submitted an SAR.

With regards to the requirement that a security be listed on a Swiss stock exchange or entity similar to a stock exchange, the Office of the Attorney General of Switzerland has issued the following clarification:

“In order to fall under the scope of Article 40 and 40a SESTA, the securities must be tradable on a Swiss stock exchange or entity similar to a stock exchange (Art. 2 let. a SESTA as well as Art. 3 SESTA); in other words, the security only needs to be tradable, not necessarily listed in the strict sense. A security traded exclusively abroad will not be taken into account.[7]

[7] See Federal Council Dispatch of 31 August 2011 on Amendment of the Stock Exchange Act, FF 2011 p. 6354; see KOENIG DANIELA, Das Verbot von Insiderhandel: eine rechtsvergleichende Analyse des schweizerischen Rechts und der Regelungen der USA und der EU, Zurich 2006, p. 138; LEUENBERGER CHRISTIAN, Die materielle kapitalmarktstrafrechtliche Regulierung des Insiderhandels de lege lata und de lege ferenda in Switzerland: unter

The attention of financial intermediaries must nevertheless also include securities that are exclusively traded outside of Switzerland within the context of a designated offence. Indeed, funds resulting from such a transaction could lead to money laundering in Switzerland even if the underlying infraction is not covered as such by Swiss legislation – or at least not under Article 40 or 40a SESTA respectively. This arises from the abstract double jeopardy principle that the Federal Supreme Court has confirmed[8]. According to this principle, an infraction committed abroad may be a predicate offence to money laundering if – by hypothetically transposing the situation to Switzerland – it would constitute a felony[9]. In order to apply this transposition in the case of stock market offences, it is important to ask whether – given the hypothesis that the perpetrator had acted in Switzerland on a security traded in Switzerland[10] – it would have to be considered as a case described in Article 40 or 40a SESTA.
Moreover, a simple accounting gain can suffice; a jump in stock market price following publication of a confidential fact would be enough for the condition to apply[11]. There is no need for the person to have sold his/her securities or derivatives at the right time; the condition of pecuniary advantage applies even if the security later drops below its initial purchase price after the initial increase in stock price following publication of the confidential fact."

2.3 Changes to the SAR submission system

In its Annual Report 2012, MROS provided a detailed presentation of the SAR submission system sent to the Federal Council for approval on 27 February 2013. MROS now provides an update of the current legislative situation.

The consultation procedure lasted until 1 July 2013. On 4 September, the Federal Council formally took note of the results of the popular consultation[12]. With regards to the SAR submission system, the Federal Council initially decided to maintain the proposal to suppress the automatic freezing of assets for a five-day period in the case of mandatory SARs submitted by

besonderer Berücksichtigung verschiedener moraltheoretischer und ökonomischer Konzepte sowie eines Vergleichs mit dem US-amerikanischen Bundesrecht, Zurich 2010, p. 320 ss; NIGGLI MARCEL ALEXANDER/WANNER MARIANNE, Basler Kommentar – Strafrecht II, Niggli *et al*. (éd.), 3ème édition, Bâle 2013, N. 15 *ad* Art. 161bis CP.

[8] Decision of the Federal Supreme Court 136 IV 179, JdT 2011 IV 143; see earlier: Decision of the Federal Supreme Court 118 Ib 543, point 3.

[9] Decision of the Federal Supreme Court 136 IV 179, point 2.3.4, JdT 2011 IV 143, point 2.3.4.

[10] Since the person had acted in a third country by making a transaction on a security negotiated in this latter jurisdiction.

[11] With regards to the condition of pecuniary advantage under previous legislation: see CHRISTIAN LEUENBERGER, Die materielle kapitalmarktstrafrechtliche Regulierung des Insiderhandels de *lege lata* und de *lege ferenda* in Switzerland, Zurich 2010, p. 391 as well as the references in nbp 1607; also see: SILVAN HÜRLIMANN, Der Insiderstraftatbestand: rechtsvergleichende Studie der schweizerischen und der US-amerikanischen Regelung unter Berücksichtigung der EU-Richtlinien und der aktuellen Entwicklungen im Finanzmarktrecht, Zürich Bâle Genève 2005, p. 95; more nuanced: PETER BÖCKLI, Insiderstrafrecht und Verantwortung des Verwaltungsrates, Zurich 1989, p. 74 ss.

[12] See: http://www.news.admin.ch/message/index.html?lang=fr&msg-id=50108

virtue of Article 9 AMLA. This is the system of deferred freezing of funds under Article 9a of the draft AMLA[13] – that MROS presented in its Annual Report 2012 – which is desired by the Federal Council. This is reflected both in its Dispatch[14] and in the draft bill[15] adopted on 13 December 2013.

Responding to requests by interested parties, the Federal Council also decided to maintain the right to report (Art. 305ter para. 2) despite the proposal to suppress this right. However, this right is not conceived as being separate from the freezing of assets. The draft bill of 13 December 2013 provides that Article 9a (deferred freezing of assets in the case of urgency) shall also apply in the case of SARs submitted by virtue of Article 305ter paragraph 2 SCC.

The Federal Council also took into account the request made by other interested parties concerning the setting of a deadline for the handling of SARs by MROS. As it happens, the draft bill submitted for popular consultation provided that only the duty to report under Article 9 AMLA would remain in effect. No deadline for the handling of SARs by MROS was set. In its draft bill of 13 December 2013, the Federal Council established a deadline of 30 working days for the handling of such SARs by MROS. This deadline only applies to SARs submitted to MROS under the duty to report (Art. 9 AMLA). Voluntary SARs submitted by virtue of the right to report under Article 305ter paragraph 2 SCC are not subject to any maximum deadline. In the latter case, it is the current situation that subsists.

[13] Concerning this article 9a, the Federal Council made certain additional clarifications, referring to questions raised during consultation. For instance, what should be done if, during the period of MROS analysis, the client concerned asks his/her financial intermediary to transfer all or part of his/her assets to another financial intermediary based in Switzerland (without the conditions of Art. 9*a* para. 2 seeming to apply)? In such cases, the first financial intermediary would notify the second of the SAR being processed by MROS. However, it is possible that certain financial intermediaries might find themselves in a situation where the second financial intermediary described above (i.e. the one receiving the funds referred to in the SAR submitted to MROS) refuses to accept these funds. In its Dispatch dated 13 December 2013, the Federal Council clearly prohibits such a refusal (Federal Council Dispatch, p. 667). Indeed, not accepting these assets would have the effect of tipping off the client that he/she is the subject of an SAR being analysed by MROS. This would go against Art. 10*a* para. 1 of the draft bill to implement the revised FATF Recommendations which, as mentioned above, stipulate that a client may not be informed under any circumstances whatsoever.

[14] Federal Council Dispatch on implementation of the Recommendations of the Financial Action Task Force (FATF), revised in 2012 (FF 2014, 585).

[15] Federal Act on Implementation of the Recommendations of the Financial Action Task Force (FATF), revised in 2012, FF 2014, 685.

2.4 Decisions of prosecution authorities

2.4.1 Decision of the Federal Criminal Court

In its judgment of 25 October 2012, the written explanation of which was sent to the parties on 17 January 2013, the Federal Criminal Court (hereinafter: FCC), in its ruling in the case SK.2011.27, acquitted a self-employed asset manager (hereinafter: the accused) of various counts of providing support to a criminal organisation, of serious violation of the Narcotics Act and of aggravated money laundering.

Between the months of September 1997 and April 2004, the accused had had accounts opened, reactivated or closed on behalf of his main client, a Spanish industrialist active in the food industry and real estate (hereinafter D.). Eleven accounts had been opened in the name of offshore companies or trusts, and major cash deposits had been made on some of these accounts. The client in question was sentenced to ten years in prison in Spain and was ordered to pay two fines in relation to very large shipments of narcotics made by a criminal organisation (see judgment of 16 November 2009 of the Spanish National Court in Madrid). With the help of the accused, D had managed to transfer the capital to his accounts in Switzerland without any physical or accounting transfers thanks to offsetting transactions.

In order to prove the illicit origin of the laundered assets, there must be evidence showing that a predicate offence as such has occurred. There must also be evidence showing that the laundered assets in question came from that same predicate offence. Therefore, the link between the assets and the predicate offence must be strong enough to exclude any and all legitimate doubt.

In this case, the FCC considered that the organisation to which D had provided support satisfied the criteria of a criminal organisation under Swiss law and that these facts could be deemed sufficient in proving the predicate offence required by Article 305bis SCC. The indictment indicated that the criminal activity of the accused had begun in 1997 and continued until March 2003. The previously mentioned criminal organisation had decided to import cocaine by a shipping route in 2002. The planning, preparation and technical execution of the importation of cocaine had begun in September 2002 and continued until October 2003. The specific illicit activities consisted in dispatching the drugs from Colombia (point of origin) and importing them to Spain (country of destination) and included transport. The drugs did not reach Spanish territory because they were seized by the Spanish authorities. In addition, no pecuniary advantage was derived from this drug trafficking operation.

In light of the foregoing, the proven activities of D in relation to drug trafficking occurred after the funds in question had reached Switzerland. Therefore, there cannot be any link between these funds, the funds managed by the accused and the crime committed by D.

The Swiss investigation also revealed transactions linked to a major case of cigarette trafficking in which D was claimed to have been involved back in the 1990s. The FCC nevertheless disregarded this information because this type of trafficking was not considered a felony under Swiss law, at any rate not prior to 1 February 2009, the date when Article 14 paragraph 4 ACLA went into effect. Under these circumstances, the FCC considered that the funds managed by the accused in Switzerland on behalf of D could not be considered the result of a predicate offence and that he must be acquitted of the accusation of money laundering.

3 Practice 2012

3.1 Case where assets were forfeited by the Swiss Confederation, despite a ruling to suspend proceedings and the corresponding MROS statistics

It is not rare for MROS to receive SARs where the reported assets were derived from criminal activities taking place exclusively abroad. In such cases, the ensuing criminal investigations into the predicate offence to money laundering usually take place outside of Switzerland. This was exactly what happened with one SAR that MROS received in 2008: the financial intermediary's attention was drawn to a business connection after reading press reports stating that the beneficial owner (who had used an alias to establish the client relationship) had been arrested for alleged involvement in drug trafficking in Europe. MROS forwarded the SAR to the prosecution authorities, which then initiated criminal proceedings for money laundering. Afterwards, the foreign prosecution authorities honoured a Swiss request for mutual legal assistance and authorised the Swiss prosecution authorities to be present during questioning of the detainee. The suspect was then extradited to a country outside of Europe where the prosecution authorities mounted a successful case against him. In 2012, he was sentenced to several years in prison for involvement in a criminal organisation as well as for drug trafficking. The accused reached a plea-bargaining agreement whereby he agreed to relinquish ownership over all of the assets linked to these criminal activities. The accused's assets in Switzerland, which amounted to over CHF 1 million, were directly linked to his participation in a criminal organisation.

The Swiss prosecution authorities therefore decided to refer to Article 72 SCC to justify possible forfeiture of these assets by the Swiss Confederation. As it happens, Article 72 SCC stipulates that the court shall order the forfeiture of all assets that are subject to the power of disposal of a criminal organisation. Since the accused had been convicted by a foreign court for participation in a criminal organisation that qualified as such under the criteria set forth in Article 260ter SCC[16], the assets could be seized in application of Article 72 SCC without the need for a conviction in a Swiss court of law. At the same time, the Swiss prosecution authorities issued a ruling suspending proceedings under Article 320 paragraph 2 CrimPC[17].

In MROS statistics, this case is listed as "Suspended", which gives the false impression that the accused person mentioned in the SAR was not convicted. As the example above shows, the reality is quite different. Not only was the entire anti-money laundering system efficient, it was also successful: the incriminated assets were detected on the Swiss financial market,

[16] Swiss Criminal Code of 21 December 1937; SR 311.0

[17] Swiss Criminal Procedure Code of 5 October 2007; SR 312.0

frozen and eventually seized by the Swiss Confederation even though the criminal activities giving rise to the predicate offence took place exclusively outside of Switzerland. In this case, the sentence was rendered outside of Switzerland and therefore does not appear in Swiss conviction statistics.

3.2 Obligation of prosecution authorities to provide MROS with copies of their decisions (Art. 29a para. 2 AMLA) for statistical evaluation

Article 29a paragraph 2 AMLA requires prosecution authorities to immediately inform MROS of the decisions reached in relation to the SARs forwarded to them. This paragraph was added in the most recent revision of the Anit-Money Laundering Act[18]. In the corresponding Federal Council dispatch, it was further stated that this meant that MROS is to immediately receive a copy of these decisions. The provision forms the legal basis for information exchange between the authorities. In addition, the Office of the Attorney General of Switzerland and the cantonal prosecution authorities must systematically and spontaneously keep MROS informed of progress in criminal proceedings opened subsequent to receipt of a forwarded SAR. MROS requires this information in order to assess the quality of its work and establish statistics. At the same time, FATF Recommendation 33 encourages FIUs to maintain statistics to determine the effectiveness and efficiency of the system used to counter money laundering and terrorist financing activities. Information exchange to MROS should therefore take place systematically and automatically in order to reduce the administrative workload. Therefore, the prosecution authorities are required to automatically and immediately send MROS a copy of all decisions reached in relation to forwarded SARs. These decisions are established in the Criminal Procedure Code (CrimPC; SR 312.0) and are listed below:

- Opening of a criminal investigation (Art. 309)
- Issuance of a no-proceedings order (Art. 310)
- Decision to extend a criminal investigation (Art. 311 para. 2)
- Suspension of a criminal investigation (Art.314)
- Resumption of a suspended criminal investigation (Art. 315)
- Ruling to suspend proceedings (Art. 320)
- Reopening of a criminal investigation (Art.323)

The corresponding feedback is presented in Chapter 2.5.12 "Status of forwarded SARs" of the MROS Annual Report. It is interesting to note the distinction between issuance of a no-proceedings order and a ruling to suspend proceedings. Under Article 319 CrimPC, the public

[18] Inserted by no. I 4 of the Federal Act of 3 October 2008 on Implementation of Revised Recommendations of the Financial Action Task Force, in effect since 1 February 2009 (AS 2009 361 367; BBl 2007 6269); http://www.admin.ch/ch/d/ff/2007/index0_38.html

prosecutor issues a ruling to suspend proceedings if, after a criminal investigation has been opened, it is later ascertained that there is not enough evidence to justify filing charges or that the elements of the offence are lacking. In contrast, under Article 310 CrimPC, the public prosecutor issues a no-proceedings order as soon as it is established on the basis of the complaint or the police report that the elements of the offence concerned or the procedural requirements have clearly not been fulfilled, or if there are procedural impediments, or if there should be no prosecution under federal law. The ruling to suspend proceedings is issued without any further investigative activities on the part of the public prosecutor's office.[19] In the past 10 years, around 41 percent of all forwarded SARs led to a no-proceedings order. This does not mean, however, that these SARs were forwarded by MROS unnecessarily to the public prosecutor's office and that MROS could have simply suspended the proceedings itself. On the contrary, in practice it transpires that in many of the no-proceedings orders there was indeed an initial suspicion, but the initial suspicion was ruled out only through a combination of MROS's analysis and police investigations, such as the questioning of individuals (N.B.: it is important to bear in mind that MROS is merely an administrative FIU, without the power to conduct investigations). Therefore, often a criminal preliminary investigation is necessary before suspicion can be dispelled or the prosecution authorities conclude that there is insufficient evidence and subsequently issue a ruling to suspend proceedings. The same applies in cases where the public prosecutor's office in Switzerland spontaneously provides information to foreign prosecution authorities within the context of mutual assistance proceedings under Article 67a IMAC [20]. If the public prosecutor's office in Switzerland later receives no feedback from the foreign prosecution authorities, it will issue a no-proceedings order after the legally prescribed deadline has expired. In other words, a no-proceedings order does not mean that there was no initial suspicion or that the prosecution authorities took no action on the case.

3.3 Changes to the Anti-Money Laundering Act

In its Annual Report 2011, MROS announced that Switzerland's Anti-Money Laundering Act would be amended to enable the exchange of financial information between financial intelligence units (FIUs). This change to existing legislation is intended to address the "warning of suspension" of membership from the Egmont Group to MROS and bring Swiss legislation in line with expected implementation of FATF Recommendations, which were revised in February 2012 (see Section 5.2 FATF). A draft proposal to revise the Anti-Money Laundering Act was prepared and presented for consultation. In June 2012, the Federal Council took note of the outcome of the consultation process[21] on amendment of

[19] Taken from "*Kommentierte Textausgabe zur Swiss Strafprozessordnung*" (Annotated Swiss Criminal Procedure Code, available in German only), published by Peter Goldschmid, Thomas Maurer, Jürg Sollberger; Stämpfli Verlag AG Bern 2008

[20] Art 67a IMAC: Spontaneous transmission of information and evidence; (Federal Act of 20 March 1981 on International Mutual Assistance in Criminal Matters (IMAC, SR 351.1)

[21] http://www.admin.ch/ch/d/gg/pc/documents/2158/Ergebnisbericht_GwG_de.pdf

the Anti-Money Laundering Act and approved the dispatch[22] to be submitted to the Federal Assembly. In the Winter Session 2012, the Council of States unanimously adopted the draft proposal without revision. The National Council in its function as second Council has adopted the draft proposal in spring 2013.

MROS's analytical activities entail the exchange of information with partner FIUs in other countries. Under current legislation in force, MROS is not authorised to provide its foreign partner FIUs with financial information such as bank account numbers, information on financial transactions or account balances, which are protected by Swiss banking secrecy and professional secrecy legislation. This situation has negative consequences in the fight against money laundering for all those concerned, including Switzerland. Various foreign FIUs have chosen to respond to Switzerland in kind by refusing to provide any financial information to MROS. It is therefore in Switzerland's best interests to put an end to bank secrecy protections that prevent MROS from responding to mutual assistance requests. If this is done, MROS will also be able to gain access to all available data being exchanged between member FIUs. To achieve this, the Anti-Money Laundering Act needs to be revised accordingly. The aim is to enable MROS to provide partner FIUs with specific financial information such as bank account numbers, information on financial transactions or account balances.

In addition to addressing these core concerns, the draft proposal also pursues two additional regulatory objectives, which are intended to address the FATF's revised Recommendations 29 and 40:

First of all, the existing powers of FIUs to require financial intermediaries to provide more complete information regarding already submitted SARs must be expanded in certain cases: the draft proposal seeks to allow MROS to require other financial intermediaries (i.e. those that did not submit a SAR to MROS) to also supply relevant information. This would only be the case, for instance, when information relates to an already submitted SAR. By approving this, lawmakers will allow the Swiss financial market to adequately meet the greater demands placed on it by the FATF: namely, that FIUs must be able to obtain additional information from financial intermediaries so that FIUs can efficiently carry out their tasks.

The second regulatory objective pursued by the draft proposal is to authorise MROS to independently sign technical co-operation agreements with foreign FIUs, which require such an agreement (Memorandum of Understanding, MoU) in order to work with partner FIUs abroad. This legislative change also matches an FATF recommendation. As things currently stand, only the Federal Council has the right to enter into such agreements. However, MROS itself does not need to sign a co-operation agreement with foreign FIUs

[22] BBl Nr. 29 of 17 July 2012 6989, 6941 http://www.admin.ch/ch/d/ff/2012/index0_29.html

in order to exchange information, since this power is already conferred upon it by the Anti-Money Laundering Act.

3.4 Regimes considered as criminal organisations: duty to report

In early 2011, referring to Article 184 paragraph 3 of the Federal Constitution, the Federal Council adopted a series of decrees ordering financial intermediaries to freeze the accounts of certain individuals who were nationals of countries experiencing mass protest movements. In order to facilitate the work of financial intermediaries applying these decrees, MROS published its practice with regards to the duty to report.[23]

Under this practice, any report that a financial intermediary submits to the Federal Department of Foreign Affair's Directorate of International Law (FDFA/DIL) is independent from a SAR submitted to MROS. Financial intermediaries that submit a report to FDFA/DIL have a special duty to clarify (Art. 6 AMLA) the business connections referred to in their report. Depending on the outcome of these clarifications, if the financial intermediary feels that there are sufficient grounds to suspect money laundering or terrorism financing, then it has a duty to report these suspicions to MROS under Article 9 AMLA. If the financial intermediary merely suspects such involvement, then it may avail itself of its right to report under Article 305ter paragraph 2 SCC.

Consequently, there may be cases where a financial intermediary – even after complying with its duty to clarify – simply has no suspicions (neither grounds for suspicion nor even simple suspicion). In such cases, the financial intermediary would simply send a report to DIL and not MROS.

As far as Egypt is concerned,[24] in June 2011 the Office of the Attorney General of Switzerland (OAG) launched criminal proceedings against several individuals who were close friends and family members of the former Egyptian president. According to the OAG, it was plausible that some practices taking place under this regime could qualify as activities of a criminal organisation (e.g. misappropriation of public funds for personal use or deriving personal gain from wide-scale corruption).

In its judgment rendered on 5 September 2012, the Federal Supreme Court (FSC) confirmed the validity of a sequestration order applied to the account of the wife of a former minister under the Mubarak regime. Given the official duties carried out by her husband on behalf of Hosni Mubarak and the fact that funds had been transferred to this account while holding that government position, the judges felt that there were sufficient grounds for suspicion that the minister's wife was involved in money laundering under Article 305bis

[23] http://www.fedpol.admin.ch/content/dam/data/kriminalitaet/geldwaescherei/jahresberichte/jb-mros-2011-e.pdf
[24] 1B_175/2012

SCC and therefore was to be considered as a member of a criminal organisation as defined in Article 260ter SCC. Without going into too much detail on the analysis of the conditions justifying application of Article 260ter SCC, the FSC ruled that the entire regime established by former President Hosni Mubarak was a criminal organisation.

In its judgment rendered on 20 December 2012 concerning a Libyan national[25], the Federal Criminal Court (FCC) explained that the Office of the Attorney General of Switzerland (OAG) initiated criminal proceedings after a SAR had been forwarded to it by MROS. The suspect was initially charged with money laundering (Art. 305bis SCC), and subsequently these charges were broadened to include participation in and support for a criminal organisation (Art. 260ter SCC).

In order to determine whether the Gaddafi regime met the required conditions to be considered a criminal organisation, the FCC based its assessment on a report drafted by the Federal Criminal Police. The most important elements retained were the fact that Gaddafi surrounded himself with a limited circle of individuals – the "men under the tent". This was sufficient to meet the secrecy condition set forth Article 260ter SCC. The "men under the tent" had direct and effective influence over the country's affairs. This position allowed them to plunder the country and embezzle state revenues. The purpose of this system was to allow its members to benefit from assets and resources that belonged to the Libyan state. These facts were enough to meet the condition of securing financial gain by criminal means.[26] According to the FCC, there was enough evidence to qualify the Gaddafi regime as a criminal organisation.

We should recall that the FSC had already qualified the Gaddafi regime as a criminal organisation in the Abacha and Duvalier cases.[27]

Without going into the issue of sequestration and confiscation of assets in relation to these rulings, the fact that these regimes were qualified as criminal organisations is important to MROS. According to Article 9 paragraph 1 letter a chapter 3 AMLA, a financial intermediary must immediately file a SAR to MROS when it becomes aware of or has reasonable grounds to suspect that assets involved in the business relationship are subject to the power of a criminal organisation.

The fact that the FSC considered the former Egyptian and Libyan regimes as criminal organisations therefore complements the practices that MROS published in 2011. In other

[25] BB.2012.71

[26] For more details on the notion of criminal organisation, see FSC ruling 27 August 1996, in Semaine judiciaire, 1997, p. 1ss.

[27] ATF 131 II 169 et ATF 136 IV 4.

words, a financial intermediary must be immediately suspicious of any client with ties to these regimes and submit a mandatory SAR (Art. 9 AMLA) to MROS.

Voluntary SARs (Art. 305ter SCC) do not apply in such cases.

3.5 Changes to the system used to submit SARs to MROS

The bill to enact legislation applying the revised FATF Recommendations – currently in the consultation phase[28] – is part of a new system of submitting SARs to MROS in relation to money laundering and terrorism financing.

The Anti-Money Laundering Act (AMLA) came into effect on 1 April 1998. In fifteen years of application, Article 9 AMLA and Article 305ter al. 2 SCC have formed a solid basis in the fight against money laundering and terrorism financing in Switzerland. Experience has nevertheless revealed difficulties that the amendment to the Anti-Money Laundering Act now seeks to address.

The current anti-money laundering system used in Switzerland draws a distinction between SARs on the basis of intensity of suspicion of money laundering. These suspicions fall into one of two categories, namely cases where there are reasonable grounds for suspicion and cases where there is merely suspicion. Each of these two categories is handled by two separate pieces of legislation, which in turn involve different measures being taken by financial intermediaries and the authorities.

When confronted with a business relationship where elements justify submission of a SAR to MROS, the financial intermediary must first determine whether the case falls within the scope of application of Article 9 AMLA or Article 305ter paragraph 2 SCC. However, financial intermediaries are not free to choose between these two provisions: the first case is a duty, the second is a right. These two provisions not only oppose one another, they are also complementary in the sense that they reflect the growing intensity of suspicion. They form a logical continuation and escalation of suspicions. In fact, suspicion can be a simple feeling of uneasiness (as in the case of Art. 305ter para. 2 SCC[29]) or justified (as in the case of Art. 9 AMLA[30]).

Because suspicions are based on personal and subjective opinions, it is not possible to establish criteria that are uniformly applicable to all situations. The relativity of the suspicion criteria means that appreciations will differ from one financial intermediary to another. Indeed, what amounts to a simple suspicion for one financial intermediary may seem entirely justified for another. This could create a difference in handling that is difficult to justify.

[28] http://www.efd.admin.ch/dokumentation/gesetzgebung/00571/02691/index.html?lang=fr

[29] Federal Council Dispatch of 30 June 1993 Concerning Modification of the Swiss Criminal Code and the Military Criminal Code, FF 1993 III 269, p. 317.

[30] Federal Council Dispatch of 17 June 1996 Concerning the Federal Act on Prevention of Money Laundering in the Financial Sector, p. 1086.

Apart from the degree of suspicion that must be reached, another important difference between these two provisions is the action taken in response to these two types of SAR. SARs submitted by virtue of Article 9 AMLA result in the automatic freezing of the account under Article 10 AMLA. This is not the case for SARs submitted by virtue of Article 305ter paragraph 2 SCC.

In addition to these practical difficulties of interpretation, the coexistence of these two provisions has been criticised by the FATF, which wants Switzerland to not only disassociate the freezing of assets (which could have the effect of "tipping off" the suspect) but also to merge the concept of the duty to report and the right to report[31].

The draft proposal, which is currently in the public consultation phase, seeks to remedy the difficulties arising from the coexistence of these two types of suspicions while simultaneously complying with the recommendations made in the FATF's Mutual Evaluation Report released in 2009.

The revocation of the right to report set forth in Article 305ter SCC is a very important measure. Only the duty to report under Article 9 AMLA will remain in force. Moreover, according to the draft proposal, when financial intermediaries submit an SAR by virtue of Article 9 AMLA, they will no longer automatically freeze the account for five days. This will have the effect of disassociating the freezing of assets from the reporting of suspicions to MROS. It will also give MROS the time it needs to conduct an in-depth analysis before deciding what subsequent action should be taken. If MROS decides to forward the SAR to the corresponding prosecution authorities, the financial intermediary – who will be notified by MROS of this decision – will then automatically freeze the account for five days to give the prosecution authorities the time to conduct a preliminary investigation and take suitable measures.

A new mechanism has been set up to prevent reported funds from escaping confiscation or being used to finance terrorist activities. In fact, the new Article 9a of the draft revision of the Anti-Money Laundering Act would require financial intermediaries to disregard transfer requests by the suspected client who attempts to hinder confiscation or finance terrorism. At the same time, under the draft revision the financial intermediary would be required to immediately inform MROS of this attempt. The transaction would then be suspended for a period of five days during which MROS would accelerate its analysis and decide whether to forward the SAR to the prosecution authorities. MROS would then inform the financial intermediary of its decision. In the case where the SAR is forwarded to the prosecution authorities, the financial intermediary would continue to freeze the assets until the prosecution authorities have reached a decision. However, assets may not remain frozen for more than five working days from the moment when MROS notifies the financial intermediary that the SAR has been forwarded.

It is also worth mentioning that the explanatory report submitted for consultation includes an important clarification concerning the threshold of certainty that a suspicion must reach in order to give rise to a SAR under Article 9 AMLA. In fact, the duty to report under Article 9 AMLA

[31] FATF "Mutual Evaluation Report" (follow-up report) – Switzerland", dated 27 October 2009, p. 22 (http://www.fatf-gafi.org/media/fatf/documents/reports/mer/mer%20switzerland%20rapport%20de%20suivi.pdf).

requires that the financial intermediary "know" or "has reasonable grounds to suspect". This legal notion is imprecise and depends on the practices of financial intermediaries. As a result, it requires case-per-case interpretation. It was not the lawmaker's intention, however, to establish the duty to report only for cases where the financial intermediary had concrete proof. According to the explanatory report, the intention was for the financial intermediary to submit a SAR under Article 9 AMLA if the specific duty to clarify under Article 6 AMLA produced various indications and clues that would make the financial intermediary presume or at least be unable to exclude that the assets were of criminal origin. This explanation given by the Federal Council will certainly be very useful for financial intermediaries.

3.6 Court rulings

3.6.1 Duty to report and professional secrecy of lawyers

Affaire Michaud c. France – Decision of the European Court of Human Rights dated 6 December 2012

On 6 December 2012, in the case of "Michaud against France", the European Court of Human Rights (ECHR) ruled that the transposition of EU anti-money laundering directives and the obligation imposed on lawyers to submit a "declaration of suspicions" of possible illicit activities of their clients did not constitute a violation of Article 8 (right to respect for private and family life) of the European Convention on Human Rights.

The claimant, a member of the Paris bar association, felt that implementation of these directives constituted a threat to professional secrecy and client-lawyer privilege. However, the ECHR pointed out that this obligation to report was imposed on lawyers in only two cases, namely (§ 127): “First of all, when, within the context of their professional activity, they carry out financial or real estate transactions on behalf of their client or act as a fiduciary. Secondly, when, still within the context of their professional activity, they help their client to prepare or carry out transactions in relation to certain specific operations.” Those activities, which are inherent to the legal profession such as consultation or defence of client interests, would not be concerned; secondly, only certain financial activities (opening and managing bank or fiduciary accounts, creating or managing companies…), which are also carried out by other professionals, are subject to the same obligation. Moreover, the ECHR reiterated that French law provides an added protective filter to professional secrecy in the person of the Bâtonnier (head of the bar association), who is required to show heightened vigilance when forwarding a declaration of suspicion to the French FIU (Tracfin). The ECHR therefore felt that the obligation to report suspicions did not have a disproportionate impact on the basic principle of professional secrecy of lawyers.

Here we see that the approach adopted by French lawmakers on this subject is similar to that applied in Switzerland where lawyers also enjoy a special status in order to guarantee respect for professional secrecy. By virtue of Article 9 paragraph 2 AMLA, Swiss lawyers are not subject to the obligation to report their suspicions when carrying out an activity subject to professional secrecy under Article 321 SCC. In contrast, they are subject to AMLA when they act in a professional capacity as financial intermediaries (FINMA Circular 2011/1, § 114ss); and even in such cases, unlike other financial intermediaries, lawyers are not subject to direct monitoring by FINMA (Art.18 para.3 AMLA). However, lawyers must be affiliated with a self-regulating body recognised by FINMA (Art. 14 para.3 AMLA) and send their "declarations of suspicion" directly to MROS[32], which will then forward the declaration to the prosecution authorities if deemed necessary.

According to established Swiss jurisprudence, this protection is conferred to all deeds and documents that have been entrusted to them by their client and bear a certain relation to their activities. Therefore, it is not possible to obtain documents that are strictly related to the exercise of their mandate. However, this limitation does not apply to the temporary seizure of documents relating to the lawyer's purely commercial activities, namely as a body representing a private company or as a manager of assets (FCC BE.2006.4, consid. 3.1).

The landmark decision reached by the European Court of Human Rights on 6 December also applies to Swiss legislation and confirms that imposing an "obligation to report suspicions" on the legal profession is in compliance with Article 8 of the European Convention on Human Rights.

[32] During the consultation process preceding the Federal Council's decision on the Anti-Money Laundering Act, the Swiss Bar Association and the Swiss Association of Notaries proposed a special regulation on reporting by lawyers and notaries. Under this proposal, lawyers and notaries would not submit their reports to MROS, but to their self-regulatory body (SRB). This body would be responsible for deciding whether the report concerned facts covered by professional secrecy or whether it could be transmitted to MROS. This proposition is reminiscent of the protective filter mentioned by the ECHR and provided for under French law. The Federal Council did not accept this proposal. Indeed, it considered that "it was up to the lawyers and notaries themselves to distinguish, as part of their practice and on a case-by-case basis, if a case concerned facts relating to their main activities or to subsidiary activities." (Dispatch of 17 June 1996 on the Anti-Money Laundering Act in the Financial Sector. Available in German, French and Italian).

4 Practice 2011

4.1 Duty to report (Art. 9 AMLA) to MROS in relation to emergency ordinances issued by the Federal Council (sanctions against natural and legal persons, entities or bodies from Tunisia, Egypt, etc.)

Invoking emergency law provisions (based on Art. 184 para. 3 of the Federal Constitution; SR 101), the Federal Council issued the following ordinances:

Ordinance of 2 February 2011 on Measures against Natural and Legal Persons, Entities or Bodies from the Arab Republic of Egypt (SR 946.231.132.1)
Ordinance of 19 January 2011 on Measures against Natural and Legal Persons, Entities or Bodies from Tunisia (SR 946.231.175.8)

Based on these Ordinances, financial intermediaries were instructed by the Federal Department of Foreign Affairs (DFA), through its Directorate for International Law (DIL) to report any business relationships with natural and legal persons, entities or bodies from the Arab Republic of Egypt or Tunisia and to freeze their assets.

At the same time, the Financial Market Supervision Authority (FINMA) published an announcement on its website stating that “financial intermediaries submitting reports to the DFA's Directorate for International Law by virtue of these ordinances are not freed of their obligation to submit SARs to MROS in accordance with Article 9 AMLA.”

The cases for which the duty to report under Article 9 AMLA (SR 955.0) applies are clarified below:

Financial intermediaries must report business relationships of natural and legal persons, entities or bodies listed in the annex of the aforementioned ordinances to the DFA's Directorate for International Law and must also freeze their assets. This action must be taken independently of the duty to report to MROS. Financial intermediaries are not required to provide MROS with a copy of the report submitted to the DFA's Directorate for International Law.

If the financial intermediary reports a business relationship to the DFA's Directorate for International Law, then it must also clarify this business relationship by virtue of Article 6 paragraph 2(b) AMLA. If there are no reasonable grounds for suspicion of the business relationship other than the fact that the name of the natural and legal person, entity or

body appears on the list in the annex to the ordinances, then the financial intermediary has no duty to report the business relationship to MROS.

If the name appears on the list of natural and legal persons, entities or bodies in the annex to the aforementioned ordinances and there are reasonable grounds for suspicion, then the financial intermediary must submit a mandatory SAR to MROS under Article 9 AMLA. Reasonable grounds for suspicion include: indications that a judicial investigation has been launched in Switzerland or in another country against the natural person or legal entity (see for instance “Council Regulation (EU) No 101/2011 of 4 February 2011 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Tunisia” as well as the grounds for listing persons, entities and bodies in Annex I); a request for mutual legal assistance has been made; implausible transaction patterns or the existence of transitory accounts.

Simple cases of suspicion may be handled by submitting a voluntary SAR to MROS under Article 305ter paragraph 2 SCC.

The duty to report under Article 9 AMLA also provides for the freezing of assets under Article 10 AMLA. Given the fact that assets are to be frozen by virtue of the Ordinances issued by the Federal Council, freezing the same assets again under Article 9 AMLA may seem unnecessary. However, the freezing of assets in each case is carried out under different legal bases. For instance, if the reported natural person, entity or body is removed from the Federal Council's list, the initial freezing of assets will be lifted. However, if there are reasonable grounds for suspicion for a mandatory SAR under Article 9 AMLA, then the assets must remain legally frozen for five working days (Art. 10 AMLA).

4.2 Duty to report terminated negotiations aimed at establishing a business relationship and duty to report existing business relationships where no assets have yet been deposited

Article 9 paragraph 1 (b) AMLA states that financial intermediaries must immediately submit a mandatory SAR if negotiations to establish a business relationship are discontinued because there are reasonable grounds for suspicion that the assets: are connected to a money laundering offence; are the proceeds of a felony; are subject to the power of a criminal organisation; or serve the financing of terrorism. If we take the wording of AMLA literally, then the financial intermediary does not have to submit a mandatory SAR under Article 9 AMLA for existing business relationships for which no assets have yet been deposited, even though Article 9 paragraph 1 (b) states that the duty to report applies when negotiations aimed at establishing a business relationship are terminated. At first glance, this may seem confusing or even paradoxical to financial intermediaries. However, considering the intention of lawmakers when drafting Article 9 AMLA and viewing letter (a)

and (b) of Article 9 AMLA as a cohesive whole, MROS feels that the duty to report also applies to an existing business relationship for which no assets have yet been deposited if there are reasonable grounds for suspicion. This raises the following questions:

1) Assets were withdrawn before the financial intermediary had reasonable grounds for suspicion under Article 9 AMLA

Legal experts agree that assets do not need to be present in the account in order to trigger an SAR. It is enough for the assets to have been in the account at a previous point in time (see Werner de Capitani, *Kommentar Einziehung/Organisiertes Verbrechen/Geldwäscherei, Band II, Schulthess Verlag*, 2002, on Art. 9 AMLA, N 49, page 1002; see also Daniel Thelesklaf, *Kommentar zum Geldwäschereigesetz, Orell Füssli Verlag AG, 2003* on Art. 9 AMLA, N8). This serves the purpose of anti-money laundering legislation, namely to trace and confiscate assets of criminal origin. Prosecution services are able to follow paper trails to gain access to transferred assets. Transaction records are also very important for criminal investigations.

2) Assets have not yet been transferred to a new account but the financial intermediary now has reasonable grounds for suspicion under Article 9 AMLA

It seems contradictory that the duty to report under Article 9 (a) AMLA would not apply in one case (i.e. when an account has been opened (i.e. existing business relationship) but no assets have yet been transferred at the time when the financial intermediary has reasonable grounds for suspicion) but not in another (i.e. when potential negotiations to establish a business relationship are interrupted for exactly the same reasons). In both cases, there are reasonable grounds for suspicion under Article 9 (a) AMLA. However, as Daniel Thelesklaf states in his *Kommentar zum Geldwäschereigesetz, Orell Füssli Verlag AG, 2. Auflage von 2009*, on Article 9 AMLA in N8: "if no assets are present, there can also be no suspicion that the assets in question: originate from criminal activities; are being used for the purpose of laundering money; are at the disposal of a criminal organisation; or are being used to finance terrorist activities." MROS feels that Thelesklaf's grammatical interpretation of Article 9 (a) AMLA is overly narrow and that Article 9 (a) and Article 9 (b) AMLA must be considered as a whole, not separately. The duty to report under Article 9 (b) AMLA expressly relates to the presence of reasonable grounds for suspicion under Article 9 (a) with full awareness of the fact that no assets can be transferred in the negotiation phase to establish a business relationship even though this is expressly mentioned in Article 9 (a). MROS therefore feels that the duty to report also applies if there are reasonable grounds for suspicion of an existing business relationship even if the assets have not yet been transferred to the account.

5 Practice 2010

5.1 Must the financial intermediary check procedural requirements or impediments to proceedings in advance with a view to mandatory reporting?

a) Procedural requirements

Under Swiss criminal law, the presence of a demand for prosecution in the case of offences which can only be prosecuted on demand is a so-called procedural requirement. This means that the punishable act is not prosecuted by prosecution authorities unless a demand for prosecution is filed by the damaged party. The facts of the offence are, as a general rule, seen as official offences (offences that are prosecuted officially), whereby in combination with money laundering (where there must always be the elements of a crime as a predicate offence) the question of a demand for prosecution is not posed. There are, however, exceptions. The following case may serve as an illustration from everyday practice:

A female client paid a cash amount into a newly-opened account, for which she alone had power of attorney. When asked by the financial intermediary about the origin of the money, she presented a letter from her lawyer, confirming that it mainly consisted of two-thirds of the money paid to her (still) husband by his pension fund on taking up self-employment. In view of the forthcoming divorce and in order to secure his wife's claims, this money had been withdrawn from the husband's account. A judicial judgement on the wife's entitlement to this money was not submitted. It must therefore be assumed that the money, which originally came from the husband's pension fund, had been withdrawn without his knowledge and paid into an account unknown to him (cash was therefore used to conceal the paper trail) in order to unlawfully deprive him of the money. The question of embezzlement of the husband's money by the wife is thus probable. The basic element of embezzlement under Article 138 SCC is an official offence. Should embezzlement, however, have been committed to the detriment of a relative or family member, it is only prosecuted on demand (Art. 138 lit. 1 para. 2). According to the legal definition (Art. 110 para. 1 SCC), spouses are to be regarded as relatives in the eyes of the law, whereby the embezzlement in the present case is to be seen as an offence requiring a demand for prosecution. The question to be asked here is whether the financial intermediary must beforehand examine if there is a demand for prosecution and if he is under a liability to report only if this is the case. In the opinion of MROS, the financial intermediary need only examine whether the requirements under Article 9 AMLA are given. In the concrete case this means whether the assets could basically originate from a crime or not. In other words, the obligation of the financial intermediary is limited to a purely material examination regarding the basic facts of the case (presence of embezzlement) and not an examination of the procedural requirements. Establishing the existence of procedural requirements, such as whether

there is a demand for prosecution in offences requiring this, involves a formal examination to be conducted exclusively by the prosecution authorities. This solution is also necessary on purely practical grounds, as it would not be possible for a financial intermediary to find out beforehand whether the damaged party with an entitlement to lay charges will later (on finding out the facts) file a demand for prosecution or not.

b) Impediments to proceedings

The question regarding limitation periods is similar. Limitation periods are regulated in the Swiss Criminal Code, whereby a distinction is made between the limitation period for prosecution (Arts. 97, 98 and 103 SCC) and the limitation period for the execution of a sentence (Arts. 99 to 101 SCC). The beginning of prosecution limitation blocks proceedings and thus represents an impediment to proceedings, i.e. an institution of procedural law. Here, too, it is not the task of the financial intermediary to examine whether there is an impediment to proceedings or not. In such a case, practical considerations also play a role, as the financial intermediary cannot elicit whether there are further related acts committed later and if the period of limitation has to be newly determined.

5.2 Is mandatory reporting under Article 9 AMLA waived in the case of the right of refusal to give evidence on the basis of family connections?

Under prevailing cantonal and federal[33] criminal procedural law, persons who for family reasons may refuse to give evidence are also exempt from the obligation to lay criminal charges. The legislator is of the opinion that persons who may refuse to give evidence in proceedings should not be obliged to initiate proceedings by filing a demand for prosecution themselves beforehand. Within the context of an Administrative Court complaint filed by a self-regulatory organisation, the Federal Supreme Court[34] was faced with the task of deciding whether the financial intermediary, who is entitled to refuse to give evidence under Article 75 paragraph 1 FJA[35], is generally exempt from mandatory reporting under Article 9 AMLA. The complainant reasoned that the SAR has the nature of a demand for prosecution or at least a similar function, and that the considerations described above could also be applied to mandatory reporting. In its decision, the Federal Supreme Court came to the conclusion that there was a strong public interest in the unlimited enforcement of mandatory reporting and that a corresponding restriction of mandatory reporting would have to be explicitly mentioned in the Anti-Money Laundering Act. Accordingly, a financial intermediary may not invoke the right to refuse to give evidence on family grounds and thus remains under an obligation to report.

[33] Likewise the new Swiss Criminal Procedure Code (Art. 168 ff), entry into force 1.1.2011

[34] Federal Supreme Court, 5.4.2007, 2A.599/2006

[35] Federal Act of 15 June 1934 on the Organisation of Federal Justice (FJA; SR 312.0)

5.3 Monitoring accounts and mandatory reporting

In the 2007 Annual Report (Chapter 5.5), MROS already expressed an opinion in connection with a disclosure order issued by a prosecution authority. It ascertained that a disclosure order basically led to a special obligation to investigate under Article 6 paragraph 2 AMLA, whereas mandatory reporting only generates this in the event of suspicious facts that go beyond the findings already available in the disclosure order.

The new Swiss Code of Criminal Procedure, which entered into force on 1 January 2011, now provides besides bank disclosure[36], which gathers bank information with retroactive effect on the order of the public prosecutor within the context of criminal proceedings, also for the possibility of monitoring accounts[37]. On the order of the public prosecutor in charge of proceedings, the bank is instructed by the enforcement action court (*Zwangsmassnahmegericht*) to provide documentation on the future banking activities of the accused. The question raised here is whether a bank which is acting in "bad faith" owing to an order to monitor accounts is then liable to report to MROS under Article 9 AMLA. This question is also interesting, inter alia, because in the case of monitoring a bank account for investigative purposes, the account is not blocked (obviously in order to be able to study transaction movements). A report under Article 9 AMLA, however, requires the immediate freezing of the assets on legal grounds. MROS cannot itself suspend the statutory freezing period under Article 9 AMLA. Accordingly, a SAR under Article 9 AMLA always and exclusively prompts the statutory freezing of assets for a period of five working days.

In the present case, the same problem exists as in bank disclosure.
A banking relationship that is specifically affected by enforcement action does not need to be reported to MROS in every case. The order to monitor the account, however, always prompts the special duty to clarify the economic background and purpose of a transaction or business relationship under Article 6 paragraph 2 AMLA. This means that the financial intermediary has to analyse the account affected by enforcement action and examine whether further suspicious accounts (which are not affected by enforcement action) are involved. If this is the case, these other banking relationships must be reported to MROS provided there are well-founded suspicions and the account actually being monitored is not under threat of exposure.

[36] Art. 265 CrimPC (Swiss Code of Criminal Procedure of 5 October 2007)

[37] Art. 284 and Art. 285 CrimPC.

5.4 Judicial and other decisions made by prosecution authorities

5.4.1 Judicial decisions / Passive money laundering

(Judgement of the Criminal Law Section of the Federal Supreme Court: 6B_908/2009 of 3.11.2010[38])

In a leading case of 3 November 2010, the Federal Supreme Court (FSC) determined that passivity on the part of financial intermediaries may suffice to justify their conviction on grounds of money laundering.
The Federal Supreme Court thus confirmed the suspended sentence of 486 days in prison and a fixed pecuniary fine of CHF 21,600 of a banker convicted for laundering millions of dollars.
The tax auditing officials working for large companies established in the State of Rio de Janeiro had set up a system to obtain from the inspected companies payments of bottles of wine in exchange for arrangements regarding reminders and demands for arrears to be collected by the administration. The money was placed in open accounts in a Geneva bank by corrupt officials from the Brazilian tax administration. The irregularities had been discovered after the repurchase of this bank by another financial institution in 2001.
Convicted by the Federal Criminal Court (FCC), the banker filed an appeal at the Federal Supreme Court. He claimed that he had had no idea of the unlawful origin of the funds deposited in Switzerland and that he himself had been cheated by employees in the branch of the bank in Rio.
The Federal Supreme Court revealed that, already in 2001, several elements indicated that the funds of the Brazilian officials could be the proceeds of a crime. In view of the very high amounts deposited in the accounts of several agents working for the Brazilian tax administration, the important and regular payments of their assets, the contradictory information related to the diverse activities of these persons and their status as officials, it could be assumed that the ensemble of these indications formed sufficient suspicions for the existence of a money-laundering operation and therefore called for immediate investigation. The banker should have had some doubts regarding the origin of these funds and should not have been satisfied by the explanations given by his client. In fact, these did not lend themselves to a valid opinion on the origin and the financial background of these unusual transactions, or to dissipate any doubts regarding the accounts. However, the appellant should have taken measures to clarify, in the shortest time possible, the situation of the Brazilian officials, to determine whether the funds were of unlawful origin and, if not or in the absence of a satisfactory answer, to submit the case to his financial management for a decision. However, this step had not been taken, which prevented the

[38] Four other bankers were convicted within the context of the same case (see leading cases: 6B_901/2009 ; 6B_907/2009 ; 6B_916/2009 ; 6B_919/2009), as well as a Brazilian official (see leading case 6B_914/2009).

reporting of the accounts and the freezing of assets. Having omitted to carry out the actions which he was legally bound to do, the banker had violated, by omission, the obligations incumbent on him. He was therefore found guilty of money laundering.

The Federal judges reminded the court that “financial intermediaries are under an obligation to clarify the financial background and the purpose of a transaction when indications point to the fact that assets are the proceeds of a crime”. This obligation of clarification is fulfilled when financial intermediaries administer open accounts for persons exercising official functions.

The court also reminded that financial intermediaries may not simply accept any explanations given by their co-contractors. In spite of the ties of confidence which they share with their clients, financial intermediaries must proceed “with a critical mind” to an examination of the truth of the declarations made to them. The Federal Supreme Court underlined the fact that, since the entry into force of the Anti-Money Laundering Act, banks have been placed in a special legal position and that the obligations imposed on them by the Anti-Money Laundering Act (Arts. 3 to 10 AMLA), as well as the obligation to inform and co-operate with MROS, places them in the position of a guarantor.

5.4.2 Order for withdrawal of proceedings / Abuse of a data-processing system Art. 147 SCC (Phishing attacks)

The phenomenon of phishing involves, above all, a form of deception via the Internet. An unknown perpetrator sends spam mails using a bank-specific Trojan virus, thus acquiring the access data to the e-banking account of the later injured party. Subsequently, money transactions are generated to the victim’s debit and against their will in favour of a so-called financial agent (also financial manager or “money mule”). These financial agents are recruited by fictional “employers” of unknown origin via e-mails and the Internet. Within the framework of an allegedly worldwide money system, the financial agents undertake to withdraw the payments made to their accounts in cash and then to transfer the money via a money transmitter to persons abroad to be identified later.

In the present case, which was to be judged by a cantonal prosecution authority, the suspect was accused of having acted as a financial agent in a phishing attack. In a police interview, the accused claimed he had been looking for employment and had come across this job offer on the Internet. He had downloaded the employment contract, signed and returned it without even entering into personal contact with his employer. Later he had been informed by mobile phone of an incoming payment by an unknown person. He was then instructed, again by phone, to withdraw the money in cash and to transfer it via a money transmitter in a neighbouring country and on no account via a money transmitter in Switzerland. Although surprised by this approach, the accused claimed that he had not

questioned the commissioner and had acted as instructed. He had assumed that it was in order to transfer the money. He had not thought that there could be any irregularities connected with the money. The prosecution authority found that the statements made by the accused financial agent were not particularly plausible, also in view of the strange-sounding business methods used by the employer.

On the other hand, it was not necessary to prove with the certainty required for a judgement that the accused had been initiated into the intrigues of the unknown perpetrator and that he had not been aware of this at the time of the transaction undertaken by him or that he could have expected that the money represented the proceeds of a crime. The negligent perpetration of the crime was not punishable. The accused could thus not be legally proven to have had a corresponding intention. The subjective element of aiding and abetting the fraudulent abuse of a data-processing system was therefore not fulfilled and the proceedings were to be suspended. If there is no proof of intention, the offence of money laundering under Article 305bis SCC may be disregarded.

MROS ascertains that criminal judgements made by cantonal prosecution authorities in similar cases in the sphere of phishing attacks and financial agents are dealt with very differently. In a similar case, a financial agent claimed that he had not imagined that the financial transaction effected at the time could be connected to money laundering. He explained that he had been deceived by the actual perpetrators and exploited by them. The criminal court, however, found that the accused had at least accepted the possibility (contingent intent) that the withdrawal and transfer of the money on behalf of a completely unknown person could be an illegal financial transaction, i.e. money laundering, for which reason he could not be believed on the basis of the whole set of dubious circumstances. He was convicted on grounds of money laundering.

6 Practice 2009

6.1 Attempted money laundering (Art. 9 para. 1b AMLA)

As already mentioned under chapter 2.1.4, mandatory reporting in cases of attempted money laundering was introduced for all financial intermediaries in 2009. The challenge facing financial intermediaries primarily consists in choosing the right moment for the submission of a SAR. In cases of well-founded suspicion, a financial intermediary should not send his SAR until he has sufficient information and details regarding the identification of the client. Furthermore, it is essential that he has actually broken off negotiations before submitting the SAR. He should not wait with breaking off the burgeoning relationship until MROS has made a decision to forward the case to a prosecution authority or to close it. Should, for instance, the financial intermediary decide to make the final suspension of contract negotiations dependent on an MROS decision to pass the case on, this investigation of the facts via the reporting office would be legally abusive.
Once a financial intermediary has broken off contract negotiations or reported the case to MROS, a subsequent decision by MROS to close the said case does not, however, mean that the resumption of the disrupted contract negotiations is unproblematic. The fact is that MROS can often confirm the suspicions contained in the SAR through its own investigations but cannot forward the case to the prosecution authorities owing to the lack of criminal procedural points of reference. An example of this is the case where there is suspicion regarding a foreigner living outside Switzerland who wants to invest drug-related money in Switzerland. If negotiations break down and the potential client returns to his native country without opening an account resp. without assets being transferred, there is no point of reference for the initiation of criminal proceedings in Switzerland. Nevertheless, in such a case the report of attempted money laundering is still useful: on the one hand, the deposit of presumably criminal assets in Switzerland can thus be prevented; on the other hand, within the scope of spontaneous information to the corresponding reporting office abroad, MROS can relay valuable information on the suspect, thus supporting the investigations there[39].

6.2 Relaxation of the ban on information (Art. 10a AMLA) and mandatory reporting

The revision of the Anti-Money Laundering Act brought a relaxation of the ban on information: under Article 9 AMLA a financial intermediary may inform another financial intermediary who is subject to the Swiss Anti-Money Laundering Act about a submitted SAR if:

[39] Art. 32 AMLA (SR 955.0)

1. the reporting financial intermediary is not in a position to freeze the assets in question,
2. both financial intermediaries execute joint services for a client on the basis of contractually agreed co-operation in connection with the administration of the latter's assets and
3. both financial intermediaries belong to the same group of companies.

However, the receipt of information from another financial intermediary does not release the informing financial intermediary from his reporting obligation, not even if because of the constellation he cannot freeze the assets himself. Should the informing financial intermediary neglect to compile his own SAR, he runs the risk of being punished for violating the obligation to report under Article 37 AMLA, for which negligence already suffices. Should MROS become aware of such behaviour, it can either report the misconduct of the financial intermediary within the framework of legal assistance to the relevant supervisory body (Art. 29 AMLA) or report the facts of the case to the administrative criminal law authorities. In contrast, the informed financial intermediary is not automatically required to send a SAR. His task is to fulfil information obligations under Article 6 AMLA and then to make the decision on his own SAR. Neither does the fact that the informing financial intermediary has already compiled a SAR release him from the obligation to submit a SAR, provided the preconditions for doing so are given.

6.3 Tax offences and mandatory reporting

So-called classical tax offences under the Federal Act of 14th December 1990 on Direct Federal Taxation[40] are not felonies and thus do not constitute predicate offences to money laundering. Tax evasion is a contravention (Art. 175 ff DFTA), punishable by a fine; tax fraud is a misdemeanour (Art. 186 ff DFTA), punishable by a custodial sentence (up to 3 years) or by a fine. Thus the prerequisite for mandatory reporting is not given under the Anti-Money Laundering Act for these offences. Nevertheless, there are tax offences which are subject to mandatory reporting, such as:

6.3.1 Gang smuggling under Article 14 paragraph 4 Federal Act on Administrative Criminal Law ACLA (SR 313.0)

Smuggling in the customs sphere is exclusively related to the movement of goods. Under administrative criminal law, merchandise smuggling in the customs sphere constitutes customs fraud and services fraud. If the perpetrator acts as a member of a gang which meets for the purpose of committing repeated crimes and with the objective of making a considerable profit, this is considered as aggravated customs fraud, which is punishable

[40] DFTA; SR 642.11

with a custodial sentence of up to five years or by a fine and is thus subject to mandatory reporting. The crime of gang smuggling is not meant to cover individual offences in customs legislation but is aimed at general cases of serious criminality. For this reason, we have not included a list of the separate provisions or laws in Article 14 paragraph 4 ACLA.

6.3.2 Value added tax carousels

Value added tax (VAT) carousels mostly occur in cross-border trading. The objective is to enable a company to claim an input tax reduction for unpaid value added tax. The bogus companies do not pay the invoiced value added tax to the tax administration but disappear, while the purchasers sell the goods on and collect the input tax deduction. If this fraudulent pattern is repeated several times with the same goods, we speak of a carousel. In a trailblazing decision, the Federal Criminal Court in Bellinzona determined that such VAT carousels do not constitute value added tax fraud but common fraud under Article 146 SCC. Guilty of fraud is whoever – outside tax assessment proceedings and thus on his own initiative – by means of forged documents deviously creates fictitious claims for tax refunds of non-existent or invented persons. Thus a link is created to Federal criminal adjudication, whereby the crime of fraud is fulfilled if there is no connection to regular tax proceedings and the deed is only aimed at purely criminal abuse of a refund system. As common fraud is a crime, such VAT carousels are subject to mandatory reporting.

6.4 "Black funds" and mandatory reporting

In chapter 5.4 of the 2008 Annual Report, MROS discussed the extent to which black funds are to be reported in connection with the offence of bribery. We refer a priori to the remarks made there but would like to introduce a fresh approach, which is derived from the findings of investigations conducted by the Office of the Attorney General of Switzerland. The question is whether identifiable black funds, which are maintained with legal funds from business activities, are not, in fact, subject to mandatory reporting. In the eyes of the Attorney General's Office, black funds are supplied with money which is, as a rule, channelled off on the basis of fictitious contracts from the group or company. It is thought that the primary purpose of these black funds is to conceal the paper trail between the group or the companies that have acquired an order by means of bribes and the bribed decision-maker. The funds channelled off in this way, according to the Office of the Attorney General, are assets from continued disloyal business management (Art. 158 subpara 1 para 3 SCC) and are thus derived from a crime[41]. Black funds are therefore subject to mandatory reporting and the financial intermediary administering the accounts of black funds no longer features in the conflict mentioned under chapter 5.4 of the MROS 2008

[41] Cf. also Niklaus Schmid, Straf- und einziehungsrechtliche Fragen bei "schwarzen Kassen" zur Begehung von Bestechungen; in: AJP /PJA 7/2008

Annual Report. MROS welcomes this approach on the part of the Attorney General's Office.

6.5 Date of receipt and expiry in connection with submitted SARs

SARs are to be submitted either by fax or first-class post, using the foreseen reporting forms (see also 2008 Annual Report under chapter 5.5.)[42]. MROS acknowledges receipt of every SAR received from financial intermediaries. In the case of mandatory SARs (Art. 9 AMLA), it moreover names the expiry of the five-day time limit with regard to the freezing of assets (Art. 10 AMLA) resp. the ban on information (Art. 10a AMLA). The following means of transmission are possible:

- by fax: transmission of the SAR and all the enclosures
- by fax: transmission of the SAR; the enclosures are sent by express or first-class post
- by first-class post: the SAR and all enclosures are sent by first-class post

In order that MROS can conduct its investigations and make its decision, it requires all the documentation related to the SAR. The receipt of the SAR is only acknowledged on arrival of the relevant enclosures, on weekdays up to 17.00 hours (otherwise not until the next working day). The reporting financial intermediary is consequently under an obligation to ensure that the SAR is submitted together with the relevant documentation without delay.

6.6 Mandatory reporting by prosecution authorities (Art. 29a para. 1 + 2 AMLA)

Cooperation between the national prosecution authorities and MROS is regulated in Article 29a paragraphs 1 and 2 AMLA. Immediate reporting to MROS of all orders (including judgements) issued on the basis of a SAR has become mandatory under the revised Anti-Money Laundering Act. This also includes the communication on when, in accordance with Article 67a IMAC[43], prosecution authorities send spontaneous information based on a SAR via mutual assistance. Unfortunately the prosecution authorities do not yet completely fulfil this obligation. At the end of each year, therefore, MROS regularly has to ask the prosecution authorities about pending cases. Likewise unsatisfactory is the implementation of the obligation under paragraph 1, whereby prosecution authorities swiftly report to MROS all pending proceedings connected with Articles 260ter subparagraph 1, 260^{quinquies} paragraph 1, 305bis and 305ter paragraph 1 SCC as well as their corresponding judgements (also acquittals) and orders on the discontinuation of proceedings, including grounds. MROS has thereby noticed that the prosecution authorities do not respect the fact that within the framework of criminal prosecution later extension orders relating to

[42] Art. 3 MROSO (Ordinance of 25 August 2004 on the Money Laundering Reporting Office; SR 955.23)

[43] Federal Act of 20 March 1981 on International Mutual Assistance in Criminal Matters (Mutual Assistance Act, IMAC; SR 351.1); Art. 67a IMAC = Unsolicited Transmission of Evidence and Information

further accused persons are also to be reported. Under the heading "Übersicht über die Bestimmungen des Bundesrechts, welche die Mitteilungspflicht selbst begründen", subparagraph 23[44] of the appendix to the Notification Ordinance[45] refers to mandatory reporting.

[44] The Notification Ordinance has not yet been adapted to the revised Money Laundering Act and still refers to the former legislation. The reference to Article 29a paragraph 1 and 2 MLA (SR 955.0) is applicable.

[45] Ordinance of 10 November 2004 on the Notification of Cantonal Criminal Judgement (Notification Ordinance)

7 Practice 2008

7.1 Revision of the Anti-Money Laundering Act AMLA

On 15 June 2007, the Federal Council approved the draft message on the Federal Act on the Implementation of the Revised Recommendations of the Financial Action Task Force against Money Laundering (GAFI/FATF), subsequently submitting it to Parliament. The draft also contains inter alia the revision of the Federal Act of 10 October 1997 on Combating Money Laundering in the Financial Sector (Anti-Money Laundering Act AMLA). Parliament discussed the draft during the 2008 spring session in the first chamber (Council of States), in the 2008 summer session in the second chamber (National Council) and in the 2008 autumn session within the framework of the resolution of differences. The draft was approved in the final vote on 3 October 2008. On 22 January 2009, the deadline for a referendum on the Federal Act on the Implementation of the Revised Recommendations of FATF expired unused, whereby the draft and thus the revised Anti-Money Laundering Act entered into force on 1 February 2009.

Below a few aspects of the revised Anti-Money Laundering Act are explained from the standpoint of MROS and placed in relation to the duty to report. We have, however, decided not to give a complete list of all the revised points of the Anti-Money Laundering Act as these may be read in the relevant message[46].

7.1.1 Explicit mention of terrorist financing (Arts. 3, 6, 8, 9, 21, 23, 27 and 32 AMLA)

In connection with the events of 11 September 2001, the FATF has so far issued nine special recommendations aimed at combating the abuse of the financial system in order to channel money for terrorist purposes. To aid the discovery and combat of terrorism financing, the requirements regarding due diligence and mandatory reporting have been successively tightened up in Swiss legislation. Various ordinances have since been correspondingly amended. With the revision, current practice under the Anti-Money Laundering Act has now been extended to incorporate terrorist financing. Thus, the hitherto statutory duty to report in connection with the suspicion of terrorist financing is no longer based only on the interpretation of terrorist financing under the present Article 9, whereby assets belonging to a criminal organisation are subject to mandatory reporting, but is now explicitly mentioned in the Act. As combating money laundering and combating terrorist financing represent two separate objectives, combating terrorist financing is not subsumed under the combat of money laundering but is independently incorporated in the title of the act and in the article on subject matter.

[46] http://www.efd.admin.ch/dokumentation/gesetzgebung/00570/01140/index.html?lang=de

7.1.2 Mandatory reporting in cases of attempted money laundering (Art. 9 para. 1 letter b AMLA)

So far, one of the preconditions for mandatory reporting under Article 9 AMLA has been the establishment of a business relationship. The obligation to report on the part of all financial intermediaries has now been extended to situations in which negotiations for the establishment of a business relationship have broken down before the actual start of business relations. The provision is not all that new, at least not for the banking sector. Under the old Federal Banking Commission's Anti-Money Laundering Ordinance Ordinance of 18 December (FBC AMLO), which was valid from 1 July 2003 to 30 June 2008, the banks were already at that time under a duty, pursuant to Article 24, to file a report to MROS under Article 9 AMLA[47] if *"the financial intermediary breaks off negotiations for the establishment of a business relationship on grounds of a manifestly well-founded suspicion of money laundering or of a link to a terrorist or other criminal organisation"*. Constitutionally, this provision was not totally acceptable as it was only regulated at ordinance level and contradicted prevailing federal legislation.

The revised Anti-Money Laundering Act places all financial intermediaries under an obligation to report attempted acts of money laundering. This means that there is a duty to report any reasonable suspicion which arises in the period of the preparatory phase, i.e. before the actual establishment of the business relationship. The challenge to the financial intermediary lies in the fact that he must have enough information and details, i.e. for the identification of the client, before negotiations are broken off. Thus attention is on lengty negotiating phases leading up to the conclusion of the contract, not however before the first meeting, when the financial intermediary has not yet gathered enough information. In the latter case he could, however, avail himself of filing a voluntary report (Art. 305ter para. 2 SCC).

Future practice has to show the effects of this new duty to report. There are initial indications for the banking sector based on the statistics collected hitherto on reports from banks under Article 24 FBC AML0 in comparison with all the bank reports: 2.5% (2006); 3.3% (2007); 1.1% (only first half year 2008).

7.1.3 Reports under Article 305ter paragraph 2 SCC submitted exclusively to MROS

Under prevailing law, the financial intermediary may either submit voluntary SARs under Article 305ter paragraph 2 SCC directly to MROS or to a prosecuting authority. In future he will only be able to file voluntary SARs to MROS. It makes no difference to the material

[47] According to the interpretation of the SFBC: cf. SFBC Money Laundering Report March 2003, Commentary on the Ordinance, Art. 24, page 44

distinction whether the financial intermediary files a SAR in accordance with mandatory or voluntary reporting. This means that the lawmaker upholds the co-existence of the two possibilities. In the foreword to our 2007 Annual Report, we explained in detail that it is not always easy for the financial intermediary to interpret the vague legal concepts of "knowledge" and "a reasonable suspicion", which are decisive in the decision as to whether mandatory or voluntary reporting is given. The circumstance that, under the revised act, mandatory reporting is no longer to be orientated to the criteria of "due diligence required in the circumstances", but to that of "good faith", will presumably lead to an increase in reports sent under Article 9 AMLA instead of under Article 305ter paragraph 2 SCC, as the threshold of the exclusion from punishment and imprisonment is thus lowered, and the protection of the financial intermediary is improved (see also Chapter 5.1.5 below).

7.1.4 Relaxation of the ban on information (Art. 10a AMLA)

The freezing of assets (Art. 10 AMLA) and the ban on information (Art. 10a AMLA) are now regulated in their own articles, which helps clarity. Newly incorporated in the article governing the ban on information is the current practice of the Anti-Money Laundering Control Authority[48]. Accordingly, the financial intermediary who is not himself in a position to freeze the assets in question may inform the financial intermediary who is authorised to freeze assets (Art. 10a para. 2 AMLA). This right to information, however, does not automatically place the authorised financial intermediary under an obligation to file a SAR himself. This information thus gives him an opportunity to carefully review the relationship with his client and, if he also comes to the conclusion that there is a reasonable suspicion, to file his own SAR to MROS. It is therefore easily possible that two reports on the same facts and the same client are received, one from the unauthorised and one from the authorised financial intermediary. In such a case it is important that the informed financial intermediary with the authority to freeze assets makes explicit reference in his report that he has been informed by the unauthorised financial intermediary under Article 10a paragraph 2 AMLA. Consequently, MROS can immediately recognise the connection.

A further relaxation of the ban on information is regulated in paragraph 3 and applies to situations in which both financial intermediaries undertake joint services for a client in connection with the management of his assets on the basis of contractually agreed cooperation or if they belong to the same company. The first situation affects the reverse case of paragraph 2, for example, under which the bank has to freeze a client's account that is managed by an external assets manager. Another possibility is the case of the credit card company where, on the basis of a SAR, a bank has to freeze an account for which there is a credit card. This information is essential as only the credit card company itself can

[48] Art. 46 Ordinance of 10 October 2003 of the Anti-Money Laundering Control Authority (AMLCA) on the duties of the directly subordinated financial intermediary; Control Authority Ordinance, AMLCAO, SR 955.16

freeze the credit cards which would remain at the client's disposal up to a certain credit limit. In connection with the relaxation of information under paragraph 3 (let. a. contractually agreed cooperation and let. b. employed in the same company), particular attention must be paid to the fact that this regulation applies to the communication of information only on the territory of the Swiss Confederation. This means, for example, that the information may be passed on to the financial intermediary only within companies domiciled in Switzerland and thus subject to Swiss law. This fact is derived from the formulation of paragraph 3, whereby a financial intermediary may inform another financial intermediary who is subject to this law.

7.1.5 Good faith as a requirement for the financial intermediary's exclusion from criminal and civil liability (Art. 11 AMLA)

In Article 11 paragraph 1 AMLA the requirement for the exclusion from criminal and civil liability has been amended so that when filing a report the financial intermediary no longer has to act "with the diligence required in the circumstances" but only "in good faith". The requirements for the exclusion from criminal and civil liability are thus less restrictive, and the financial intermediary is therefore afforded better protected. The number of incoming SARs and the efficacy of the reporting system should, on the whole, increase as a result. The trigger for this amendment was the FATF mutual evaluations report, which comes to the conclusion that the Swiss reporting system showed deterring elements which weakened its effect.

7.1.6 New anonymity clause for the reporting financial intermediary (Art. 9 para. 1bis AMLA)

During the resolution of differences in Parliament, a motion on the possibility of sending an anonymous SAR to MROS was filed in order to protect the reporting financial intermediary from possible threats on the part of the reported client. In Article 9 a new paragraph 1bis has been introduced, whereby the name of the financial intermediary must be visible from the SAR but the names of his staff involved in the case may be made anonymous, provided MROS and the competent prosecuting authority can still make immediate contact with the said persons. This is essential for MROS's swift analysis work within the short duration during which assets may be frozen.

7.1.7 Mutual assistance clause for MROS (Art. 32 para. 3 AMLA)

Likewise within the scope of the parliamentary resolution of differences, the wish was approved for an explicit regulation of the restrictive contents of what MROS may pass on to its foreign counterparts within the framework of international mutual assistance. The

parliamentarians feared that MROS may illegally pass on to foreign countries sensitive data on reporting financial intermediaries as well as financial information. The current Article 32 AMLA regulates the exchange of information between MROS and its foreign counterparts. In this context, paragraph 1 regulates exchanges between MROS and the reporting offices abroad with a police or quasi state structure, whilst paragraph 2 regulates the exchange with foreign reporting offices that are of an administrative nature. Both articles involve the mutual assistance with which reporting offices provide one another. In this context, only personal data on reported persons, thus never on the reporting financial intermediary or his staff, is passed on. Information on financial intermediaries and other financial information, for example, bank account numbers, information on money transactions, account balances, etc., are subject to bank clients confidentiality and may only be communicated via regular mutual assistance channels. Such information is never, as mentioned above, passed on by MROS via official channels. This is prevailing law, based on current special regulation; thus an explicit regulation would have been superfluous. Nevertheless, the lawmaker choose to incorporate current legal practice and regulations into section 3.

7.1.8 Control of cross-border cash transfers

The FATF's special recommendation IX regulates cross-border cash transfers (*via cash couriers*). The aim of this special recommendation is to combat the cross-border flow of cash, currency and other means of payment which are used to launder incriminated money or the financing of terrorist activities. Of the two possible systems which the FATF foresees for implementation, Switzerland decided on the so-called information system[49]. According to this system, a person has to provide information on cash amounts carried on him when requested to do so. In connection with inspections of goods, the customs authorities already report persons transporting cash amounts of considerable value to the prosecuting authorities should they suspect money laundering. With the creation of this new information system on cross-border cash transfers, the Federal Customs Administration (FCA) will take on a new task in the fight against money laundering and terrorist financing. This is newly regulated in the Customs Act of 18 March 2005[50] in Article 95 paragraph 1bis. The accompanying ordinance[51] will define the information system in more detail. The obligation to provide information is not only limited to travellers but also applies to commercial traffic. At the explicit request of the customs officials, persons crossing the border must provide information on imported, exported and transited cash amounts amounting to at least CHF 10,000, on the origin and use of the funds as well as on the financial beneficiary. In cases of suspected money laundering or terrorist financing, the customs post may, however,

[49] FATF calls this "reporting system".

[50] CA; SR 631.0; Amendment of 3.10.2008 in force 1.2.2009 AS (Official Compilation of Federal Laws and Decrees) 27 January 2009

[51] Ordinance on the Control of Cross-Border Cash Transfers; in force 1.3.2009 AS 24 February 2009

also request information even if the amount does not reach the threshold of CHF 10,000 or the corresponding equivalent value. The customs officials may provisionally confiscate the cash. The refusal to give information or the provision of false information is liable to punishment. On identifying a suspicion of money laundering or terrorist financing, the customs officials may contact the competent police headquarters. The customs officials are thus not subject to the obligation to report under the Anti-Money Laundering Act, i.e. they thus do not send a report to MROS but directly to the police headquarters.

7.2 Money Laundering Reporting Office Ordinance (MROSO[52]) is now valid without restrictions (Art. 20 PISA, Annex 1, para. 9 in conjunction with Art. 35a AMLA)

Since its creation, the MROS Ordinance has always been valid for a limited period of two years. The reason for this was that the legal foundations for access to the MROS database were not regulated in a formal federal act but only in an ordinance, viz. the MROS Ordinance[53]. With the entry into effect of the Federal Act on the Federal Police Information Systems[54], a new Article 35a with the relevant legal basis was created[55]. The accompanying ordinance[56] consequently replaces in subparagraph 20 the limit of validity in Article 31 MROSO.

7.3 Adjustments to the Federal Banking Commission's Anti-Money Laundering Ordinance FBC AMLO

As mentioned above, the Swiss Federal Banking Commission has amended its Anti-Money Laundering Ordinance[57], which came into effect on 1 July 2008. On 1 January 2009 the FBC was integrated into the new Financial Market Control Authority FINMA[58]. By means of the Ordinance on the Amendment of Administrative Ordinances to the Federal Act of 20 November 2008 on the Swiss Financial Supervisory Authority, the original FBC AMLO changed into the Anti-Money Laundering Ordinance – FINMA 1[59]. In connection with the change to the ordinance, the two Articles 24 and 27 are worthy of discussion. With regard to the deletion of Article 24, we refer to our above-mentioned remarks under Chapter 5.2.1. Article 27 deals with dubious business relations and voluntary reporting

[52] SR 955.23

[53] Art. 5 MROSO of 25 August 2004

[54] PISA; SR 361

[55] Art. 20 PISA in conjunction with Annex 1, subparagraph 9

[56] Ordinance on the Amendments due to the Federal Act of 15 October 2008 on the Federal Police Information Systems; AS 2008 4943

[57] AS 2008 2017

[58] www.finma.ch

[59] AS 2008 5613 ; MROSO-FINMA 1; SR 955.022

under Article 305ter paragraph 2 SCC. Paragraph 1 states that the financial intermediary who has no reasonable suspicion of money laundering or terrorist financing, but has made observations which lead him to the assumption that the assets originate from a crime or that legal funds have been used for a criminal purpose, may, based on voluntary reporting under Article 305ter paragraph 2 SCC, report this to the appropriate prosecuting authority and MROS. Regarding legal funds misused for a criminal purpose, MROS holds that the regulations contained in the ordinance are not in agreement with the SCC. Because voluntary reporting under Article 305ter paragraph 2 SCC is actually limited to observations leading the financial intermediary to conclude that assets originate from a crime. In other words regulations regarding the reporting of legal funds which are used for a criminal purpose cannot be subsumed under Article 305ter paragraph 2, therefore not even when they are used to finance terrorism[60]. Had the lawmaker wished the viewpoint of the appropriation of the funds, irrespective of the precondition of a criminal origin, this should have been expressed accordingly. The fact is that, also within the scope of the draft to the Federal Act on the Implementation of the FATF revised recommendations, there was no corresponding amendment of Article 305ter paragraph 2 SCC, which in turn supports the legal opinion of MROS that this passage in AMLO – FINMA 1 contravenes federal law.

7.4 "Black funds" and mandatory reporting[61]

7.5 Contents of a suspicious activity report, use of the reporting form and later submission of records (Art. 3 MROSO)

More than ten years after the creation of the Anti-Money Laundering Act, MROS still sometimes receives inadequately formulated SARs. At this point we would like to mention once again that the MROS Ordinance[62] clearly refers in Article 3 to the required contents of a report and in particular in paragraph 2 indicates that the financial intermediary is to use the reporting form[63] provided by MROS. The enclosures listed in the reporting form are not to be seen as final, but rather as examples. The financial intermediary should enclose with the SAR all the required documents substantiating his suspicion and comply with any request by MROS to submit missing documents. Unfortunately, financial intermediaries are sometimes under the false impression that the subsequent submission of missing documents (e.g. missing statements of account related to suspicious transactions) may only be effected through a judicial order from a prosecuting authority. This would, however, only be the case if documents were requested on a business relationship other than the

[60] This differs from mandatory reporting under Art. 9 AMLA, whereby also legal assets used for terrorist financing are to be reported compulsorily.

[61] On this matter, see above: Practice 2009 point 6.4.

[62] SR 955.23

[63] This may be downloaded from the Internet under: http://www.fedpol.admin.ch/fedpol/de/home/themen/kriminalitaet/geldwaescherei.html

one reported. However, the documents subsequently requested by MROS are always linked to a SAR, and the financial intermediary who complies with such a request violates neither the protection of the bank client nor business confidentiality. The reason for this is that the submitted SAR and all documents linked thereto are based on federal law (the Anti-Money Laundering Act for mandatory reports and the Swiss Criminal Code for voluntary reports), so that there is formal legal justification for doing so. Furthermore, under Article 3 paragraph 1 let. g MROSO the financial intermediary is under an obligation to include in the report *"as far as possible an exact description of the business relationship".* In addition, Article 3 paragraph 3 MROSO states that the relevant documentation on the financial transactions of the SAR must be enclosed.

8 Practice 2007

8.1 Revision of the Anti-Money Laundering Act

Revision work carried out by the inter-departmental working group (IDA-FATF)[64] on the legal adaptations for the implementation of the revised recommendations of the Financial Action Task Force against Money Laundering (GAFI / FATF), which were adopted in 2004, have reached a decisive result. On 15 June 2007 the Federal Council approved and submitted to Parliament a Message on a federal act on the implementation of the revised FATF recommendations. The draft extends the sphere of application of the Anti-Money Laundering Act to cover terrorist financing. It also contains several measures which raise the efficacy of Swiss precautionary mechanisms and strengthen the general protection of the financial market. As a further important step, the parliamentary consultations are now due in 2008. Both the Message[65] and the draft legislation[66] may be seen on the Internet in German, French and Italian.

8.2 The mandatory reporting of "phishing cases" in connection with financial agents

Although modern electronic banking fulfils high demands for security against criminal attack and, according to the 2007 half-yearly report by MELANI[67], classical “phishing” attacks by e-mail requesting passwords have markedly decreased in Switzerland, there were still cases of abuse in the reporting year. Among other attacks, perpetrators succeeded, by acquiring confidential information such as victims’ passwords through mass e-mails and through the use of a forged website, in gaining access to their accounts. By these means they obtained access to the corresponding accounts via e-banking and ordered various illegal money transfers. For the transfer of the fraudulently obtained money, the perpetrators engaged so-called “financial agents”[68], who made their own accounts available for the money transfers and then, according to the terms of their contract as “financial agents”, withdrew the money in cash and transferred it to the perpetrator via payment transaction services. A financial agent receives up to 10% of the incoming payments as commission. “Financial agents” who offer their services in these cases commit the offence of aiding and abetting the fraudulent misuse of a data-processing system (Art.

[64] We refer to MROS 2005 Annual Report under point 4.2.

[65] http://www.admin.ch/ch/d/ff/2007/6269.pdf

[66] http://www.admin.ch/ch/d/ff/2007/6311.pdf

[67] Reporting and Analysis Centre for Information Assurance MELANI (Cybercrime Section), Service for Analysis and Prevention, www.melani.admin.ch

[68] Cf also MROS 2006 Annual Report, subpara 5.1. Dubious job offers for financial agents

147 SCC[69]) and money laundering (Art. 305bis SCC)[70]. It quite often happens that the "financial agents" are persons who are well known to the financial intermediary as blameless citizens and long-standing clients. On the basis of their personality profiles, therefore, these persons hardly arouse suspicions of fraudulent intentions. Here the financial intermediary is in fact confronted with the question of whether he should call the "financial agent" to account and point out that he has been drawn into a fraudulent intrigue and should therefore distance himself by sending the money back to the defrauded person.

In the view of MROS, this internal financial institution solution is not only wrong but even unlawful. MROS is of the opinion that, as soon as the fraudulently acquired money arrives in the account of the "financial agent" and is recognised as such by the financial intermediary, the latter should submit an SAR under Art. 9 AMLA[71] to MROS and the money should be blocked. This is because it is not the duty of the financial intermediary to prejudge the subjective facts of the case (potential intent/intent on the part of the financial agent); that is solely the task of the law enforcement agency. The duty of the financial intermediary is limited to the obligation to report the objective facts of the case, in concreto, the report of presumable criminal assets to MROS. Only by acting in this way, is it also possible for the law enforcement agency to investigate the underlying perpetrator (the actual phishing fraudster) and to prevent further crimes.

8.3 Value Added Tax "carousel fraud"

MROS is frequently confronted, either on the basis of SARs or on the basis of requests from foreign FIUs, with the problems of Value Added Tax (VAT) carousel fraud in European Union countries. The prerequisite for such an SAR to be passed on to a domestic law enforcement agency or for the reply to such a request from a foreign FIU is that the criminal behaviour described is also considered as a crime or predicate offence to money laundering under Swiss law. The following case constellations are examples of such:

a) In the simple case of the so-called "missing trader Intra-Community VAT fraud" small but valuable merchandise, i.e. electronic goods such as MP3 players, mobile phones, computer chips and accessories, laptops, games consoles or navigation systems, are exported legitimately exempt from VAT within the European Union from one member country to another. The importing country, frequently Great Britain, subsequently sells the goods to a third party, plus the VAT rate that is valid in this EU country, whereby the vendor subsequently – without paying the VAT received from the purchaser to the competent tax authorities – disappears with the money. Although the country involved loses the VAT previously collected by the vendor, the damage it suffers could become even more serious

[69] Swiss Criminal Code (SCC); SR 311

[70] Cf also MROS 2007 Annual Report, Chapter 4.1

[71] Anti-Money Laundering Act (AMLA); SR 955.0

if the gullible purchaser re-exports the goods again and can even possibly claim back the VAT previously levied but not passed on to the tax authorities. As the facts described do not, however, refer to assets which are the proceeds of a crime (since only the statutory charges owed have not been paid), and it cannot therefore be a case of money laundering, MROS will neither pass on the corresponding SAR from a financial intermediary in this case under Art. 23 para. 4 AMLA to a law enforcement agency, nor will it reply to a corresponding request from a foreign FIU, due to the absence of a predicate offence to, or the crime of, money laundering. Such cases are not therefore subject mandatory reporting.

b) In contrast, it is different in the case of aggravated fraud by means of a so-called VAT carousel, where payments are obtained without the slightest entitlement, i.e. when assets originate from tax fraud. This happens when trade-based transactions are simulated between various companies in order to claim fictitious tax refunds and to obtain the payment of sums from the government which bear no relationship to the real tax situation. A fictitious action of this kind to the detriment of the tax authorities is punishable as common law fraud under Supreme Court jurisdiction and not as tax fraud under administrative criminal jurisdiction. Under Art. 146 SCC a person is punishable if he decides on his own initiative to enrich himself or third parties unlawfully by misleading the authorities in claiming the fictitious fiscal rights of existing or fictitious persons to a refund and obtain the payment deriving from the right to reimbursement. The difference to the procedure described above is that by means of fictitious delivery chains and intermediary companies, whose sole task is to make out invoices and which are partly liquidated again after a short time, the tax authorities are wilfully deceived in a systematic attempt to obtain VAT refunds. As such cases represent criminal predicate offences to money laundering under the Swiss legislation, MROS will pass on a corresponding SAR describing such a procedure to the law enforcement agency under Art. 23 para. 4 AMLA and will likewise reply to a relevant request from a foreign FIU. Such cases are thus subject to mandatory reporting.

Please also consult the published decision of the Federal Criminal Court of 19 November 2007, Appeals Chamber II (Transaction number: RR 2007 106[72]).

8.4 “Advance fee” fraud / Spanish lotteries

Time and time again MROS receives SARs from money transmitters in connection with payments to Africa, Spain, London and Amsterdam. The reason given for these reports is often that there is no obvious connection between the senders (mostly Swiss citizens) and the recipients and that the senders have frequently behaved in an uncooperative and secretive manner. The analysis of these reports by MROS often shows the same picture. It appears namely that the persons transferring money are mostly blameless citizens who

[72] http://bstger.weblaw.ch/cache/f.php?url=http%3A%2F%2Fbstger.weblaw.ch%2Fdocs%2FRR_2007_106.pdf&ul=de&q=PR+2007+106

are the victims of so-called advance fee fraud[73]. There is no obligation to report such cases provided the origin of the money is not of a criminal nature and the legal origin is, in the best case, even documented.

The typology always looks the same in such cases: people are informed by e-mail, fax or normal letter post about the win of a considerable sum in the Spanish lotteries. They are told that they have won a large amount in the draw of a Spanish lottery although they have not even taken part in such a lottery. In order to receive their winnings as soon as possible, they are instructed either to make an advance payment for various charges or to send back personal details such as their bank connection, copies of identity documents, etc. This is all to take place at very short notice as the win will expire if they do not answer in time. It is pointed out to them that they should keep their win as secret as possible and not inform other people about it. As a rule, only a telephone number, an e-mail or post office box address are given as the company's contact details. As soon as someone contacts the "lottery company" in order to receive their winnings, the supposed winner is requested to pay a "caution" for the delivery of the winnings. Once this amount has been transferred, a "processing fee" for the payment of the promised win is requested. Quite often an alleged employee from a Spanish bank will make contact, claiming that the winnings are already at the bank, waiting to be transferred. He then explains that there is just one problem: tax must be paid on the winnings because the winner does not have a residence in Spain so that the tax has to be paid in advance. When all the various amounts have been paid (towards several thousand euros), contact to the fictitious lottery organiser breaks off and the money paid by the gullible victim is irredeemably lost. It frequently happens that the personal details given to the fraudsters are also used for further crimes (the forgery of identity papers, the conclusion and later payment of whole life insurances by means of forged death certificates, unlawful withdrawals from the bank account indicated, etc.).

Victims of this type of fraud can report their loss to a police station and bring charges. The money transferred, however, remains definitively lost in most cases.

8.5 Disclosure orders from law enforcement agencies and mandatory reporting

It occasionally happens that a financial intermediary first receives indications by means of a disclosure and/or seizure order from a law enforcement agency according to which there is a well-founded suspicion that the client's assets originate from a crime, are connected to money laundering or could be within the power of disposal of a criminal or terrorist

[73] Cf also MROS 2005 Annual Report, Chapter 4.1 and www.fedpol.admin.ch, www.stoppbetrug.ch

organisation. The question facing the financial intermediary in such cases is whether, on the basis of the disclosure and/or seizure order, he should send the MROS an SAR under Art. 9 AMLA or whether, in view of the fact that the law enforcement agency is already in possession of the facts, this is unnecessary. Basically it should be mentioned that a disclosure and/or seizure order always sets off an obligation to conduct special inquiries under Art. 6 AMLA. Each disclosure and/or seizure order must be formulated in sufficiently concrete terms so that the financial intermediary requested to disclose knows exactly what he should submit to the law enforcement agency; on the basis of the contractual due diligence obligation, he will not submit more than has been requested. In cases where his obligation to conduct special inquiries does not produce more than the law enforcement agency has already requested with the disclosure and/or seizure order, he can waive the submission of an additional SAR to MROS. Such a report would be an unnecessary duplication as MROS would pass on the SAR to the law enforcement agency issuing the disclosure and/or seizure order. In addition, the law enforcement agency can request further information via a direct request to MROS for international mutual assistance. Vice versa, MROS is informed on the basis of the law enforcement agency's obligation to report under Art. 29 para. 2 AMLA of ongoing criminal proceedings in connection with Art. 260ter subpara. 1 SCC (criminal organisation), 305bis SCC (money laundering) and 305ter SCC (lack of due diligence in financial transactions), whereby for both these purposes an SAR is unnecessary. Wherever, in contrast, the obligation to conduct special inquiries shows further suspicious factors which provide elements for a well-founded suspicion exceeding the relationship to the client mentioned in the disclosure and/or seizure order, an SAR is to be submitted to MROS by the financial intermediary under Art. 9 AMLA. In such a case it is important for the financial intermediary to name the connection to the original disclosure and/or seizure order so that MROS can co-ordinate further communication to the law enforcement agency.

8.6 Dissolved business relationships and subsequent obligation to report

Under Art. 9 AMLA, wherever there is a well-founded suspicion concerning assets involved in a business relationship, a report is to be sent to MROS. A question which frequently arises in practice is whether a financial intermediary is still obliged to report suspicious dealings to MROS after a business relationship has ended, namely if the financial intermediary only has grounds for a well-founded suspicion after a business relationship has been terminated. Legal doctrine is widely divided on this issue, and opinions differ greatly. MROS supports mandatory reporting even after termination of a business relationship[74]

[74] This opinion is shared by Daniel Thelesklaf, Commentary on AMLA, Orell Füssli Verlag 2003 on Art 9 AMLA; it is not shared by Werner de Capitani, Commentary on AMLA, Schutlhess Verlag 2002, on Art.9, RN ff and Michael Reinle, "Die Meldepflicht in Geldwäschereigesetz", St. Galler Schriften zum Finanzmarktrecht, Dike Verlag 2007, RN 336 ff.

and this not primarily with the intent of sequestrating assets but, above all, of prosecuting the perpetrator. Under Art. 7 para. 3 AMLA the financial intermediary is obliged to maintain all records for at least ten years after the termination of the business relationship. The available documents could thus provide the law enforcement agency with valuable information and facilitate a paper trail including the sequestration of assets. According to MROS, the financial intermediary is not himself in a position to judge whether the documentation is useful or not, which is why the obligation to report is to be upheld. In contrast, there is no further obligation for the balanced accounts to be monitored within the scope of the due diligence obligation.

8.7 Definition of a crime under supplementary penal legislation / Is MROS responsible for all SARs?

On 1 January 2007 the revised General Part of the Swiss Criminal Code entered into force. Although the prior distinction between a crime and an offence was maintained, the distinction between penal servitude and imprisonment was waived in favour of a uniform custodial sentence. Thus, under Art. 10 para. 2 SCC, crimes are acts which are punishable by a custodial sentence of more than three years' duration. The relevant factor for the distinction is still the highest limit of the punishment. Accordingly, acts which are now punishable by custodial sentences of not under a year's duration are also defined as crimes. In this connection, there is a problem that not all supplementary penal laws have been adapted to the new formulation, and the wording of these laws still mentions "imprisonment". Where the law merely mentions "prison", the financial intermediary can assume that a custodial sentence of up to three years, i.e. an offence, is indicated. It is particularly in the sector of supplementary penal legislation that legal texts must be assiduously read to the very end as there are special conditions which result in the change of the elements of an offence to the elements of a crime. An example of this is given by Art. 62 para. 2 Trademark Act[75] regarding the fraudulent use of trademarks, which is punishable by "prison" under paragraph 1, i.e. it is thus an offence, but in the case of trade-based activities under paragraph 2 (as a qualification of the elements) by "prison up to 5 years", it is defined in the new terminology as a "5 years' custodial sentence" and is thus a crime. Therefore assets which are gained from the fraudulent use of trademarks in business practice are of criminal origin and must be reported to MROS under Art. 9 AMLA.

Particularly in the sector of supplementary penal legislation, specialised authorities are often familiar with the criminal law investigation of the elements of a crime, as for example Swissmedic in violations against the Therapeutic Products Act[76]. However, this does not alter the fact that under Art. 9 AMLA SARs are always and exclusively to be sent to

[75] Federal Act of 28 August 1992 on the Protection of Trademarks and Indications of Sources (Trademark Act; SR 232.11).

[76] Federal Act of 15 December 2000 on Therapeutic Products (Therapeutic Products Act; SR 812.21)

MROS[77]. Thereafter it is the duty of MROS to decide to which competent law enforcement agency it forwards the report (Art. 23 para. 4 AMLA).

8.8 Reports from law enforcement agencies to MROS under Art. 29 para. 2 AMLA

Under Art. 29 para. 2 AMLA law enforcement agencies are obliged to report to MROS all proceedings, judgements and decisions to suspend proceedings under Art. 260ter sub-para. 1 (criminal organisation), 305bis (money laundering) and 305ter (lack of due diligence in financial transactions) SCC. Since the entry into force of this article in April 1998, MROS has repeatedly observed that the law enforcement agencies only partially comply with this statutory obligation to report. Accordingly, MROS has already frequently pointed out this deficiency not only directly to the law enforcement agencies concerned but also via the cantonal justice and police directorates and in its annual report.

The lack of success has prompted MROS to undertake more substantial inquiries to find out which law enforcement agencies do not, or only insufficiently, comply with their obligation to report. Thus, a data comparison was carried out in co-operation with the Swiss Criminal Records (Federal Office of Justice) between the two databases VOSARA and GEWA in order to find out whether the cantonal authorities were complying with this article. In total, 1,452 judgements which had been pronounced since 1 April 1998 were reported to MROS via the Swiss Criminal Records.

SCC article	**Number of persons convicted according to VOSARA**	**Number of convicted persons who were reported to MROS under Art. 29 para 2 AMLA (according to GEWA)**	
	Number	Number	In %
260ter	26	10	38%
305bis para. 1	1277	716	56%
305bis para. 2	118	69	58%
305ter	31	9	29%
Total	**1452**	**804**	**55%**

The comparison showed that in the last 10 years approximately, MROS was only informed of about 55% of the judgements pronounced. On the basis of this comparison, MROS can identify

[77] We refer you here to the explanations in MROS 2004 Annual Report under subpara 5.1

exactly which law enforcement agencies do not, or only insufficiently, comply with their obligation to report. MROS will now lodge a complaint with the erring law enforcement agencies and set them a time limit for subsequent amelioration, in the hope of improving future reporting behaviour.

9 Practice 2006

9.1 Dubious job offers for financial agents

"Employees wanted urgently!" or "Financial manager (m/f) to work freelance": thus or similar read the titles of e-mails landing in their thousands in Swiss mailboxes in recent months. Various fictitious enterprises are flooding the electronic mailboxes in Switzerland via "spam[78]" mails, all with virtually the same contents: the enterprises offer a "job" as a courier or financial agent, which essentially consists of placing one's own bank or postal account at the disposal of others in order to carry out financial transactions for the "employer". The individuals concealed behind the façade of these enterprises initially transfer a rather modest amount to the account of the "financial agent". If the initial transactions run smoothly, higher and higher amounts are transferred. Up to ten per cent of these amounts may be retained by the courier or financial agent as his commission; he then has to transfer the balance via a "money transmitter[79]" to a third country. The money paid into the accounts of the newly-engaged "financial agents" comes from the accounts of persons who are victims of "phishing[80]" (mostly abroad). The perpetrators are hereby taking advantage of the fact that the prosecution of crimes with an international aspect take longer to investigate than national cases. This is because information frequently has to be obtained via international mutual assistance, which can sometimes take months. Since the money is at first transferred to the account of a blameless citizen ("financial agent"), the transaction involving a few thousand francs does not immediately arouse any suspicion on the part of the financial intermediary.

"Financial agents" who accept a job offer of this type may be prosecuted under criminal law on charges of money laundering, because they are helping to cover traces of money originating from irregular activities[81] (for example, "phishing").

[78] Spam is the collective term for unsolicited advertising e-mails or chain letters in e-mail communication; further information under http://www.melani.admin.ch/gefahren-schutz/schutz/00025/index.html?lang=de

[79] Provider of cash payment services

[80] By means of phishing, swindlers attempt to obtain confidential data from unsuspecting Internet users. This may, for example, be the account details of online auction bidders or access data for Internet banking. The swindlers take advantage of the gullibility and helpfulness of their victims by sending them, for example, e-mails with forged senders' addresses. Further information under: http://www.melani.admin.ch/gefahren-schutz/schutz/00022/index.html?lang=de

[81] Guilty of money laundering under Article 305[bis] SCC is *"anyone who commits an act designed to obstruct the establishment of provenance, the discovery or the confiscation of assets which he knows, or must assume, to be derived from a crime."*

9.2 Revision of the Money Laundering Ordinance (MLO; SR 955.23)

The Money Laundering Ordinance regulates in detail the work of MROS, that is to say the processing of reports from the financial sector and access to the various information systems operated by the police and justice authorities at government level. The Money Laundering Ordinance entered into force in October 2004 and was limited until the end of 2006.

With its decision of 1 November 2006, the Federal Council extended the validity of the ordinance to the end of 2008 and updated its contents by adapting the regulations on access to the latest level of the information systems. This adjustment was urgently needed in connection with the introduction of the new central migration information system (ZEMIS) and did not materially alter MROS's access rights.

The new limitation of the ordinance to the end of 2008 is necessary until the foreseen Federal Act on Police Information Systems within the Confederation (PISA)[82] enters into force and at the same time, within the scope of amendments to prevailing law, Article 35bis MLA[83] enters into force. This new article will formally regulate MROS' access to the various information systems of the police and justice authorities. The prevailing legal basis for MROS's access rights is provided by Article 5 MLO. In the 2002 report on MROS activities to the Federal Council, reference was made to the fact that this legal basis did not suffice at ordinance level and that a formal law was required. With the decision of 9 April 2002, the Federal Department of Justice and Police was instructed to produce a corresponding draft law. The draft of Article 35bis MLA is the result of this mandate.

9.3 Revision of the Money Laundering Act

The task of the inter-departmental working group IDA-FATF[84] of drawing up legal adaptations for the implementation of the revised recommendations of the Financial Action Task Force against Money Laundering (GAFI / FATF), which were adopted in 2004, led to several significant decisions being made in the reporting year 2006. On 29 September 2006 the Federal Council defined the further steps to be taken in the implementation of the revised FATF recommendations on the fight against money laundering and the financing of terrorism. It instructed the Federal Department of Finance to submit a message by mid-2007. In contrast to the consultation procedure draft, the message is to be limited to essential points. The aim of the GAFI draft is the made-to-measure adaptation of Swiss

[82] PISA is aimed at summarising and harmonising the legal bases of all police information systems within the government. It was widely welcomed within the framework of the consultation procedure in 2005 and will shortly be dealt with in Parliament.
[83] Message regarding the Federal Act on Police Information Systems; BBI No. 24 dated 20 June 2006, Chapter 2.3.5
[84] We refer to the MROS 2005 Annual Report under Chapter 4.2.

money laundering legislation to new challenges in the sphere of international crime. The new draft is also to raise the conformity of Swiss legislation to the relevant international standards.

According to the Federal Council decision, the following points from the consultation procedure draft are to be retained:

- Creation of new predicate offences in the sphere of money laundering for gang smuggling, counterfeiting goods and product piracy as well as insider offences and market rigging;

- Extension of the Money Laundering Act (MLA) to cover the financing of terrorism (explicit formulation in MLA);

- Introduction of a reporting obligation in the non-conclusion of a business relationship;

- Release of the financial intermediary from the obligation to observe due diligence in amounts of low value (clause on petty cases);

- Relaxation of the ban on information between financiary intermediaries in certain cases, for example when a financial intermediary is not able to freeze the assets concerned when reporting to MROS;

- Clarification in the Money Laundering Act that reports pursuant to the right to report (Article 305ter paragraph 2 SCC) do not entail a freeze on assets; in addition, verification of whether exemption from punishment and liability should also be extended to the self-regulatory organisations (SRO);

- Improvement of legal protection of the reporting financial intermediary from reprisals in reports on cases of suspicion of money laundering;

In the revised draft, then, some new measures are to be incorporated on the basis of the results of the FATF evaluation reports on member countries:

- Cooperation of the customs authorities in the fight against money laundering and terrorist financing through the introduction of an information system, for cross-border cash transports above a threshold value of CHF 25 000 (implementation of SR IX);

- Introduction of an obligation for the financial intermediaries to identify the representatives or persons holding a power of attorney on behalf of legal persons;

- Introduction of an obligation for the financial intermediary to identify the purpose and planned nature of the business relationship sought by the client;

- Unlimited extension of the ban on information of the financial intermediary towards his client on the reports sent to MROS, provided the report was not passed on to the law enforcement agencies;

- Reports submitted under the right to report are in future only to be addressed to MROS (hitherto the financial intermediaries have been able to choose between contacting the law enforcement agencies or MROS);

As these measures were not included in the consultation procedure draft, the Federal Department of Finance will hold another hearing on this matter at the beginning of 2007.

The Federal Council does not intend to deal with a number of proposals from the consultation procedure draft within the scope of this draft. This includes, in particular, the misrepresentation of cash payments for certain trading activities under the Money Laundering Act. Further steps with regard to bearer shares will be laid down by the Federal Council within the framework of the foreseen reform of company law. Within the scope of this draft, the Federal Council proposed the abolition of bearer shares.

9.4 Council of Europe Convention No. 198 on Money Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism

In the 2005 Annual Report MROS reported on this important set of agreements which for the first time constitutes a binding instrument of international law and includes detailed guidelines on FIUs. We announced that the Federal Council was likely to make a decision on further procedures concerning this draft in summer 2006. However, the Federal Department of Finance's draft on the implementation of the 40 revised FATF recommendations (see remarks under Chapter 4.3 above) was delayed. Thus Convention No. 198 could not yet be signed and was likewise delayed. The Federal Council is therefore probably unlikely to decide on further procedures before the second half of 2007.

9.5 Implementation of UN Resolutions 1267 and 1373 in Switzerland

9.5.1 UN Resolution 1267

The worldwide fight against terrorist financing is based on several UN Security Council resolutions[85]. In October 1999 the UN Security Council had already imposed economic sanctions (incl. financial sanctions) against the Taliban regime in Afghanistan with Resolution 1267. Subsequently, the measures were modified several times by follow-up resolutions. Today the sanctions are no longer directed against the Taliban as a group or against Afghanistan but against certain natural persons, legal entities and groups linked

[85] http://www.un.org/docs/sc/

to Osama bin Laden and the "Al-Qaida" group or the Taliban. Through the decision of the UN Security Council Sanctions Committee (today the "Al-Qaida and Taliban Sanctions Committee"), which was created by Resolution 1267 (1999), these natural persons and legal entities are indicated on a list of names. The UN Member States have undertaken steps to enforce sanctions against these natural persons and legal entities.

In Switzerland these sanctions have been implemented as follows:

a) Economic sanctions under the Embargo Act[86] :

Since 1 January 2003 the Federal Act on the Implementation of International Sanctions (Embargo Act) has formed the legal basis for the implementation of Switzerland's sanctions. Under Article 2 Embargo Act, the Federal Council is responsible for issuing coercive measures[87] in order to enforce sanctions decided on by the United Nations Organisation. By means of the Ordinance on Measures against persons, organisations and groups with links to Osama bin Laden, Al-Qaida or the Taliban[88], the Federal Council imposes economic sanctions against persons and organisations which have been placed on a list of names under Resolution 1267 through the decision of the Sanctions Committee of the UN Security Council. The economic sanctions consist of freezing assets and economic resources which are in the possession or under the control of individuals, companies, groups or organisations on the list. At the same time these assets are to be reported to SECO, the State Secretariat for Economic Affairs within the Federal Department of Economic Affairs. The assets remain frozen until the relevant country responsible for entering the names of persons, groups or organisations removes the name in question from the list.

b) Obligation to report in accordance with the Money Laundering Act[89]

In accordance with the prevailing practice of the Swiss money laundering supervisory authorities[90], business relationships with persons and organisations on such lists are subject to a well-founded suspicion under Article 9 MLA and require the financial intermediary to report such business relationships without delay to MROS, at the same time freezing the assets under Article 10 MLA. It must explicity be mentioned thereby that a report made to SECO (see above under subparagraph a) does not rule out a report to MROS but that this must be made parallel to the former. MROS analyses the suspicious activity report and decides whether to pass it on to the law enforcement agencies. If the report is not passed on to a law enforcement agency, the case is dismissed or criminal proceedings are dropped by the latter and the funds are released again. On the basis of this parallel reporting procedure to both MROS and to SECO, it can occur that the same reported assets, on the one hand, based on the Embargo Act remain frozen (report to SECO) and, on the

[86] Federal Act on the Implementation of International Sanctions (Embargo Act; SR 946.231)
[87] Before the entry into force of the Embargo Act, the sanctions were directly based on the Federal Constitution Article 184 paragraph 3 ab (SR 101).
[88] SR 946.203
[89] SR 955.0
[90] Anti-Money Laundering Control Authority, Federal Banking Commission, Federal Gaming Boadrd, Federal Office of Private Insurance

other hand, that the assets in report proceedings under the Money Laundering Act (report to MROS) are released again. We must therefore emphasise that these are two separate procedures.

9.5.2 UNO Resolution 1373

On 28 September 2001 the UN Security Council also issued a comprehensive resolution on combating terrorism − Resolution 1373 − which, amongst other things, requires certain measures including the freezing of assets to be applied against persons and groups that carry out terrorist activities or have links to terrorism. This resolution expressly emphasises the importance of international cooperation in the fight against terrorism.
Based on their previous knowledge, certain states compile their own lists of persons and groups with links to terrorist activities and take measures against them, analogously to the corresponding UN resolutions. These measures include, in particular, the freezing of assets. Some of these lists are sent to other countries with the request to adopt them and apply the same sanctions. In Switzerland a practice has evolved in dealing with such lists, which roughly divides them into two types:

a) Type 1 lists / Obligation to report to SECO and to MROS:
Provided names on these country lists correspond to the names placed on the lists by the Al-Qaida and Taliban Sanctions Committee (Resolution 1267), the financial intermediary, should he have business relations with such persons, has to send a report to SECO and also to MROS, at the same time freezing the assets (cf. procedure explained under Chapter 5.5.1. above).

b) Type 2 lists / greater due diligence and possible obligation to report to MROS:
If the names on the country lists indicate links to terrorist activities but cannot be linked directly to Osama bin Laden, Al-Qaida or the Taliban, the financial intermediaries are required to place such a business connection under greater due diligence. If, based on an overall analysis of the business connection under Article 9 MLA, the financial intermediary has a well-founded suspicion, he is required to send a suspicious activity report without delay to MROS, at the same time freezing the assets.

10 Practice 2005

10.1 Nigerian scams / advance fee fraud

Time and time again financial intermediaries, especially those working as money transmitters, come up against the questionable dealings known colloquially as “Nigerian scams”. This is a phenomenon involving advance fee fraud[91] which first appeared at the beginning of the 1980s. By e-mail, fax or personal letters, the public is offered the chance to make extraordinary profits. The senders, using fictitious names or false identities, often let it be understood that this money-making opportunity is highly confidential. Once the scam artist has won the confidence of his victim he asks for an advance fee or other financial service. Often the victim is asked for bank account details and other particulars regarding his person, or is required to sign and send documents. Through this illegal activity, the perpetrators try to enrich themselves possibly through financial transactions carried out with the help of the personal information provided by the victims. Because the first cases involved senders from Nigeria advance fee fraud in the past was often referred to as “Nigerian letters” or “Nigerian scams”. Today, however, the senders and the stories for the most part have nothing more to do with Nigeria. According to Article 146 of the Swiss Criminal Code (SCC), fraud occurs only when certain facts are present. Mainly it must be shown that the perpetrator acted with wilful deceit. This prerequisite however does not always apply, for example if it has been shown that the victim could have protected himself by paying more attention or could have avoided the mistake with a minimum of reasonable caution (Decision by the Federal Court 126 IV 165). It is also necessary to clarify in every case whether the incriminating behaviour is in fact punishable. In practice law enforcement agencies rarely take action in cases involving advance fee fraud, particularly because this scam has become too well known, and adequate warnings have been made (also by fedpol).

The mere sending of a fraudulent offer which promises high returns is essentially still not a punishable act. The Federal Office of Police and its partners, therefore, advise putting the matter to a stop there and then, and in no way to accept the offer or to reply.

Questions by the financial intermediary in connection with advance fee fraud:

Question 1: Should the financial intermediary warn the potential fraud victim?
Answer 1: The financial intermediary is under no obligation to issue a warning. However we recommend that the financial intermediary draws the attention of the potential victim to the situation and refuses the transaction.

[91] The warning by the Federal Office of Police is available at www.fedpol.ch/d/aktuell/warnung/vorschussbet.htm

Question 2: Is the financial intermediary obliged to report to MROS?
Answer 2: This question has to be answered in two parts: If the transaction was carried report according to Article 9 MLA. If the financial intermediary refuses to have been transferred has criminal origins, MROS recommends that he also reporting obligation if the fraud victim's money has a legal origin.

Basically, however, we would like to warn against making a hasty conclusion that all suspicious payments to Nigeria and other African countries are the proceeds from advance fee fraud. In the drug trade so-called smurfing and structuring are common typologies in cash transactions. Therefore, we emphasise that the financial intermediary is obliged by Article 6 MLA to look into incidences of unusual transactions.

10.2 Revision of the Money Laundering Act

In the 2004 annual report we discussed the inter-departmental working group IDA-FATF[92] established on the orders of the Federal Council. This working group, which is headed by the Federal Finance Administration at the Federal Department of Finance (FDF), had the task of drawing up legal adaptations for the implementation of the revised recommendations of the Financial Action Task Force against Money Laundering (GAFI/FATF).

On 12 January, 2005, the Federal Council opened the consultation procedure[93] for several legislative changes, among them the revision of the money laundering act. This consultation procedure lasted until mid-April 2005.

On 30 September, 2005, the FDF published the results of the consultation procedure[94]. The main features of the draft were welcomed, and the participants in the consultation procedure expressed their commitment to Switzerland as a financial centre, which is clean and one with integrity, and their commitment to the fight against money laundering. At the same time there was criticism - especially from economic circles and conservative political parties - that some of the proposed measures regarding the maintenance and strengthening of this mechanism went too far. The criticism concerned especially what was considered to be the overly rapid implementation of the FATF recommendations, the general over-regulation and the lack of comparisons with corresponding regulations in other countries. The criticism also targeted the proposed extension of the most important due diligence obligations to certain branches of trade.

The draft is being reworked on the basis of the results of the consultation procedure. Some of the proposed measures will be examined again in depth. The Federal Council considers

[92] The MROS is a member of the IDA-GAFI

[93] http://www.efd.admin.ch/d/dok/medien/medienmitteilungen/2005/01/gafi.htm

[94] http://www.efd.admin.ch/d/dok/gesetzgebung/vernehmlassungen/2005/09/gafi.htm

it crucial that Switzerland, as an important financial centre, continues to have an effective mechanism to fight money laundering and is in harmony with relevant international norms. At the same time the proportionality of the measures concerning the implementation of the revised FATF recommendations and their economic compatibility are to be improved in keeping with the suggestions made during the consultation procedure.

The Federal Council will decide on further action concerning the draft in 2006 based on additional fundamental decisions. This includes the report on the consultation procedure and the result of the third FATF peer-group study of Switzerland, which ended in October 2005. In addition a Federal Council report to parliament is awaited. This report, which was written in response to two parliamentary motions[95] and which will be presented before the message is written, requests clarification on aspects of comparative law and on cost-benefit questions.

10.3 New European Convention No. 198 on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism

The Council of Europe Convention No. 141 on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime[96] of 1990 was ratified by Switzerland in 1993. Convention No. 141 is one of the most important international agreements in the fight against money laundering. All 46 states of the Council of Europe are members. In 2004/2005, the Convention was reviewed by a Council of Europe expert group with a mandate to update and expand the terms of the money laundering convention. Out of this work emerged a new convention, Convention No. 198 on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism[97], which besides provisions concerning terrorism also includes the obligation to operate an FIU. With the drafting of Convention No. 198 it is the first time that a binding instrument of international law includes detailed guidelines on FIUs. Switzerland has not yet signed Convention No. 198, because signing must take place in coordination with the Federal Department of Finance's draft on the implementation of the revised 40 FATF recommendations. The Federal Council will likely make a decision in summer 2006 on further procedures concerning this draft.

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[95] 05.3456 – Postulate Philipp Stähelin: Costs, benefits and success of the FATF recommendations. Evaluation / http://www.parlament.ch/afs/data/d/gesch/2005/d_gesch_20053456.htm und

05.3175 – Postulate Philipp Stähelin: Implementation of FATF recommendations in other countries. Evaluation / http://www.parlament.ch/afs/data/d/gesch/2005/d_gesch_20053175.htm

[96] http://www.conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=141&CM=8&DF=24/01/2006&CL=GER

[97] http://www.conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=198&CM=8&DF=24/01/2006&CL=GER

11 Practice 2004

11.1 Suspicious activity reports under Art. 9 MLA[98] must always be submitted to the Money Laundering Reporting Office Switzerland

In 2004 MROS learned that a financial intermediary had sent a suspicious activity report under Art. 9 MLA directly to a law enforcement agency and submitted only a copy of the report to the attention of MROS. MROS criticised the financial intermediary for this action. The financial intermediary however pointed out the statement by Werner de Capitani[99], saying that if a charge is proven by the nature of the suspicious activity report then the report can be submitted to a law enforcement agency. Seen in a legally formalistic way, the statement that the suspicious activity report is, by its legal nature, a denouncement is correct. But the formulation in Art. 9 MLA is clear and unmistakeable that the suspicious activity report must be submitted only to MROS. Also the message on the Federal Act on Money Laundering in the Financial Sector of 17 June 1996[100] is clear on this issue[101]:

"The law enforcement agencies are basically responsible for the prosecution and judgement of the offences relevant here. Nevertheless, the report should not go to these authorities but to the Money Laundering Reporting Office Switzerland. The advantages of this solution are obvious: It relieves law enforcement authorities of the burden of handling reports that are insufficiently corroborated. As a specialised office, MROS is in a position to separate the real money laundering suspects from the less substantiated facts and thus to conduct an efficient preliminary examination (Art. 23, section 2 MLA) for the law enforcement authorities. As the main specialised agency, MROS also has the possibility to discover connections between different reports. This is information which would remain unknown if the reports were sent directly to local law enforcement agencies. Finally, MROS can compile an overview of the methods and developments in the area of money laundering, analyse threatening situations and competently inform the financial intermediaries, the supervisory bodies and law enforcement agencies."

Besides these advantages there is also the fact that MROS has an efficient array of instruments to collect in the shortest possible time national and international information for its analyses. This time-saving aspect also helps the financial intermediary with regard to

[98] Federal Act on Money Laundering in the Financial Sector (Money Laundering Act);

MLA; SR 955.0

[99] Werner de Capitani on „Einziehung, Organisiertes Verbrechen, Geldwäscherei" volume II, Schulthess Publishers 2002, p. 1003 N 53

[100] BBl **1996** III 1101

[101] Page 30 of Art. 9, par. 1 MLA in third section

blocked funds. Finally it must also be mentioned that the FATF[102] recommendation No. 26 requires every country to maintain a Financial Intelligence Unit (FIU), which as the sole national office receives suspicious activity reports, analyses them and if necessary passes them on to the relevant law enforcement agency. MROS fulfils these requirements and, therefore, suspicious activity reports according to Art. 9 MLA are to be submitted only to this office.

11.2 Reports from law enforcement agencies to MROS under Art. 29, par. 2 MLA

Art. 29, par. 2 MLA obliges law enforcement authorities to report to MROS on all procedures, judgements and case dismissals under Art. 260ter, no. 1 (criminal organisation), 305bis (money laundering) and 305ter (lack of due diligence by financial intermediaries) of the Swiss Criminal Code (SCC). In recent years, MROS has noticed a growing tendency to ignore this legal obligation by not passing information on about all verdicts, or not until requested by MROS, and then only after a great delay. MROS has also noticed that sometimes only the dispositive of judgements are submitted, either not including the arguments for the judgement or only as a brief outline. Article 29, par. 2 MLA aims to give MROS an up-to-date picture of organised crime and of the development, situation and procedures of criminal organisations in the area of money laundering. To have this picture, it must have complete and immediate access to these judgements and decisions to dismiss a case including the arguments. Only with full details can MROS use its knowledge in this matter to train financial intermediaries either directly or through the supervisory authorities. Moreover these reports enable MROS not only to monitor the fate of a suspicious activity report that has been passed on, but it is also in the picture about proceedings, which have been initiated because of a direct charge by the financial intermediary, a third person or the law enforcement agencies themselves. MROS has pointed out the above mentioned shortcomings several times and attributes the problem partly to the fact that there is insufficient regulation in the cantons concerning the responsibilities of meeting the present legal obligations. It must be admitted that the term "law enforcement authorities" as used in the legal text does not make it absolutely clear who has responsibility. What is meant are not only the criminal investigation authorities, but also the presiding court[103]. MROS believes that there is an urgent need for action regarding an implementation concept in the cantons.

[102] Groupe d'action financière sur le blanchiment de capitaux (GAFI) / Financial Action Task Force on Money Laundering (FATF)

[103] de Capitani a.a.O. S. 1180 N 4

11.3 New ordinance on the Money Laundering Reporting Office Switzerland (MGwV[104])

On 1 October 2004, the new Ordinance on the Money Laundering Reporting Office Switzerland came into force with the aim of defining its activities as well as determining regulations on how the money laundering data system GEWA is used.

In brief, the complete revision of the ordinance improves the structure of the ordinance, adapts the ordinance to MROS practice and in particular integrates changes arising from the adoption by the Financial Action Task Force on Money Laundering of new norms aimed at fighting the financing of terrorism. Because MROS is responsible for receiving and handling reports from financial intermediaries regarding the financing of terrorism, it was necessary to change the ordinance.

That is why there is an express reference to the fight against financing terrorism in the different articles of the ordinance[105]. There is no question of expanding the activities of MROS, which was already receiving reports concerning the financing of terrorism[106].

As concerns financial intermediaries and the oversight authorities, it was necessary for the ordinance to include certain measures concerning the contents and handling of reports and complaints (Arts. 2-11). Article 3 refers to the minimal content that must be included in a report[107] or a complaint[108]. To be able to carry out its legal analyses MROS must have a minimum of information about the case.

The revised ordinance also sets down the procedures for the on-line exchange of information. At present, only MROS has access to the information in the GEWA database. The ordinance defines the authorities who will have access to GEWA data by computer as well as the type of information available to them. These measures are intended to strengthen the resources in the fight against money laundering, the financing of terrorism and organised crime. To enable effective on-line access, what was needed on data protection grounds was a precise legal basis in the MLA. This is now being done in the context of the work of IDA-FATF (implementation of the revised FATF recommendations).

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104 RS 955.23

105 Arts. 1, 11, 12, 14, 15, 16, 20 and 23 of the ordinance

106 Federal Council message of 26 June 2002 concerning the change in the Swiss Criminal Code, FF 2002 5061 à 5066

107 Art. 9 MLA or Art. 305ter, par. 2, Criminal Code

108 Arts. 16, par. 3, 21, 27, par. 4, MLA

Finally, the ordinance has changed the length of time that data must be kept in GEWA and provides for a uniform time limit of 10 years for all data, as is now the case for financial intermediaries (Art. 7, par. 3, MLA).

11.4 Revision of the MLA

Following the revision of the Recommendations of the Financial Action Task Force on Money Laundering (FATF)[109], the Federal Council charged the Federal Department of Finance (FDF) to set up a working group to propose changes necessary to implement the new standards. The inter-departmental group IDA-FATF was formed and held numerous meetings in 2004 to set up a first project.

On 12 January 2005, the Federal Council opened external consultation proceedings[110]. The deadline for the consultation is mid-April.

[109] On this point, see the MROS 2003 annual report MROS 2003, ch. 4.2.3.

[110] http://www.efd.admin.ch/f/dok/medien/medienmitteilungen/2005/01/gafi.htm (To access the consultation texts, click on the two objects mentioned in the box marked “consultations”)

12 Synoptic table

Year	Legal reference	Amendments / changes	Key elements / reminders	Remarks
2014	**Federal Act of 12.12.2014 on Implementation of Revised FATF Recommendations,** **Art. 9*a*, AMLA,** **Art 10 para. 1 AMLA,** **Art. 9 para. 1 let. a and c AMLA,** **Art. 22*a* para. 2 AMLA**	The act was passed by parliament on 12.12.2014. **Important new aspects have been added to the system for submitting SARs:** The act of submitting SARs is separated from the act of freezing assets for SARs submitted under Art. 9 AMLA. Financial intermediaries are no longer under an obligation to freeze assets and must now continue to execute client orders. Also, the time limit for analysing SARs under Art. 9 para. 1 let. a AMLA is extended to a maximum of twenty days. Under the new Art. 10 para. 1 AMLA, assets are frozen only once MROS decides to forward the SAR to the prosecution authorities, regardless of whether it has been submitted under Art. 9 para. 1 let. a AMLA or Art. 305ter para. 2 SCC. An exception to the immediate freezing of assets applies to SARs submitted under the new Art. 9 para. 1 let. c AMLA and which involve a person or organisation figuring on the terrorist lists under the new Art. 22a para. 2 AMLA. In this case, assets are frozen immediately for a period of five working days starting from the date on which MROS receives the SAR. The financial intermediary is no longer permitted to inform the client that assets have been frozen. This applies for an unlimited time period.	According to MROS, financial intermediaries who fulfil their obligation under the new Art. 9a AMLA to carry out the client's orders do not violate Article 305bis SCC. They should pay particular attention at all times to the paper trail.	See MROS Practice 2013.
	Art. 14 para. 4 ACLA, **Art. 305bis para. 1 SCC, Art. 186 DFTA,**	The scope of application of Art. 14 para. 4 ACLA is extended to include all taxes and duties. Qualified tax offences are now included in the catalogue of predicate offences to money laundering.	The act provides for a threshold of CHF 300,000 in evaded tax per fiscal year.	See MROS Practice 2007; 2009.

	Art. 59 para. 1 DTHA			
	Art. 2 para. 1 let. b AMLA	The scope of application of Art. 2 para. 1 let. b AMLA is extended to include 'natural persons and legal entities that, in a professional capacity, market goods and receive cash payments' (merchants). This concerns natural persons or legal entities whose activities do not match the definition of a financial intermediary under Art. 2 AMLA. Plans are underway for due diligence and reporting obligations for merchants under certain circumstances.	A new ordinance by the Federal Council is required to address technical questions arising from this new provision.	
	FATF Recommendations 1 and 2	The Federal Council decides to commission a National Risk Assessment (NRA) on Swiss efforts to combat money laundering and terrorist financing, therefore implementing revised FATF Recommendations 1 and 2. An interdepartmental working group under the aegis of the State Secretariat for International Financial Matters (SFI) is established for this purpose. MROS is to head the Risk Analysis Sub-committee and provide the working group with strategic analytical capacities.		
	Art. 158 SCC, **Art. 305bis SCC,** **FSC 6B_967/2013 of 21.02.2014,** **6B_627/2012 of 18.07.2013**	**Judgment** regarding **criminal mismanagement** : In its judgment the Federal Supreme Court (FSC) underscored that an asset manager may not make useless investments for the sole purpose of having the client pay more in commissions for the transactions made (a practice referred to as churning). The court also defines the responsibility of the 'introducing broker.' **Judgment** regarding money laundering : the FSC rules that **indirect intent is sufficient to fulfil** the subjective element of money laundering.		
2013	**Art. 30 AMLA**	Entry into force of the partial revision of AMLA (1.11.2013) which grants **new powers to MROS:**		See MROS Practice 2008.
		Art. 30 para. 1 to 3 AMLA establish the conditions under which MROS may transmit information to foreign FIUs.	Financial information may be exchanged.	

			Anonymity of **financial intermediary** guaranteed.	
		Art. 30 para. 4 and 5 AMLA establish the conditions under which information transmitted by MROS to foreign FIUs may be passed on to law enforcement agencies in that country.	Information may be exchanged for intelligence purposes only.	
		Art. 30 para. 6 AMLA authorises MROS to negotiate and sign co-operation agreements with foreign FIUs.		
	Art. 11a AMLA	Art. 11a para. 2 AMLA allows MROS to gather information from Swiss financial intermediaries who have not submitted a SAR.	Imposes on the financial intermediary a duty to clarify according to Art. 6 AMLA and, depending on the outcome of these clarifications, to submit a SAR (under Art. 9 AMLA or 305ter para. 2 SCC). Prohibits the financial intermediary completely and for an unlimited duration from informing the client. This is in the sense of the draft law on implementing the FATF recommendations (Federal Gazette 2014 685, p. 698 in the French version / not available in English).	
	Art. 40 SESTA, **Art 40a SESTA,** **Art 44 SESTA**	New securities violations as predicate offences to money laundering are defined (1.5.2013): **use of insider information** (Art.40 para. 2 SESTA), and **price manipulation** (Art. 40a para. 2 SESTA).	Condition : monetary advantage exceeds CHF 1 million. Exclusive federal jurisdiction.	
	Art. 9 AMLA, **Art. 305ter para. 2 SCC**		System of submitting SARs to MROS: Maintains the right to report. Proposal for extending the statutory deadline for processing SARs under Art 9 AMLA (30 days).	
2012	**Art. 29a AMLA** **(in conjunction with Art. 302, 309, 310, 311 para. 2, 314, 315, 320 and 323 CrimPC)**		Reminder: it is the responsibility of law enforcement agencies to inform MROS of its decisions.	

	Art. 9 para. 1 let. a, no. 3 AMLA **(Art. 260ter SCC)**		Reminder concerning the qualification of a criminal organisation and the obligation to submit a SAR to MROS.	
	Art. 260ter SCC	The FSC considers the regimes in Libya and Egypt to be **criminal organisations**. All financial intermediaries with clients linked to these regimes must therefore submit a SAR.		
	FATF Recommendations 29 and 40	Future amendments to AMLA (entry into force: 1.11.2013) that are in line with the revised FATF Recommendations: new provisions allow MROS to request information from financial intermediaries who have not submitted a SAR (future Art. 11a para. 2 AMLA) and to conclude co-operation agreements.		See MROS Practice 2013 ; 2014.
	Art. 9 AMLA, **Art. 305ter para. 2 SCC**		Reminder: the difference between the duty to report and the right to report is based on the **degree of suspicion.** This can range from a simple uneasiness (Art. 305ter para. 2 SCC) to a well-founded suspicion (Art. 9 AMLA). The project on amending AMLA proposes abolishing the right to report as well as the automatic freezing of assets for 5 days. However, these proposals are not taken up.	
	Judgment ECHR of 6.12.2012, concerning Michaud c. France, **Art. 9 para. 2 AMLA,** **Art 321 SCC,** **FINMA Circular 2011/1 para. 114 et seq.** **Art. 14 para. 3 AMLA**		**Judgment** regarding the obligation to report to MROS and professional confidentiality on the part of lawyers: Lawyers are subject to AMLA as soon as they perform financial intermediary acts in a professional capacity. In this context, they must belong to a regulatory body recognised by FINMA.	

2011	**Art. 9, 10 and 6 para. 2 let. b AMLA,**		Mandatory reporting with respect to the Federal Council's emergency regulations (concerning **Tunisia** and **Egypt**) : Reports must be submitted to the Federal Department of Foreign Affairs (FDFA) irrespective of submitting a SAR to MROS. The financial intermediary must carry out additional clarifications and report all suspicions of money laundering or terrorist financing to MROS under Art. 9 AMLA. The financial intermediary can exercise his right to report (Art. 305ter para. 2 SCC) at any time.	
	Art. 9 para. 1 let. a & b AMLA		Introduction of the obligation to report when **negotiations to establish business relations have been broken off** and where no assets have been deposited.	See MROS Practice 2008 ; 2009.
2010	**Art. 9 AMLA,** **Art. 97, 98, 103, 110 para. 1,** **Art 138 no. 1 para. 4 SCC,** **FSC 5.4.2007, 2A. 599/2006**		Examination of procedural requirements and impediments to proceedings: Financial intermediaries must only clarify whether the material conditions of Art. 9 AMLA are fulfilled. The formal examination rests solely with the prosecution authorities. The existence of a criminal complaint (in the case of an offence prosecuted only on complaint, such as breach of trust to the disadvantage of a close relative) is not a prerequisite for submitting a SAR. The same applies to questions regarding the limitation of prosecution rights.	
	Art. 75 para. 1 FCJA, **Art. 168 CrimPC**		A financial intermediary does not have the right to refuse to give evidence due to a family relationship and remains subject to mandatory reporting under Art. 9 AMLA.	
	Art. 6 para. 2 AMLA,		A provision on handing over assets (Art. 265 CrimPC) to a law enforcement authority contains a special obligation	

	Art. 265 CrimPC **Art. 284 CrimPC** **Art. 285 CrimPC**		to clarify the business relationship (Art. 6 para. 2 AMLA). A provision on the surveillance of banking transactions (Art. 284, 285 CrimPC) contains the same obligation.	
	FSC Judgment 6B_908/2009 of 3.11.2010	The FSC considers that **failure by financial intermediaries to report a suspicion** may be sufficient to justify their conviction for money laundering. Suspicious elements present in a business relationship, even more so if the client holds a public office, require immediate clarification. With regard to the particular legal situation of financial intermediaries, they have a **guarantor status**. The court therefore **confirms a case of money laundering through omission**.		
	Art. 25 SCC, **Art. 147 SCC**		**Judgments** on **phishing**: The assessment by cantonal courts of the subjective element of complicity in computer fraud (i.e. the role played by the financial agent or 'mule') varies considerably. Because Article 147 SCC requires the element of **intent (**the negligent violation of this provision is not punishable), some courts dismiss procedures while others recognise indirect intent and convict the financial agent for money laundering.	See MROS Practice 2006 ; 2007.
2009	**AMLA**	Revised AMLA enters into force on 1.2.2009.		
	Art. 9 para. 1 let. b AMLA	Mandatory reporting for **attempted** money laundering is introduced, whereby sufficient elements are required to justify a well-founded suspicion. Also, the financial intermediary does not need to wait with breaking off the business relationship until MROS has made a decision about forwarding the case to a prosecution authority.		See MROS Practice 2008 ; 2011.
	Art. 10a AMLA, **Art. 37 AMLA,** **Art. 6 AMLA,** **Art. 9 AMLA**	**Relaxation of the ban on information:** A financial intermediary not authorised to freeze assets may inform another financial intermediary who is authorised to freeze assets of suspicious elements. However, this does not relieve the informing financial intermediary		See MROS Practice 2008.

		of his obligation to report to MROS. The financial intermediary who has been informed of suspicious elements must then carry out due diligence under Art. 6 AMLA and, depending on the outcome of his clarifications, submit a SAR to MROS.		
	Art. 175 et seq. DFTA, **186 et seq. DFTA,** **Art. 14 para. 4 ACLA,** **Art. 146 SCC**		**Classic fiscal crime:** Tax evasion and tax fraud are not considered predicate offences to money laundering. Therefore, they are not subject to mandatory reporting. Some tax-related offences are, however, subject to mandatory reporting: **Organised contraband of goods** (Art. 14 para. 4 ACLA), punished with a custodial sentence of 5 years or more or a fine; and **value-added tax fraud**, which the FCC considers as common fraud.	See MROS Practice 2014; 2007.
2008	**AMLA**	In view of the entry into force of the amended AMLA (1 February 2009).		See MROS Practice 2013, 2014.
	Art. 3, 6, 8, 9 AMLA, **Art. 21, 23, 27 AMLA,** **Art. 32 AMLA**	Mandatory reporting for suspected terrorist financing (although already applied because terrorist organisations are considered criminal organisations) is now explicitly mentioned in legislation.	Combating money laundering and terrorist financing constitutes two separate objectives.	
	Art. 9 para. 1 let. b AMLA, **Art. 305ter para. 2 SCC**	The obligation to report all **attempts** at money laundering **when negotiations to establish a business relationship break down** is now regulated by law. However, the financial intermediary must have sufficient elements to justify a suspicion.	Thanks to voluntary reporting under Art. 305ter para. 2 SCC, a financial intermediary can report attempted money laundering even if sufficient information does not exist.	See MROS Practice 2009 ; 2011.
	Art. 305ter para. 2 SCC	SARs based on Art. 305ter para. 2 SCC (voluntary reporting) must be sent **exclusively to MROS**.		
	Art. 10 AMLA, **Art. 10a AMLA,** **Art. 6 AMLA**	**Freezing assets and ban on information** are regulated in their own specific articles: A financial intermediary who is not in a position to freeze assets (Art. 10 AMLA) may inform another financial intermediary who is (Art. 10a para. 2 AMLA).	A financial intermediary who has received information from another financial intermediary reviews his own relationship with the client in question (Art. 6 AMLA). If he subsequently files a SAR with MROS, he must explicitly	See MROS Practice 2014, 2009.

		Art. 10a para. 3 let. a and b AMLA only allow the transmission of information to a financial intermediary domiciled in Switzerland and therefore subject to the provisions of AMLA**.**	mention that he has been informed by another financial intermediary.	
	Art. 11 AMLA, **Art. 9 para. 1bis AMLA**	To ensure the effectiveness of the system for combating money laundering Art. 11 AMLA provides better protection for financial intermediaries by **excluding them from criminal or civil liability for breach of secrecy on filing a report in good faith**.		
	Art. 32 AMLA	The transmission of information under administrative assistance takes place according to legal provisions.	Information transmitted abroad does not mention the name of the financial intermediary who submitted the SAR, nor the names of his staff. Also, no financial information is transmitted under administrative assistance.	See MROS Practice 2013.
	Art. 95 para. 1bis CustA	To combat the **cross-border flow of criminal assets,** a person is required to inform the customs authorities, on request, if they are transporting a sum of money that exceeds CHF 10,000 (or an equivalent sum in foreign currency). This provision enters into force on 1 February 2009. The customs authorities are not required to report to MROS but to the police.		
	MROSO, **Art. 20 FPISA,** **Art. 35a AMLA**	MROS Ordinance now applies without a time limit.		
	AMLO-SFBK – **AMLO-FINMA 1**	Amendment of the Anti-Money Laundering Ordinance with entry into force on 1 July 2008.		
2007	**Art 9 AMLA,** **Art 305ter para. 2 SCC**		**Distinction between mandatory reporting based on a well-founded suspicion and voluntary reporting**: A financial intermediary must report under Art. 9 AMLA if, under his due diligence obligation according to Art. 6 AMLA, he cannot exclude that assets are the proceeds of a crime.	See Introduction of Annual Report 2007, MROS Practice 2012.

		The entry-into-force of the revised FATF Recommendations (adopted in 2004) is to be accompanied by a revision of AMLA. Parliamentary consultations are planned for 2008.		
	Art. 9 AMLA, **Art. 147 SCC,** **25 SCC**		Cases of ***phishing*** must be reported to MROS and may not be solved internally by a financial institution. The goal of MROS and the prosecution authorities is to obtain information on the underlying perpetrator, i.e. the person who contacted the financial agent.	See MROS Practice 2010.
	Art. 146 SCC, **FCC Judgment of 19.11.2007, Appeal Chamber II (Transaction no. 2007 106)**		***Carousel fraud*** : In the case of '***Missing Trader Intra-Community VAT fraud*** ', MROS does not forward SARs to the prosecution authorities due to the absence of a predicate offence to, or the crime of money laundering. In the case of aggravated carousel fraud, which constitutes fraud (and not tax fraud under administrative criminal law) MROS forwards the SAR to the prosecution authorities under Art. 23 para.4 AMLA. Cases involving ***Spanish lotteries or advance-fee-fraud*** need not be reported to MROS.	See MROS Practice 2005 ; 2009.
	Art. 6 AMLA, **Art. 265 CrimPC**		**A disclosure order** (*Art. 265 CrimPC*) from a prosecution authority does not include ipso facto an obligation to report to MROS. A financial intermediary must submit a report only if the special inquiries he conducts (Art. 6 para. 2 AMLA) turns up further suspicious elements in addition to that which the prosecution authority has requested.	
	Art. 7 para. 3 AMLA, **Art 9 AMLA**		Doctrine and opinions differ on whether a financial intermediary is still **obliged to report suspicious dealings to MROS after a business relationship has ended**. **MROS is in favour** of mandatory reporting if the financial intermediary has a **well-founded suspicion** after a business relationship has been terminated. Also, under Art. 7 para. 3 AMLA, a financial intermediary must keep	

			all records which could provide valuable information in the event of later reporting.	
	Art. 10 para. 2 SCC	The revised General Part of the Swiss Criminal Code enters into force on 1 January 2007. **Felonies, i.e. predicate offences to money laundering, are acts that carry a custodial sentence of more than three years.** Not all supplementary penal laws have been adapted to the new formulation and their wording still mentions 'imprisonment.' However, a sentence of imprisonment according to the old law does not necessarily sanction felonies.		
	Art. 23 para. 4 AMLA	Under Art. 23 para. 4 AMLA, MROS determines which SARs should be forwarded to which prosecution authority.		
	Art. 29a AMLA (former Art. 29 para. 2 AMLA)		Under **Art. 29a AMLA prosecution authorities must report to MROS** all pending procedures, judgments and case dismissals under Art. 260ter no. 1 (criminal organisation), 305bis (money laundering) and Art. 305ter SCC (lack of due diligence by financial intermediaries). Since the entry into force of this measure in 1998, MROS has on several occasions drawn the prosecution authorities' attention to this legal provision.	
2006	**Art. 305bis SCC**		MROS warns about dubious job offers for 'financial agents.' Such jobs consist of placing one's own bank or postal account at the disposal of others to carry out financial transactions. The money paid into the account of the newly-engaged 'financial agent' comes, in reality, from the accounts of people who have fallen victim to phishing (often from abroad). The 'financial agent' may be prosecuted for money laundering.	See MROS Practice 2006 ; 2007 ; 2010.
	MROSO, **Art. 5 MROSO**	MROS's activities are regulated by the MROS Ordinance. In particular, access to various police and judiciary information systems is limited to within the strict framework of this piece of legislation. The validity of the ordinance, which was originally limited to the end of 2006, is extended to the end of 2008.		

	FATF Recommendations	On 29 September 2006, the Federal Council decides on the next steps regarding the implementation of the revised FATF recommendations. Implementation will raise the conformity of Swiss legislation to the relevant international standards.		See MROS Practice 2004 ; 2005 ; 2012 ; 2014.
	Council of Europe Convention 198 on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism	This convention includes – amongst other things – detailled provisions on Financial Intelligence Units. It has not yet been signed by the Federal Council.		See MROS Practice 2005.
	UN Resolutions 1267 and 1373. **Embargo Act,** **Measures against people or entities linked to Osama bin Laden, Al Qaeda or the Taliban,** **Art. 9 AMLA,** **Art. 10 AMLA**		**Resolution 1267 of 15.10.1999** : UN Member States are required to impose sanctions against persons and groups whose name figures on a list of the UN Security Council. The implementation of economic sanctions and Federal Council measures in Switzerland is regulated in the Embargo Act. SECO must be informed. **However, in practice,** business relations with people figuring on such lists are subject to well-founded suspicion and therefore mandatory reporting. A report made to SECO does not exempt a report to MROS. Both reports should be made at the same time. **Resolution 1373 of 28.9.2011** : this resolution expands the fight against terrorist financing. Implementing this resolution results in two types of lists in Switzerland: Type 1 lists: the names on these lists **must** be reported to SECO and MROS because they correspond to resolution 1267 ; Type 2 lists: names on these lists are subject to **greater due diligence** because they indicate terrorist activities	

			but no direct link to the names on Type 1 list. If, based on an analysis of the business connection under Art. 9 AMLA, the financial intermediary has a well-founded suspicion he is required to send a suspicious activity report without delay to MROS.	
2005	**Art. 146 SCC,** **Art. 9 AMLA,** **Art. 305ter para. 2 SCC,** **Art. 6 AMLA**		Under Art. 146 SCC fraud only occurs when certain facts are present. 'Nigerian' scams, because of their lack of wilful deceit on the part of the perpetrator, constitute advance fee fraud and law enforcement agencies rarely take action because this type of fraud is well known and adequate warnings have been given. Reporting to MROS therefore depends on the degree of suspicion as to the origin of the money paid. However, not all suspicious payments to Nigeria and other African countries are the proceeds of advance fee fraud. In the **drug trade** smurfing and structuring are common typologies in cash transactions. Therefore, due diligence is absolutely necessary in the case of unusual transactions (Art. 6 AMLA).	See MROS Practice 2007.
	FATF/ **amendment AMLA**	The interdepartmental working group IDA-GAFI, established by the Federal Council, draws up legal adaptations for the implementation of the revised FATF recommendations. The results of the consultations are published.		See MROS Practice 2004, 2006, 2012, 2014.
	Council of Europe Convention 198 on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism	Convention 198 builds on Convention № 141 on Laundering, Search, Seizure and Confiscation of the Proceeds of a Crime of 1990. This revised convention contains provisions on combating terrorist financing and includes the obligation to operate an FIU. Switzerland has signed and ratified Convention 141 but not yet Convention 198.		See MROS Practice 2006.
2004	**Art. 9 AMLA**		SARs under Art. 9 AMLA must be submitted systematically to MROS.	

	Art. 29a AMLA *(former Art. 29 para. 2 AMLA)*		Under **Art. 29a AMLA prosecution authorities must report to MROS** all pending procedures, judgments and case dismissals under Art. 260ter no. 1 (criminal organisation), Art. 305bis (money laundering) and Art. 305ter SCC (lack of due diligence by financial intermediaries). The purpose of this is to give MROS an up-to-date picture of the current status, the development and the modi operandi of launderers and criminal organisations. The term 'prosecution authorities' includes not only prosecutors and examining magistrates but also the criminal courts.	
	MROSO	Entry into force of the Ordinance on the Money Laundering Reporting Office Switzerland (MROS Ordinance) on 1.10.2004. The ordinance defines MROS's activities and regulates how money laundering information is processed (GEWA). It also includes new standards for combating terrorist financing		

ACLA	Administrative Criminal Law Act
AMLA	Anti-money Laundering Act
AMLO	Anti-money Laundering Ordinance
CrimPC	Criminal Procedure Code
CustA	Customs Act
DFTA	Direct Federal Taxation Act
DTHA	Direct Taxation Harmonisation Act
FATF	Financial Action Task Force
FCJA	Federal Criminal Justice Act
FINMA	Swiss Financial Market Supervisory Authority
FPISA	Federal Police Information Systems Act
FSC	Federal Supreme Court
MROSO	MROS Ordinance
SCC	Swiss Criminal Code
SESTA	Stock Exchanges and Securities Trading Act (Stock Exchange Act)
SFBC	Swiss Federal Banking Commission

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MROS OFFICE PRACTICES

FEDERAL OFFICE OF POLICE
FEDPOL
CH-3003 Bern

Phone +41 (0)58 463 11 23
info@fedpol.admin.ch
www.fedpol.ch