2017 Symposium on Economic Crime; Cambridge/UK

Brief overview of the situation in Switzerland regarding financial issues and, in particular, money laundering in conjunction with the status of lawyers, notaries and fiduciaries.

Current situation

The fourth FATF[1] report, published in December 2016, reveals that Switzerland is doing relatively well but also points out what the FATF considers to be loopholes which the legislator must rectify.

In particular, the FATF laments the fact that lawyers, notaries and fiduciaries are not subject to the Money Laundering Act[2].

"*The highest risk identified was for private banking and universal banks operating internationally, independent asset managers, lawyers and notaries, fiduciaries and foreign exchange brokers. With regards to TF, the risk assessment concluded that there was a limited risk in Switzerland, and identified banks, money and value transfer services and credit services as the most exposed sectors.*"[3]

I propose that you examine what the FATF considers to be a distinctive feature of Swiss legal norms in respect of money laundering.

What does the law state about money laundering?

"*The current law applies to:*

a. financial intermediaries;

b. natural or juristic persons who, on a professional basis, trade goods and receive cash as payment (traders).[1]

[2] *Financial intermediaries are deemed to include:*

a. banks in the meaning of the Federal Act on Banks and Savings Banks [2]*;*

b.[3]*fund management companies in so far as they manage share accounts or they distribute collective capital investments themselves;*

b[bis]*.*[4]*open-end investment companies, partnerships for collective investment schemes, fixed capital investment companies and managers of collective investment undertakings (asset managers) in the meaning of the law of 23 June 2006 on collective investments*[5] *insofar as they distribute collective investment shares themselves;*

c.[6]*insurance institutions in the meaning of the Federal Insurance Supervision Act of 17 December 2004*[7] *if they exercise a direct life insurance activity or if they propose or distribute collective investment shares;*

d. securities dealers in the meaning of the Federal Stock Exchange Act of 24 March 1995[8]*;*

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[1] http://www.fatf-gafi.org/media/fatf/documents/reports/mer/mer%20switzerland%20rapport%20de%20suivi.pdf

[2] Federal Act on Combating Money Laundering and Financing of Terrorism of 10 October 1997; LBA ; RS 955.0 ; art. 2

[3] Anti-money laundering and counter-terrorist financing measures Switzerland, Mutual Evaluation Report, December 2016; page 7, note 4; http://www.fatf-gafi.org/media/fatf/content/images/mer-switzerland-2016.pdf

d^bis^.[9]central counterparties and depositories in the meaning of the Swiss Financial Market Infrastructure Act of 19 June 2015 [10];

d^ter^.[11] payment systems insofar as they must obtain the authorisation of The Swiss Financial Market Supervisory Authority (FINMA) according to Article 4, al. 2, of the Swiss Financial market Infrastructure Act;

e.[12]gaming houses in the meaning of the Swiss Gaming Act of 18 December 1998 [13]."

Effectively, lawyers, notaries and fiduciaries are not included on this list and they are therefore not subject to the classic obligations incumbent upon financial intermediaries, in particular, that of the MROS[4], Money Laundering and Suspicious Transactions Reporting Office[5].

According to Article 9 al. 2 LBA "*Lawyers and notaries are not obliged to report their suspicions insofar as they are bound by professional secrecy in terms of Article 321 of the Criminal Code*."

Why this exception and is the risk acceptable or not?

The first reason is linked to the Lawyers Act[6]. The said law provides in its Article 13 that "*The lawyer is subject to professional secrecy for all business that is entrusted to him by his clients in exercising his profession; this obligation is not limited in terms of time and is applicable with regard to third parties. The fact of being exempt from professional secrecy does not oblige the lawyer to disclose facts confided in him."*

It is therefore not possible for a lawyer, who may uncover a suspicious transaction on the part of his client, to inform a third party of his discovery, even if it is an authority, in this instance MROS.

If he were to do so, he would render himself guilty and subject to a disciplinary sanction which could go so far as the withdrawal of his authorisation to practise, but also a violation of Article 321 of the Swiss Criminal Code[7].

"*Breach of professional confidentiality*

1. *Any person who in his capacity as a member of the clergy, lawyer, defence lawyer, notary, patent attorney, auditor subject to a duty of confidentiality under the Code of Obligations[1], doctor, dentist, chiropractor, pharmacist, midwife, psychologist or as an auxiliary to any of the foregoing persons discloses confidential information that has been confided to him in his professional capacity or which has come to his knowledge in the practice of his profession is liable on complaint to a custodial sentence not exceeding three years or to a monetary penalty[…].*"

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[4] Money Laundering Reporting Office-Switzerland, MROS ;https://www.fedpol.admin.ch/fedpol/en/home/kriminalitaet/geldwaescherei.html

[5]in application of Article 9 al. 1, lit a LBA: "*The financial intermediary immediately informs the Money Laundering Reporting Office in the meaning of Article 23 (reporting office):*
a. *if he knows or presumes, on the basis of well-founded suspicions that the financial assets involved in the business:*
1. *are related to one of the violations mentioned in Art. 260^ter^, ch. 1, or 305^bis^ CP[1],*
2.[2] *from a crime or a qualified tax offence in the meaning of Article 305^bis^, ch. 1^bis^, CP,*
3. *are subject to the right of disposal of a criminal organisation,*
4. *are used to finance terrorism (art. 260^quinquies^, al. 1, CP);* »

[6]LLCA; Federal Law on Lawyers' free Movement of 23 June 2000; RS 935.61

[7]https://www.admin.ch/opc/en/classified-compilation/19370083/index.html

The debate took place in Switzerland on the Scope of Lawyer or Notary-Client Privilege. Apart from a few scattered votes, it was almost in a unanimous manner that the political class, namely the Federal Parliament and Government considered that it was not necessary to change the Criminal Code and consequently the Law on Lawyers.

This decision to maintain the status quo is perhaps not to protect a few unscrupulous men of the law, but rather not to compromise the trust which must exist between a lawyer and his client.

The client must be able to trust his representative without fearing that the latter will inform the authority or a third party without his approval and/or without being relieved of lawyer/client privilege by his supervisory authority.

"Panama Papers" Scandal

The harshest criticism against lawyer/client privilege was issued on the occasion of the *Panama Papers* scandal in April 2016, in particular owing to the role, to say the least, of the firm of Lawyers "*Mossack Fonseca*" and its Geneva branch.

It is not for me to give an opinion on the legality or not of what this firm of lawyers did. This is open to discussion. I note however that to date there has been no conviction or sentencing in Switzerland of lawyers linked to the Panama Papers scandal.

I would like to point out in passing that the few lawyers who stated that they were linked to this scandal, said that they had done nothing illegal and if by chance there was something that did not respect the rules, it was in the past and that they were now scrupulously adhering to them.

However, I note that the activities of this firm and its colleagues who carried out activities of this type have given a bad reputation to the lawyer's profession by making us appear to be accessories to large-scale tax evasion.

This is not what practising as a lawyer is about.

Some of you are lawyers or training to be lawyers, I do not need to expand on this subject.

In conclusion on this matter

From a legal point of view, there is no obligation or political will to subject the activities of lawyers, notaries and fiduciaries to the Money Laundering Act.

The negative connotation of the Panama Papers has sufficiently shaken lawyers who specialised in the creation of offshore companies to temper their activities and to encourage them to scrupulously respect the rules in force.

Novelties of Swiss law with regard to economic crime:

Economic crime is prevalent in Switzerland.

In its annual report[8], KPMG stated in 2016 that "*57 cases of economic crime had caused damages of CHF 1.4 billion in Switzerland. This is what is revealed by the current "KPMG Forensic Fraud Barometer", which every year analyses the legal cases in public hearings and published in the media. The volume of damages is particularly high in relation to 2015 as it rose from CHF 280 million to CHF 1.4 billion. This historic peak is essentially explained by one case of economic crime which alone was*

[8] https://home.kpmg.com/ch/fr/home/media/press-releases/2017/02/kpmg-forensic-fraud-barometer.html

responsible for damages of CHF 800 million, as well as by three crimes of a volume of more than CHF 125 million each."

These cases have all been brought before the courts and judged.

Nevertheless, such information must not be interpreted too positively. Firstly it must be recalled that what is revealed by these criminal investigations is just the tip of the iceberg.

Secondly, some proceedings fail due to the lack of cooperation of the States for which there is no compelling interest to reveal the crime prior to money laundering, for example corruption.

Finally, as long as money laundering remains a very lucrative activity, even if there is a cost[9], it will continue to be an activity prized by criminal networks.

What about the tools that make it possible to combat this modern-day scourge.

The fight against money laundering must remain a priority of the criminal prosecution authorities, even if it not always successful and if these cases are complex.

The legislative tools must still be improved, in particular in order to facilitate revealing the prior crime. I quote for example Article 260ter of the Swiss Criminal Code which must be changed in order to make it less difficult to demonstrate the existence of a criminal organisation and therefore the possibility to confiscate the contentious funds. This Article of the Criminal Code is currently inadequate to fight against new forms of criminal organisation, for example the Daesh Group:

"*Criminal organisation*

1. Any person who participates in an organisation, the structure and personal composition of which is kept secret and which pursues the objective of committing crimes of violence or securing a financial gain by criminal means,

any person who supports such an organisation in its criminal activities,

is liable to a custodial sentence not exceeding five years or to a monetary penalty.

2. The court has the discretion to mitigate the penalty imposed (Art. 48a)[2] if the offender makes an effort to foil the criminal activities of the organisation.

3. The foregoing penalties also apply to any person who commits the offence outside Switzerland provided the organisation carries out or intends to carry out its criminal activities wholly or partly in Switzerland. Article 3 paragraph 2 applies."

Final Conclusions

Firstly, I would like to highlight the fact that Switzerland is not lagging behind in the fight against economic crime. It has no reason to be ashamed of the 57 cases that were listed in 2016. On the contrary, this shows the willingness to fight against this scourge which is impoverishing States. It must therefore simply update its legislative tools and give itself further means to increase its efficiency.

[9]It is estimated that to launder CHF 2.- costs CHF 1.- (rule of thumb)

Then it is also up to the States in which the criminal activities prior to money laundering are committed, to collaborate, in particular by fighting against corruption and meeting with the requests for legal assistance.

To illustrate the importance of the damages caused by these criminal activities, I note that the turnover of the three Italian Mafias fluctuates between 100 and 150 billion euros. It exceeds the budget of the European Union[10].

Together the States have a chance of winning this war against criminal organisations.

Neuchâtel/Switzerland, August 2017

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[10] Express Business, 23 April 2014; https://fr.express.live/2014/04/23/le-budget-de-la-mafia-italienne-depasse-celui-de-lue-exp-204598/