

## Significant Amendments of Anti-Money Laundering Laws in Switzerland

Responding to an international demand for more transparency and harsher money laundering regulations, the Swiss legislator is constantly revising Swiss anti-money laundering law. The latest revision, adopted in December 2014, is the new Act on the implementation of the Financial Action Task Force's Recommendations ("Implementation Act") amending eight different acts relating to various matters. As one of the most important and controversial modifications, the Implementation Act introduces two predicate offences to money laundering in relation with direct and indirect taxation.

### The FATF and the FATF Recommendations

The Financial Action Task Force ("**FATF**") is an inter-governmental body in charge of setting standards, through non-binding recommendations (soft law), to combat money laundering. The current version of the FATF Recommendations was adopted in 2012. The implementation of FATF Recommendations is controlled by a system of peer review and enforced by the constant threat of being added to the FATF blacklists.

### The Implementation Act: Entering into Force in Two Stages

The Implementation Act will enter into force in two stages:

- Dispositions on the transparency of legal entities and bearer shares will enter into force on 1 July 2015;
- the remaining amendments, including the ones on tax predicate offenses, will enter into force on 1 January 2016.

### Overview of the Amendments

The Implementation Act modifies the following areas:

- Creation of two predicate tax offences to money laundering;
- announcement of money laundering suspicions to the Money Laundering Reporting Office Switzerland ("**MROS**").

The modification relates to the three following points:

- The MROS is given 20 days instead of five to analyze the suspicions and decide whether it will refer the case to the criminal authorities;
- the assets are frozen if and when the case is communicated to the criminal authorities. Currently, the assets are already frozen when the suspicions are communicated to the MROS;
- in principle, the client should not be informed of the communication of the suspicions to the MROS.

- Extension of the definition of Politically Exposed Persons ("**PEPS**").

Increased due diligence requirements apply to transactions linked with PEPs and persons close to them. Three categories of persons are considered as PEPs:

- Persons who are or have been entrusted with governing public functions abroad;
  - persons who are or have been entrusted with governing public functions in Switzerland; and
  - persons exercising an important function in an international sports federation. This was also a controversial point because of the recent FIFA corruption scandals, having led to this amendment being nicknamed "*lex FIFA*".
- Increased due diligence requirements linked with cash payments exceeding CHF 100,000 in relation with the sale of movable and immovable goods.

Under the Implementation Act, any transaction exceeding CHF 100,000 and settled in cash will be subjected to the following increased due diligence requirements:

- Written track of the sale;
- clarification of the background of any unusual operation; and
- information to the authorities in case of discovery of any probable link with criminal activities.

If the buyer refuses to subject itself to these requirements, he will not be able to settle in cash but only through an electronic money transfer.

- Increased obligations linked to the transparency of legal entities and bearer shares.
- Increased due diligence requirements related to the identification of the beneficial owners.
- Financial sanctions in relation with (the financing of) terrorism.

The most significant amendment in terms of combatting money laundering is the introduction of

two predicate offences associated with direct and indirect taxation, as discussed below.

## Predicate Tax Offences to Money Laundering

The third 2012 FATF Recommendation requires each country to possess a predicate offence to money laundering in relation to indirect taxation and one in relation to direct taxation.

Under Swiss law, a predicate offence to money laundering has to be in line with the definition of a crime pursuant to Art. 10 para. 1 of the Swiss Criminal Code ("**SCC**"). In other words, the offence has to carry a custodial punishment of more than three years. This was not the case with regard to the existing tax offences (which were considered as contraventions or misdemeanors but not crimes).

The solutions adopted by the Swiss legislator are described below.

## Indirect Taxation

Art. 14 para. 4 of the Criminal Administrative Law Act ("**CALA**"), which embodies customs contraband, was already a predicate offence to money laundering. The Swiss legislator amended this article in order to extend it to qualified tax frauds committed in Switzerland in the context of indirect taxation (e.g. withholding tax, VAT).

A qualified tax fraud is given if the following requirements are fulfilled:

- Fraud in relation with benefits (*escroquerie en matière de prestations*, art. 14 para. 1 CALA) or fraud in relation with contribution ("*escroquerie en matière de contribution*", art. 14 para. 2 CALA) (*Arglistmodell*);
- particularly significant unlawful benefit or particularly significant breach of the economic interests or other rights of public authorities; and
- perpetration in a professional manner (*commission par métier*) or with the assistance of third parties (*concours de tiers*).

## Direct Taxation

Instead of creating a new predicate offence to money laundering, the legislator decided to extend the application of the money laundering offence to qualified tax offences. This extension creates a number of uncertainties with regard to its implementation.

### Principle

Art. 305bis para. 1 SCC is amended in a way that not only crimes but also qualified tax offences constitute predicate offences to money laundering.

A qualified tax offence is given if the following conditions are met:

- Either forgery in accordance with art. 186 LIFD (*Loi fédérale sur l'impôt fédéral direct*) or tax fraud in accordance with art. 59 LHID (*Loi fédérale sur l'harmonisation des impôts directs des cantons et des communes*). Both provisions require the use of forged, falsified or inaccurate documents (*Urkundenmodell*);
- a materiality threshold of CHF 300,000 of subtracted tax per taxation period.

Art. 305bis SCC applies to tax offences committed after the entry into force of the Implementation Act and in relation to tax on revenue and wealth only (as opposed to inheritance and donation taxes).

### Practical Difficulties with the Implementation

As from the beginning of next year, the Anti-Money Laundry Act ("**AMLA**") will oblige financial intermediaries to report any suspicion of qualified tax offences to the MROS.

Assessing whether there is an obligation to report will be a difficult task for the financial intermediaries. They will have to solve complex issues such as the exact time at which the money laundering offence was committed (in particular the time when the subtraction of tax occurred), the determination of

the CHF 300,000 threshold and the application of the principle of double incrimination if the predicate tax offence was committed abroad (the tax offence must be a qualified tax offence under Swiss law).

Undoubtedly, these complex issues will provide plenty of food for thought for the financial intermediaries as well as for the judicial and administrative authorities applying the new regulations.

Saverio Lembo  
[saverio.lembo@baerkarrer.ch](mailto:saverio.lembo@baerkarrer.ch)  
T: +41 58 261 57 00

Anne Valérie Julen Berthod  
[anne.julen@baerkarrer.ch](mailto:anne.julen@baerkarrer.ch)  
T: +41 58 261 57 50

Zurich  
Bär & Karrer AG, Brandschenkestrasse 90, CH-8027 Zurich,  
T: +41 58 261 50 00, F: +41 58 261 50 01, [zurich@baerkarrer.ch](mailto:zurich@baerkarrer.ch)

Geneva  
Bär & Karrer SA, 12, quai de la Poste, CH-1211 Geneva 11,  
T: +41 58 261 57 00, F: +41 58 261 57 01, [geneva@baerkarrer.ch](mailto:geneva@baerkarrer.ch)

Lugano  
Bär & Karrer SA, Via Vegezzi 6, CH-6901 Lugano,  
T: +41 58 261 58 00, F: +41 58 261 58 01, [lugano@baerkarrer.ch](mailto:lugano@baerkarrer.ch)

Zug  
Bär & Karrer AG, Baarerstrasse 8, CH-6301 Zug,  
T: +41 58 261 59 00, F: +41 58 261 59 01, [zug@baerkarrer.ch](mailto:zug@baerkarrer.ch)

[www.baerkarrer.ch](http://www.baerkarrer.ch)