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Tax offences as predicate offences to money laundering – Key takeaways for practitioners

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QUICK READ Art. 305bis(1bis) of the Swiss Criminal Code entered into force on 1 January 2016 to include aggravated tax misdemeanours as predicate offences to money laundering. Switzerland introduced this provision to comply with FATF standards.

Aggravated tax misdemeanours qualify as predicate offences to money laundering if cumulatively, (i) the relevant conduct meets the requirements of Art. 186(1) FDTA or Art. 59(1) FTHA and (ii) the unduly avoided taxes exceed CHF 300,000 per tax period. Fraud in relation to indirect taxes does not fall under this provision, but is considered a felony and therefore a predicate offence to money laundering under Art. 305bis(1) SCC. Tax offences committed abroad establish jurisdiction for Swiss authorities to prosecute acts of money laundering, provided that the same act is punishable in the relevant State and simultaneously qualifies as a felony or an aggravated tax misdemeanour under Swiss law.

Although the moment when (aggravated) tax misdemeanour is committed is undisputed, the moment when resulting money laundering occurs is highly debated and has yet to be clarified by courts.

As tax offences generally generate illicit savings rather than illicit profits, another outstanding question is how criminal proceeds of (aggravated) tax misdemeanours can be localized. It is generally accepted that criminal and clean funds should be considered commingled in a specific bank account of the perpetrator. However, it is unclear whether and on which conditions subsequent transfers out of said account qualify as money laundering. The classification of the funds in the account as tainted or clean depends on whether the authorities employ the *"First in First Out"* or *"Last in First Out"* approach. While other jurisdictions have clarified their respective positions, Switzerland is yet to do the same.

Art. 305bis(1bis) SCC is also relevant for financial intermediaries who must implement new measures to detect and report assets suspected of originating from predicate aggravated tax misdemeanours. These intermediaries also risk potential criminal liability for money laundering for having carelessly allowed fund transfers despite suspicions of the criminal origin of the funds.

Currently, Art. 305bis(1bis) is primarily relevant in the context of mutual legal assistance in criminal matters. Although Switzerland has historically been and remains reluctant to grant mutual legal assistance in criminal matters for unqualified tax offences (especially tax evasion), such requests are now generally accepted if based on allegations of money laundering predicated upon aggravated tax misdemeanours under Swiss law.

While courts have not yet clarified legal uncertainties regarding this new provision, pressure from foreign States in tax related matters could result in an increase in such cases in the future.

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1. Introduction

Art. 305bis(1bis) of the Swiss Criminal Code (SCC) entered into force on 1 January 2016 to include aggravated tax misdemeanours as predicate offences to money laundering. 1

This amendment to the SCC was introduced to comply with the recommendation of the Financial Action Task Force (FATF) of February 2012, pursuant to which serious tax crimes related to direct and indirect taxes were to be considered predicate offences to money laundering.[01] 2

This contribution provides an overview of the current state of play in Switzerland and sets forth the specific issues that crystallised since Art. 305bis(1bis) SCC entered into force, both in domestic criminal proceedings and mutual legal assistance *("MLA")* in criminal matters. 3

Given the very limited case law addressing Art. 305bis (1bis) SCC[02], many related legal questions currently remain unresolved. 4

[01] FATF Recommendation 2012 (as of June 2021), p. 121, found online on 20 September 2021 at: https://www.fatfgafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf; compare FATF Recommendations 2012 - Press Handout from 16 February 2012, found online on 20 September 2021 at: https://www.fatfgafi.org/media/fatf/documents/Press%20handout%20FATF%20Recommendations%202012.pdf.

[02] One of the few topical decisions is: Federal Criminal Court, TPF 2017 160, of 27 December 2017, par. 9.3 et seq. (case reference: BB.2017.129, BB.2017.130, BB.2017.133, BB.2017.134, BB.2017.146, BB.2017.147, BB.2017.152, BB.2017.153) confirming the freezing of Swiss assets on grounds of suspected money laundering resulting from suspected aggravated tax misdemeanours committed abroad; see also Federal Supreme Court, 4A_263/2019, 02.12.2019, par. 5.3.2 considering that a bank could not refuse to surrender gold to a client based on Art. 31 and 32 AMLO FINMA for lack of indicia that an aggravated tax misdemeanour had been committed abroad (notably that the CHF 300,000 threshold per tax period had been exceeded).

5 We begin by providing an overview of the tax offences within the scope of Art. 305bis(1bis) SCC, including those committed abroad, (section 2) and outlining the applicable statute of limitation periods and their interplay (section 3). Subsequently, we will discuss the specific issues related to the confiscation of proceeds of tax offences and the related money laundering implications (section 4) and present the main duties of Swiss financial intermediaries in this context (section 5). Finally, we will conclude by focusing on the particularities of mutual legal assistance in this field (section 6).

2. Tax offences as predicate offences to money laundering

6 Both Swiss tax offences (section 2.1) as well as, in certain circumstances, foreign tax offences (section 2.2) may be considered predicate offences to money laundering under Swiss law.

2.1 Swiss tax offences as predicate offences to money laundering

7 Art. 305bis(1) SCC provides that any person carrying out an act aimed at frustrating the identification of the origin, the tracing or the confiscation of assets which he or she knows or must assume are the proceeds of a felony or of an aggravated tax misdemeanour shall be punishable for money laundering. The sentence shall be a prison term not exceeding three years or a monetary penalty for ordinary cases. Pursuant to Art. 305bis(2) SCC, the prison term may reach five years in severe cases, for example when the perpetrator is part of a criminal organization or derives significant profits from professional money laundering activities (annual gross turnover of at least CHF 100,000 or annual profit of at least CHF 10,000).[03]

8 Two sets of offences qualify as predicate offences to money laundering: felonies and, as of 1 January 2016, aggravated tax misdemeanours.

- Felonies are defined as any offence punishable by a prison term exceeding three years under Swiss law (Art. 10(2) SCC). Some tax offences qualify as felonies, such as tax fraud within the meaning of Art. 14(4) of the Federal Act on AdminIStRative Criminal Law (ACLA) (section 2.1.2) or Art. 146 SCC (section 2.1.3), which both carry prison terms exceeding three years.
- Aggravated tax misdemeanours are exclusively those falling under Art. 186(1) of the Federal Direct Tax Act (FDTA) and Art. 59(1) of the Federal Tax Harmonisation Act (FTHA) provided the unduly avoided taxes exceed CHF 300,000 per tax period (Art. 305bis(1bis) SCC) (section 2.1.1).

2.1.1 Aggravated tax misdemeanours (Art. 186(1) FDTA or Art. 59(1) FTHA)

9 Aggravated tax misdemeanours qualify as predicate offences to money laundering provided that, cumulatively, (i) the relevant conduct meets the requirements of Art. 186(1) FDTA or Art. 59(1) FTHA (section 2.1.1.1) and (ii) the unduly avoided taxes exceed CHF 300,000 per tax period (section 2.1.1.2).

2.1.1.1 Criminal conduct

10 Art. 186(1) FDTA exclusively governs federal (i) income and (ii) tax at source (both for individuals and companies). According to this provision, anyone who uses falsified, forged or inaccurate documents, such as accounting books, balance sheets, profit and loss accounts or salary certificates and other certificates from third parties to mislead tax authorities for the purpose of evading taxes within the meaning of Art. 175 to 177 FDTA shall be punished by a custodial sentence of up to three years or by a monetary penalty of up to CHF 10,000.

11 Art. 59(1) FTHA exclusively applies to cantonal and communal (i) income, (ii) tax at source and (iii) real property gain taxes (all for individuals and companies). According to this provision, anyone who, with the aim of committing tax evasion, uses false, forged or inaccurate documents, or anyone who is responsi-

[03] Federal Supreme Court, ATF 129 IV 188, 26 November 2002; Federal Criminal Court, RR.2012.47, 22 November 2012, par. 3.3.

ble for collecting a tax at source and misappropriates the same for her or his own benefit or for that of a third party, shall be punished by a custodial sentence of up to three years or by a monetary penalty. A suspended sentence may be accompanied by a fine of up to CHF 10,000.

12 These two provisions share a common feature differentiating them from ordinary tax offences: the use of falsified documents designed to mislead the tax authority. By contrast, a simple (even wilful) omission to disclose taxable income or wealth in a tax return is considered merely an ordinary tax offence, even if the resulting tax evaded exceeds CHF 300,000 per tax period.

13 Prominent legal scholars consider that the notion of forged documents under the above provisions refers to the one set out in Art. 251 SCC cum Art. 110(4) SCC. These latter provisions only criminalize the creation or use of false written information if the document in question bears an increased probative value under Swiss law *("Qualified documents")*. In Switzerland, tax returns are not considered as Qualified documents. Thus, providing wrong or even false information on a tax return does not qualify as criminal forgery of document, meaning that doing so would not qualify as an aggravated tax misdemeanour. However, providing falsified or intentionally inaccurate or incomplete financial statements (or any document comprising the same, such as balance sheets, profit and losses accounts or any appendix thereto[04]) with tax returns falls under Art. 186(1) FDTA or Art. 59(1) FTHA as such statements are all Qualified documents.[05]

14 Aggravated tax misdemeanours are only applicable to taxes on income or wealth (for individuals), profit or capital (for companies), as well as on real property gains. Similar misconduct related to taxes on donations and inheritance are notably not covered by Art. 305bis(1bis) SCC and therefore do not qualify as predicate offences to money laundering (irrespective of the amount of tax avoided).

2.1.1.2 Additional requirement: evaded taxes amounting at least to CHF 300,000 per tax period

15 The taxes evaded by committing an aggravated tax misdemeanour must be a minimum of CHF 300,000 per tax period for Art. 305bis(1bis) SCC to apply. As a result, aggravated tax misdemeanours resulting in tax savings below that threshold are not considered predicate offences to money laundering. This does not mean that the proceeds cannot be confiscated, but only that concealing them or otherwise hampering their confiscation cannot lead to a criminal conviction and associated sentence under Art. 305bis(1bis) SCC.

16 Legal scholars unanimously agree that the amounts evaded for all relevant taxes must be added when assessing whether the tax offence resulted in an illicit gain exceeding CHF 300,000.[06] Therefore, evading CHF 100,000 in federal income taxes (subject to the FDTA) and CHF 200,001 in cantonal and communal income taxes (subject to the FTHA) in the same tax period would result in a total exceeding this threshold.

17 It is worth noting that only the tax savings resulting from an aggravated tax misdemeanour are decisive in determining whether the CHF 300,000 threshold was met. The amount of the undisclosed assets is, in itself, irrelevant.[07] By way of example, an individual must at least prevent the taxation of gross income in the region of CHF 700,000 (or even up to CHF 1,4 million depending on the canton and commune) in a given

04 Federal Supreme Court, ATF 125 IV 17; Federal Supreme Court, ATF 122 IV 25; Federal Supreme Court, ATF 108 IV 25.

05 L'Eplattenier Séverine, Contraventions, délits et crimes fiscaux, Genève - Zurich - Bâle 2019, N 34-39, pp. 267-269 (zit. L'Eplattenier, Contraventions).

06 Christoph Suter/Cédric Remund/Nina Lumengo Paka, Steuervortaten zur Geldwäscherei, GesKR 2019 522, p. 544 (zit. Suter/Remund/Lumengo, Steuervortaten Geldwäscherei).

07 Cassani Ursula, L'extension du système de lutte contre le blanchiment d'argent aux infractions fiscales: Much Ado About (Almost) Nothing, RSDA 2015 78, p. 83.

fiscal year to meet the CHF 300,000 threshold.[08] For individual wealth tax, an individual must annually conceal CHF 30 million from the Geneva tax authorities and up to CHF 110 million from the Zug tax authorities to reach the CHF 300,000 threshold.[09]

2.1.2 Fraud in relation to indirect taxes (*"tax fraud"*, Art. 14(4) ACLA)

18 Fraud in relation to indirect taxes *("tax fraud")* pursuant to Art. 14(4) ACLA is a felony and therefore a predicate offence to money laundering under Art. 305bis(1) SCC.

19 Art. 14(4) ACLA applies only to indirect taxes, such as VAT, customs tariffs, special consumer taxes, stamp duties and withholding taxes on dividends and other capital gains.[10]

20 Pursuant to Art. 14(4) ACLA, it is a felony for anyone, professionally or by conspiring with third parties, to obtain for herself/himself or a third party a particularly large unlawful advantage – more than CHF 100,000 according to legal scholars[11] – or to cause a particularly substantial impairment of the pecuniary interests or other rights of the public authorities by committing an offence pursuant to Art. 14(1) ACLA or Art. 14(2) ACLA in taxes or customs matters, i.e. by maliciously misleading the adminIStRation, another authority or a third party by making false statements or by concealing true facts, or by maliciously maintaining them in their error.

21 The definition of this offence differs from that of aggravated tax misdemeanours insofar as malicious conduct may fall under Art. 14(4) ACLA even if the perpetrator does not use forged or falsified Qualified documents to mislead the tax authority. The perpetrator must nevertheless display malicious conduct, i.e. one that is particularly deceitful and misleading. Unsophisticated, although deceitful, conduct would not suffice.[12]

22 For instance, setting up a Swiss domiciliary company[13] is not in itself maliciously misleading conduct punishable under Art. 14 ACLA unless it is part of a scheme to deceive or mislead the tax authorities.[14] This could be the case if a nominee director lacking the proper decision-making powers is appointed and registered in the regIStRy of commerce and if the correspondence with the tax authority states an incorrect address in order to conceal the taxpayer's relationship with the domiciliary company.[15] Providing the authorities with fictitious correspondence or contractual documents (e.g. bills of lading[16]) – although not Qualified documents[17] – or interposing offshore companies would also qualify as malicious conduct under Art. 14 ACLA.[18]

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08 Suter/Remund/Lumengo, Steuervortaten Geldwäscherei, p. 543.

09 Suter/Remund/Lumengo, Steuervortaten Geldwäscherei, p. 543.

10 Dispatch from the Swiss Federal Council in relation to the inclusion of aggravated tax offences as predicate offences to money laundering of 13 December 2013, in FF 2014 585, p. 604 (French).

11 Pieth Marc in: Niggli Marcel Alexander/Wiprächtiger Hans (Hrsg.), Baslerkommentar zum Schweizerischen Strafgesetzbuch (StGB), 4. Aufl., Basel 2018, Art. 305bis N 22c (zit. Autor in: Niggli/Wiprächtiger, BSK StGB).

12 L'Eplattenier Séverine, Contraventions, p. 349 ; Suter Christoph/Remund Cédric, Infractions fiscales, blanchiment et intermédiaires financiers, GesKR 2015 54, p. 71 (zit. Suter/Remund, Infractions fiscales).

13 Previously a company predominantly active abroad and only (or mostly) taxed on Swiss derived income; this special tax status has been abolished as of 1st January 2020.

14 Federal Supreme Court, 1A.244/2002, 24 October 2003, par. 5.1.

15 Federal Supreme Court, 6B_79/2011, 5 August 2011, par. 6.5; ATF 139 II 404, par. 9.4.

16 Federal Criminal Court, RR.2012.262, 28 June 2013, par. 2.3.6.

17 Federal Supreme Court, 6B_184/2013, 1 October 2013, par. 6.6.

18 Federal Criminal Court, RR.2020.29, 16 June 2021, par. 4.1.1.

23 Since tax fraud is a felony, the threshold of CHF 300,000 per tax period need not be met to qualify as a predicate offence to money laundering, unlike aggravated tax misdemeanours.[19]

2.1.3 Tax offences as ordinary fraud under Art. 146 SCC

24 In certain situations, offences committed to the detriment of tax authorities, Swiss or foreign, qualify as ordinary fraud within the ambit of Art. 146 SCC, not as tax offences.

25 According to case law, this is the case if the perpetrator *"is not acting as a taxpayer in the context of tax proceedings to which he or she is subject, but rather takes the initiative of systematically filing fictitious repayment claims on behalf of existing or non-existing individuals and/or entities before the tax authorities in view of obtaining an undue enrichment"*. In this case, his or her behaviour constitutes fraud pursuant to Art. 146 SCC.[20] This is notably the case of VAT carousel fraud.[21]

2.2 Foreign tax offences as predicate offences to Swiss money laundering

26 According to the prevailing opinion among legal scholars, the mere transfer to Switzerland of assets originating from a predicate offence committed abroad is sufficient to establish jurisdiction of the Swiss authorities to prosecute for money laundering.[22]

27 The perpetrator may be prosecuted in Switzerland for money laundering even if the predicate offence was committed abroad, provided that the same act is punishable in the relevant State and simultaneously qualifies as a felony or an aggravated tax misdemeanour under Swiss law (Art. 305bis(3) SCC cum Art. 10(2) SCC) (so-called *"dual criminality principle"*).[23] It is however not required that the criminal authorities of the State where the predicate offence was committed convict or even prosecute the perpetrator.[24]

28 Foreign tax offences may thus qualify as a predicate offence to Swiss money laundering if the dual criminality criterion is met. In other words, the acts committed abroad must meet the requirements of Swiss aggravated tax misdemeanours (Section 2.1.1), tax fraud under Art. 14(4) ACLA (Section 2.1.2) or ordinary fraud pursuant to Art. 146 SCC (Section 2.1.3).[25]

29 Swiss prosecution authorities are faced with important practical challenges when prosecuting potential acts of money laundering of the proceeds of suspected foreign aggravated tax misdemeanours. They must first establish that a Swiss tax predicate offence to money laundering was indeed committed abroad, which almost always requires gathering evidence in the relevant State through mutual legal assistance. Furthermore, they must verify that the relevant conduct is also prohibited under local law to comply with the dual criminality principle. To this end, Swiss authorities may try to prompt a local investigation abroad by spontaneously transferring information and

19 Schauwecker Marc-André Beat, Steuerdelikte als Vortaten zur Geldwäscherei und deren Konsequenzen für Finanzintermediäre, Bern 2016, p. 112.

20 Federal Supreme Court, 1A.233/2004, 8 November 2004, par. 2 (free English translation).

21 Matthey Sylvain, Blanchiment de fraude fiscale : les conséquences des nouveaux Art. s 305bis ch. 1bis et 14. al. 4 DPA in SJ 2016 II 285, p. 295-296 (zit. Matthey, Blanchiment de fraude fiscale).

22 Villard Katia, La compétence du juge pénal suisse à l'égard de l'infraction reprochée à l'entreprise, Zürich 2017, par. 763.

23 Federal Criminal Court, 2017 160, 27 December 2017 (case reference BB.2017.129, BB.2017.130, BB.2017.133, BB.2017.134, BB.2017.146, BB.2017.147, BB.2017.152, BB.2017.153), par. 9.3 et seq.; Cassani Ursula, Evolutions législatives récentes en matière de droit pénal économique: blanchiment d'argent et corruption privée, RPS 136/2018 179, p. 183.

24 CR CPP II-Cassani, Art. 305bis N 2.

25 Federal Criminal Court, 2017 160, 27 December 2017 (case reference BB.2017.129, BB.2017.130, BB.2017.133, BB.2017.134, BB.2017.146, BB.2017.147, BB.2017.152, BB.2017.153), par. 9.3.

documents to their foreign counterpart under Art. 67a of the Federal Act on International Mutual Assistance in Criminal Matters. The foreign authority may then reciprocate by transferring evidence to Switzerland for use in the Swiss proceedings.

30 If the suspected offence is an aggravated tax misdemeanour, additional hurdles must be overcome. Swiss authorities must additionally prove that such misdemeanour, if established beyond reasonable doubt, resulted in tax avoidance – necessarily expressed in foreign currency – equivalent to CHF 300,000 per tax period. This requires Swiss prosecution authorities to ascertain the legal situation under foreign tax law to then demonstrate that the conduct under investigation met (i) the CHF 300,000 threshold and (ii) the applicable tax period, both to be determined according to foreign law.[26] Relying on private legal opinions to this effect seems insufficient as the defendant would likely challenge their conclusions and possibly file a conflicting opinion that could establish reasonable doubt.

31 Obtaining a final decision from the foreign authority acknowledging the foreign tax offence and – ideally – that all the requirements of Swiss aggravated tax misdemeanours are also met would obviously be more conclusive, but it presupposes that the foreign State is sufficiently organized and prepared to prosecute the defendant. Any delays in the resolution of the foreign criminal tax proceedings will naturally lengthen the Swiss investigation. This gives rise to the potential risk that Swiss prosecution become time-barred (Section 3), thus compelling the discontinuance of the investigation and the release of potentially frozen assets. Even if the foreign State efficiently prosecutes the matter, the result still must be communicated to the Swiss authorities. This requires a sufficient level of cooperation between Switzerland and the concerned foreign State, which is not always a given.

3. Statute of Limitations

32 The time limitation applicable to the confiscation of assets originating from a predicate offence has a significant effect on a potential Swiss prosecution for money laundering. Since money laundering requires the hampering or prevention of the confiscation of assets resulting from a predicate offence, money laundering under Swiss law can only occur if the predicate offence can still result in the confiscation when the tainted assets are transferred or concealed. Otherwise, this conduct does not hamper confiscation, thus rendering it irrelevant from a money laundering perspective.[27]

33 If the predicate offence was committed abroad, the limitation period applicable to the related confiscation is determined by the applicable foreign law.[28] If it is committed in Switzerland, the power to confiscate assets of illicit origin becomes time-barred (i) 7 years after their illicit acquisition or (ii) once the originating offence can no longer be prosecuted due to the statute of limitations for that offence (Art. 70(3) SCC). As a result, money laundering can only be committed if the predicate Swiss offence (i) was committed no more than 7 years before the tainted assets were transferred or concealed or (ii) could still be prosecuted at that time due to a longer limitation period.

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[26] Explicit regarding the CHF 300,000 threshold: Dispatch from the Swiss Federal Council in relation to the inclusion of aggravated tax offences as predicate offences to money laundering of 13 December 2013, in FF 2014 585, p. 649 et seq. (French); see also Suter/Remund, Infractions fiscales, p. 66.

[27] Mauron Benoît, Interactions entre blanchiment et confiscation, notamment dans un contexte international, PJA 2021, 368.

[28] Federal Supreme Court, ATF 126 IV 255, 29 November 2000 ; for a critical analysis of this decision : Mauron Benoît, Interactions entre blanchiment et confiscation, notamment dans un contexte international, PJA 2021, 368.

34 The limitation period applicable to the prosecution of tax fraud under Art. 14(4) ACLA and of ordinary fraud pursuant to Art. 146 SCC is 15 years (Art. 97(1)(b) SCC, applicable pursuant to Art. 2 ACLA[29]), as is the limitation period for aggravated tax misdemeanours (Art. 189(1) FDTA and Art. 60(1) FTHA). Since Art. 305bis(1bis) SCC only entered into force on 1 January 2016, there can be no conviction for money laundering in Switzerland if the predicate offence is an aggravated tax misdemeanour committed (in Switzerland or abroad) prior to 1 January 2016. This holds true for acts of money laundering that continued or occurred after that date.[30] This exclusion does not apply to tax fraud as defined in Art. 14(4) ACLA or to ordinary fraud pursuant to Art. 146 SCC – both felonies and thus predicate offences to Art. 305bis(1) SCC – committed earlier.

35 If confiscation is not time-barred at the time of the conduct, Swiss prosecution authorities must prosecute for money laundering within the applicable limitation period, i.e.:

- 7 years for ordinary money laundering having occurred before 1 January 2014[31];
- 10 years for ordinary money laundering having occurred after 1 January 2014[32] (Art. 97(1)(c) SCC); and
- 15 years for aggravated money laundering pursuant to Art. 305bis(2) SCC (Art. 97(1)(b) SCC).[33]

36 Pursuant to Art. 189(1) FDTA and Art. 60(1) FTHA, the statute of limitation applicable to the prosecution of offences proscribed by Art. 186 FDTA and Art. 59 FTHA, respectively, starts running as soon as said offences are committed. This is the case as soon as the perpetrator uses falsified, forged or inaccurate documents. A result, such as the tax authorities being deceived or taxes being evaded, is not required.[34] Thus, the statute of limitation starts running when the perpetrator uses falsified, forged or inaccurate documents.[35]

37 This does not mean that the starting date of the limitation period applicable to the prosecution of an ensuing money laundering offence is identical, even though some scholars argue that the limitation periods should be.[36] Some scholars instead advocate for either the date of issuance of an erroneous tax decision or for the date on which they were misled into paying an (undue) amount to the offender.[37] Others for the date when the erroneous tax decision entered into force – i.e. 30 days after the tax assessment has been communicated (Art. 132 FDTA or Art. 48 FTHAe

29 Paris Valérie, Taxe sur la valeur ajoutée/ L'assujettissement subséquent selon l'article 12 DPA est-il encore et toujours une arme efficace de l'arsenal de lutte contre les infractions en matière de TVA ?, dans: OREF Ordre romand des experts fiscaux diplômés (éd.), Au carrefour des contributions, Mélanges de droit fiscal en l'honneur de Monsieur le Juge Pascal Mollard , Berne 2010, p. 187.

30 Matthey, Blanchiment de fraude fiscale, p. 298.

31 The limitation period for ordinary money laundering increased from 7 years to 10 years as of 1 January 2014.

32 The limitation period for ordinary money laundering increased from 7 years to 10 years as of 1 January 2014.

33 Federal Supreme Court, ATF 129 IV 188, 26 November 2002; Federal Criminal Court, RR.2012.47, 22 November 2012, par. 3.3.

34 Andreas Donatsch/Omar Abo Youssef, in: Zweifel Martin/Beusch Michael (Hrsg.), Kommentar zum Schweizerischen Steuerrecht, Bundesgesetz über die direkte Bundessteuer (DBG), 3. Aufl., Basel 2017, Art. 186 DBG N 8 (zit. Autor in: Zweifel/Beusch, Komm. DBG); Andreas Donatsch/Omar Abo Youssef, in: Zweifel Martin/Beusch Michael (Hrsg.), Kommentar zum Schweizerischen Steuerrecht, Bundesgesetz über die Harmonisierung der direkten Steuern der Kantone und Gemeinden (StHG), 3. Aufl., Basel 2017, Art. 59 StHG N. 5 (zit. Autor in: Zweifel/Beusch, Komm. StHG).

35 Andreas Donatsch/Omar Abo Youssef in: Zweifel/ Beusch, Komm. DBG, Art. 189 DBG N 6; Andreas Donatsch/Omar Abo Youssef in: Zweifel/Beusch, Komm. StHG, Art. 60 StHG N 5.

36 Giovanni Molo/Daniele Galliano, L'introduction du blanchiment fiscal dans le domaine de la fiscalité directe, Jusletter 23.02.2015, N 19.

37 Matthey, Blanchiment de fraude fiscale, p. 299-300.

contrario) – or, absent a tax assessment, when tax can no longer be levied because of time limitations – i.e. ten years after the end of the tax period (Art. 152(1) FDTA or Art. 53(2) FTHA).[38] Before this date, they argue that money laundering cannot be committed since the assets are not yet of illicit origin.[39] The Federal Supreme Court has not yet opined on this question.

38 In contrast to other jurisdictions, money laundering is not a continued offence under Swiss law. Thus, the mere retention of the illicit assets after they were moved or otherwise concealed does not postpone the start of the limitation period.

39 Finally, a first instance criminal judgment with a finding of guilt must be rendered (not necessarily served) before the limitation term expires.[40]

4. Criminal proceeds of tax offences and possible confiscation

40 To qualify as money laundering, the act must hinder or prevent the confiscation of criminal proceeds. Consequently, if the assets are not subject to confiscation, money laundering cannot occur. Under Art. 70 SCC, the court shall order the confiscation of assets acquired as a result of an offence. According to influential legal scholars, criminal proceeds can only be confiscated if they originate from a criminal offence, which implies that they can be traced back to the criminal conduct.[41]

41 However, in the case of tax offences, the acts in question generally do not generate illicit profits for the perpetrator (or favoured third party), but rather illicit savings. According to these legal scholars, such illicit savings are not suitable for confiscation according to Art. 70 SCC.[42] As a consequence, they arguably cannot be laundered in a way relevant and potentially punishable under Art. 305bis SCC.

42 The Federal Criminal Court initially took the view that proceeds of tax offences cannot be confiscated.[43] It reconsidered this position in a decision dated 27 December 2017, holding that proceeds of tax offences are likely to be amenable to confiscation, thus warranting their temporary freezing pending the resolution of the investigations.[44] However, it explicitly left open the question whether such proceeds could thereafter be definitely confiscated.[45]

43 The Federal Supreme Court has issued similar decisions with respect to temporary freezing orders, but never confirmed that proceeds from tax offences could be definitely confiscated.[46]

44 If confiscation is impossible, the State may only impose a compensatory claim pursuant to Art. 71 SCC, i.e. a claim of an amount equivalent to the criminal proceeds that may be secured by freezing and later foreclosing upon any assets of the offender (or of the favoured third party), even assets of legal source. As

38 Suter/Remund, Infractions fiscales, pp. 67-68.
39 Suter/Remund, Infractions fiscales, pp. 67-68.
40 Federal Supreme Court, 6B_425/2011, 10 April 2012, par. 4.3.
41 Baumann Florian in: Niggli/Wiprächtiger, BSK StGB, Art. 70/71 StGB N 75/75a;Ackermann in: Niggli/Wiprächtiger, BSK StGB, Art. 305bis N 279; Cassani, ZStrR 2018, 188 ff.
42 Baumann Florian in: Niggli/Wiprächtiger, BSK StGB, Art. 70/71 StGB N 75/75a.
43 Federal Criminal Court, BK_B 083/04, 8 November 2004, par. 2.4.
44 Federal Criminal Court, 2017 160, 27 December 2017 (case reference BB.2017.129, BB.2017.130, BB.2017.133, BB.2017.134, BB.2017.146, BB.2017.147, BB.2017.152, BB.2017.153), par. 10.2.
45 Federal Criminal Court, 2017 160, 27 December 2017 (case reference BB.2017.129, BB.2017.130, BB.2017.133, BB.2017.134, BB.2017.146, BB.2017.147, BB.2017.152, BB.2017.153), par. 10.2.
46 Federal Supreme Court, ATF 137 IV 151; Federal Supreme Court, 1B_783/2012, 1B_784/2012 and 1B_786/2012, par. 8; Federal Supreme Court, 1S.5/2005, 6 September 2005, par. 7.5.

hampering the securing or collecting of a compensatory claim does not qualify as money laundering,[47] laundering proceeds of tax offences would be impossible if they would not be subject to confiscation but merely to a compensatory claim. In response, the Swiss legislature expressly stated its intent to subject proceeds of tax offences to confiscation as, otherwise, Art. 305bis(1bis) SCC would be ineffective.[48] For these compelling reasons, confiscation pursuant to Art. 70 SCC of criminal proceeds originating from tax offences must be possible.

4.1 Theories to determine and locate criminal proceeds

45 The fact that proceeds of tax offences are merely illicit savings begs the question where they are located. Doing so is necessary to clarify which assets are subject to confiscation and can therefore possibly be laundered if transferred or concealed.

46 Although legal scholars have proposed various approaches to this question, the predominant view is that one should avoid a result where all assets of the perpetrator would be contaminated and thus subject to money laundering. This approach is in line with case law.[49] Accordingly, legal scholars assume that criminal proceeds only contaminate specific assets of the defendant, e.g. unreported and therefore untaxed assets or bank accounts usually used to discharge tax obligations, and not all the assets of the defendant.[50]

47 Irrespective of this question, and even if one assumes that illicit tax savings and clean funds are commingled within the confines of a single bank account, the following example illustrates a further issue.

48 A defendant with a bank account with a balance of CHF 1,000,000 commits an aggravated tax misdemeanour by concealing said account from the tax authority by using falsified or forged documents. As a result, the defendant avoids CHF 310,000 in taxes. Subsequently, the defendant transfers CHF 500,000 out of this same account to an account held by an offshore company. Did the defendant commit money laundering?

49 Under the total contamination approach, all assets in one account of the perpetrator are considered tainted once the criminal proceeds are mixed with clean funds. Consequently, every transfer of the defendant's account could potentially constitute money laundering.[51]

50 A less extreme variation of the total contamination approach considers the funds on the account to be tainted only if a certain percentage of contamination of the clean funds in the account is reached. The percentages discussed range between 0.5 % to 25 %.[52]

51 Other scholarship advocates that the clean funds ought to be considered tainted only in the amount of the criminal proceeds. The *"first in first out"* (FIFO) approach is based on the idea that once criminal proceeds and clean funds are commingled, transactions are deemed to be made first with the legitimate funds, whereas the criminal proceeds are used last. In the above example, the CHF 310,000 is deemed to be the

47 CR CP II-Cassani, Art. 305bis CP N 27.

48 Dispatch from the Swiss Federal Council in relation to the inclusion of aggravated tax offences as predicate offences to money laundering of 13 December 2013, in FF 2014 585, p. 606 (French).

49 Federal Criminal Court, 2017 160, 27 December 2017 (case reference BB.2017.129, BB.2017.130, BB.2017.133, BB.2017.134, BB.2017.146, BB.2017.147, BB.2017.152, BB.2017.153), par. 10.3 and reference to the Dispatch from the Swiss Federal Council in relation to the inclusion of aggravated tax offences as predicate offences to money laundering of 13 December 2013, in FF 2014 585, p. 606 (French).

50 Cassani Ursula, Evolutions législatives récentes en matière de droit pénal économique: blanchiment d'argent et corruption privée, RPS 136/2018 179, pp. 191-192 and ref.

51 Delnon Vera/Hubacher Marc, Geldwäscherei und Teilkontamination, ZStrR 134/2016, p. 332 (zit. Delnon/Hubacher, Geldwäscherei); Pieth Mark in: Niggli/Wiprächtiger, BSK StGB, Art. 305bis N 35.

52 Delnon/Hubacher, Geldwäscherei, p. 333.

floor, meaning that the defendant cannot commit money laundering as long as he/she only transacts with the *"clean"* CHF 690,000. However, once the defendant transfers assets located below the CHF 310,000 floor, he/she potentially commits money laundering. This CHF 310,000 consisting of criminal funds remains unchanged if additional clean funds are transferred into the account.

52 A variant of this approach is the last in first out (LIFO) approach.[53] Under the LIFO approach, once the funds have been contaminated by assets originating from a predicate offence, the first transactions are considered acts of money laundering until the transactions exceed the amount of the criminal proceeds. In contrast to the FIFO approach, the LIFO approach considers the criminal proceeds to be at the top of the funds.[54]

53 The Swiss Court have not yet taken position on the question on how proceeds should be determined. The Federal Criminal Court has dismissed the total contamination theory but has not endorsed any other theory.[55]

4.2 Determination of criminal proceeds of tax offences in other jurisdictions

54 Other jurisdictions have also considered the treatment of the proceeds of tax offences potentially subject to money laundering.

55 In Germany, the Federal Court of Justice *("Bundesgerichtshof")* held in 2015 that if cash deriving from lawful origin and from criminal acts is commingled in one account, the entirety of the assets of that account are subject to potential money laundering, unless the portion originating from criminal acts is insignificant from an economical perspective.[56]

56 In the United States, the United States Court of Appeals for the Fifth Circuit rejected the theory of the total contamination in a 2001 decision. The Court of Appeals held that it cannot be determined beyond a reasonable doubt that the assets are tainted or obtained by illegal activities if the individual withdrawal is less than the amount of clean money in the account.[57] In a decision from 2000, the Fifth Circuit Court declared that if the aggregated amount withdrawn from an account containing commingled funds exceeds the clean funds, the withdrawal contains tainted money.[58] The Fifth Circuit Court named this approach the *"clean funds out first rule",* which corresponds to the FIFO approach described above and was recently confirmed by the Fifth Circuit Court.[59]

57 The Internal Revenue Service (IRS) has adopted the FIFO approach in its Internal Revenue Manual. This approach is applied provided that the perpetrator's account is not considered to be permeated with fraud to the extent that the business operation is so intertwined with criminal activities that segregating the legitimate operation from the criminal proceeds is impossible.[60] However, the Internal Revenue Manu-

53 Philipp Behrendt, Tax evasion as the predicate offence of money laundering under German and US law, ZIS online 4/2020, S. 206.

54 Egger Tanner, Die strafrechtliche Erfassung der Geldwäscherei: ein Rechtsvergleich zwischen der Schweiz und der Bundesrepublik Deutschland, Diss., Zürich 1999, p. 109.

55 Federal Criminal Court, 2017 160, 27 December 2017 (case reference BB.2017.129, BB.2017.130, BB.2017.133, BB.2017.134, BB.2017.146, BB.2017.147, BB.2017.152, BB.2017.153, par. 10.3. According to the Dispatch from the Federal Council regarding the implementation of the FATF recommendation of 2012, the introduction of tax offences as predicate offences does not contaminate the entire funds of the defendant, but only the saved tax expenditure can be the object of money laundering (Federal Council Dispatch regarding the implementation of the 2012 revised recommendations of the FATF, dated 13 December 2013, BBl 2014 626).

56 BGH, Judgment of 20.5.2015 – 1 StR 33/15.

57 United States v. Loe, 248 F.3d 449 (5th Cir. 2001).

58 United States v. Davis, 226 F.3d 346, 357 (5th Cir. 2000).

59 United States v. Evans, No. 17-20158.

60 IRS, part. 9 *"Criminal Investigation";* 9.5.5.2.1.5.1, September 2020, found online on 16 September 2020 at: https://www.irs.gov/irm/part9/irm_09-005-005.

al does not specify the consequences regarding the determination of criminal proceeds in cases of such permeation.

4.3 Overview of the drawbacks and benefits of the FIFO and LIFO Methods

58 The FIFO approach is the most recommended in the Swiss doctrine. As only a portion of the total assets are contaminated, the perpetrator is not prevented from conducting ordinary business as long as the criminal proceeds remain available. This promotes exchanges and supports the global economy. It is thus compliant with the guarantee of property according to Art. 26 of the Swiss Federal Constitution.

59 However, the FIFO approach is not ideal. The general concept of preventing crime is that criminal conduct should not be profitable. Under the FIFO approach, the defendant could transfer criminal proceeds to an account with clean funds, derive profits from accruing interest while still using the account to the extent of the clean funds. Moreover, the defendant could always transfer new assets to the account and thus avoid committing money laundering.

60 This being said, the FIFO approach makes it less complex for authorities to track the criminal proceeds as they remain in the account (until and unless they are used). The authorities can therefore confiscate assets on the account despite further transfers (provided that only clean funds were used).

61 If one uses the LIFO approach, any outgoing transfers would be considered money laundering. The criminal proceeds would therefore leave the account with the first outgoing transfer(s), obliging the authorities to track the funds with a view to confiscating them. Their trace may be lost or practical hurdles may prevent their confiscation, notably if transferred to uncooperative foreign jurisdictions. As the funds remaining on the account – although potentially equivalent to or even higher than the criminal proceeds – are considered clean, they are immune to confiscation. They would still be subject to a compensatory claim pursuant to Art. 71 SCC, which provides a lesser protection to victims as said claim must be enforced via debt collection proceedings – with associated delays and costs – and does not grant any preferential rights to the victim, whose claim could be diluted should other creditors assert competing civil claims.[61]

62 The FIFO and LIFO approaches each have advantages and disadvantages. The Swiss courts will hopefully decide which approach should be followed in due course.

63 Furthermore, some authors maintain that the proceeds should be determined differently when it comes to the confiscation according to Art. 70 SCC.[62] However, according to Art. 305bis SCC only the criminal proceeds which can be confiscated are suitable objects for money laundering.[63] Therefore, we do not see the merits in using a different approach when determining those criminal proceeds which are subject to money laundering and those amenable to confiscation.

5. Duties imposed on financial intermediaries

5.1 General remarks

64 Swiss banks, as financial intermediaries, are required to comply with specific anti-money laundering obligations under the Federal Act on Combating Money Laundering and Terrorist Financing (the Anti-Money Laundering Act AMLA) and its related ordinance. In particular, banks are obligated to report any suspected cases of money laundering to the Money Laundering Reporting Office of Switzerland (MROS) (Art. 9 AMLA).

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61 Benoît Mauron, La restitution pénale, in: Sandrine Giroud/Héloïse Rordorf (éds), Droit suisse des sanctions et de la confiscation internationales, Bâle 2020, N 573, p. 168 et seq.

62 Mario Giannini, Anwaltliche Tätigkeit und Geldwäscherei, Zur Anwendbarkeit des Geldwäschereitatbestandes (Art. 305bis StGB) und des Geldwäschereigesetzes (GwG) auf Rechtsanwälte, Diss., Zürich 2005, p. 72.

63 Delnon/Hubacher, Geldwäscherei, p. 340.

65 According to Art. 9(1)(a)(2) AMLA, financial intermediaries have a duty to immediately file a suspicious activity report (SAR) with the MROS if they know or have reasonable grounds to suspect that assets involved in business relationships are the proceeds of a felony or of an aggravated tax misdemeanour. According to case law, this threshold is rather low as a *"mere doubt"* triggers the reporting obligation.[64] The client must not be made aware that his assets were reported (Art. 10a AMLA) and said assets must furthermore be frozen internally as soon as MROS informs the financial intermediary that the matter was referred to the criminal authorities for further review (Art. 10(1) ALMA). The funds may only be released if, within 20 days after the report has been filed, MROS (i) does not respond, (ii) responds that the matter shall not be referred to prosecution authorities or (iii) informs the financial intermediary that the matter has been referred to prosecution authorities without the financial intermediary receiving a blocking/freezing order from prosecution authorities within 5 days of MROS's response (Art. 30(1)(a) FINMA-MLA Ordinance).

66 In addition to this reporting duty, Art. 305ter(2) SCC provides that financial intermediaries have a right to report any business relationship whose assets they suspect originate from a felony or an aggravated tax misdemeanour. The threshold with respect to this mere *"right"* to report to MROS is thus lower than that of the duty to report.

67 If financial intermediaries close a suspicious relationship without reporting to MROS for lack of reasonable grounds to suspect money laundering, they can only authorize withdrawals leaving a paper trail (Art. 32(1) of the Swiss Financial Market Supervisory Authority (AMLO FINMA)). Furthermore, they cannot terminate such suspicious relationship or authorize significant withdrawals if there are concrete signs of imminent measures from an authority (Art. 32(2) AMLO FINMA). The Supreme Court held that a bank could not refuse to surrender gold to a client based on Art. 31 and 32 AMLO FINMA for lack of indicia that an aggravated tax misdemeanour had been committed abroad, in particular for lack of indicia that the CHF 300,000 threshold per tax period had been exceeded.[65]

68 Insofar as aggravated tax misdemeanours are concerned, a financial intermediary may or shall file a report to MROS only where the predicate offence is related to assets being deposited with or managed by said financial intermediary. A global assessment of the financial situation of the client is not required.[66]

69 This duty to report on the basis of Art. 9 AMLA or Art. 305ter(2) SCC does not apply to aggravated tax misdemeanours committed prior to 1 January 2016, even if the alleged laundering of the proceeds resulted from acts allegedly continued after this date.[67]

70 Swiss financial intermediaries, such as employees of banks or asset managers, may be held criminally liable for money laundering for having carelessly allowed fund transfers despite suspicions as to their origin that should have prompted them to report to MROS or for otherwise not complying with their obligations under the AMLA.[68] Companies, such as banks, moreover expose themselves to criminal convictions with monetary penalties up to CHF 5,000,000 in case of an organizational failure (Art. 102(1) and (2) SCC).

71 Financial intermediaries must perform enhanced due diligence on high-risk business relationships (Know Your Customer) or transactions (Know Your Transaction) in accordance with the conditions and criteria set out in Art. 13 to 15 AMLO FINMA. Specific criteria apply to business relationships presenting high risks of tax misdemeanours (Art. 21 AMLO FINMA).

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64 Federal Supreme Court, 6B_786/2020, 11 January 2021; Federal Council, 1B_433/2017, 21 March 2018, par. 4.9; Federal Council, 4A_313/2008, 27 November 2008, par. 4.2.2.3.

65 Federal Supreme Court, 4A_263/2019, 02.12.2019, par. 5.3.2 et seq.

66 Matthey, Blanchiment de fraude fiscale, p. 312-313.

67 Matthey, Blanchiment de fraude fiscale, p. 298.

68 Federal Supreme Court, ATF 136 IV 188; Federal Supreme Court, 6B_729/2010, 8 December 2011.

72 Financial intermediaries should pay particular attention to clients:

- investing into tax free products;
- using offshore and complex structures;
- refusing to provide tax declarations;
- carrying out transactions/withdrawals involving large amounts of cash;
- in relation to which there are indications of ongoing criminal tax proceedings in Switzerland or abroad;[69]
- transferring funds from States with high tax rates to non-AEOI low tax rate States.[70]

73 Duties imposed on financial intermediaries apply when onboarding the client and then continuously throughout the business relationship (Art. 20 AMLO FINMA). In case of suspicion of money laundering related to possible tax offences, financial intermediaries must request additional documents from the client to confirm (ongoing) compliance with the applicable tax regulations. Such confirmation may also be obtained from tax experts where needed.[71]

5.2 MROS Statistics (annual reports)

74 The annual reports of the MROS provide percentages of SARs for money laundering per relevant predicate offence.[72] As shown below, suspicious activity reports are still rarely based on suspicion of money laundering predicated on tax offences, which can be explained by the difficulties related to its application as outlined above.

→ 75

Year of MROS report	Percentage of SARs based on suspicion of money laundering of tax offences
2016	1%
2017	4%
2018	5%
2019	3%
2020	4%

6. MLA in criminal matters

76 Requests for mutual legal assistance must follow the applicable legal framework between Switzerland and the requesting State. Absent any applicable agreement, the request must follow the applicable laws of the respective country (in Switzerland, the Federal Act on International Mutual Assistance in Criminal Matters; *"IMAC"*).

77 As a rule, Switzerland does not accept MLA requests in criminal matters (including those pertaining to the confiscation and return of assets) for offences committed with a view to evading taxes, i.e. when the offender obtained a tax advantage by using specific legal forms, failing to declare income or personal wealth or by declaring only part of the same in tax returns (Art. 3(3) IMAC).[73]

78 Until Art. 305bis(1bis) SCC entered into force on 1 January 2016, Switzerland, as a rule, only allowed for the confiscation and return to foreign States by way of MLA of undue payments received from the concerned foreign tax authorities resulting from offences equi-

69 Marc-André Beat Schauwecker, Steuerdelikte als Vortaten zur Geldwäscherei und deren Konsequenzen für Finanzintermediäre, p. 152.

70 Lutz Peter/Kern Martin, Geldwäscherei und das qualifizierte Steuervergehen von Art. 305 bis Ziff. 1 bis StGB", in SJZ, Jg. 113, 2017, Nr. 5, S. 104 (zit. Lutz/Kern, Geldwäscherei und das qualifizierte Steuervergehen).

71 Lutz/Kern, Geldwäscherei und das qualifizierte Steuervergehen, S. 104.

72 MROS Annual Report 2016 p. 29; MROS Annual Report 2017, p. 34; MROS Annual Report of 2018, p. 18; MROS Annual Report of 2019, p. 12; MROS Annual Report of 2020 p. 20; all reports available at: https://www.fedpol.admin.ch/fedpol/en/home/kriminalitaet/geldwaescherei/jb.html.

73 However, such requests can be granted in the framework of adminIStRative assistance in tax matters under a double taxation treaty.

valent to tax fraud within the meaning of Art. 14(4) ACLA or tax offences qualifying as ordinary fraud under Art. 146 SCC.[74] For any other tax offences, mutual assistance was unavailable because Switzerland did not entertain MLA requests in criminal matters for offences committed with a mere view of evading taxes (Art. 3(3) IMAC).[75]

79 This being said, as Art. 305bis(1bis) SCC is not a tax offence within the meaning of Art. 3(3) IMAC but a separate (and subsequent) money laundering offence, influential scholars take the view that all forms of mutual assistance should be granted on the basis of alleged money laundering of proceeds from aggravated tax offences, including through the confiscation and return of laundered proceeds of assets that were illicitly not taxed.[76] The Swiss Federal Criminal Court implicitly confirmed this approach when reviewing the validity of freezing orders in place pending the enforcement of a possible future foreign confiscation decision pursuant to Art. 74a IMAC.[77]

80 Moreover, since 1 January 2016, Switzerland grants assistance to foreign States in cases where money laundering appears to have occurred as a result of suspected foreign aggravated tax misdemeanours (Art. 305bis(1bis) SCC). Such is the case even if the predicate offence was committed prior to 1 January 2016 since the non-retroactivity principle does not apply in MLA proceedings.[78]

81 A review of the available case law shows that foreign States are still unaccustomed to the specificities of Art. 305bis(1bis) SCC, notably its requirements that (i) the offence resulted in savings of CHF 300,000 per tax period[79] or (ii) the perpetrator use falsified or forged (Qualified) documents[80]. Several MLA requests within this period failed to properly set out why the domestic investigation met the Swiss criteria for aggravated tax misdemeanours, resulting in their dismissal by Switzerland for lack of dual criminality.

74 Unseld, Internationale Rechtshilfe im Steuerrecht, Akzessorische Rechtshilfe, Auslieferung und Vollstreckungshilfe bei Fiskaldelikten, 2011, p. 320 (zit. Internationale Rechtshilfe im Steuerrecht, 2011); Federal Supreme Court, 1A.218/2000, 6 November 2000, par. 2a; Internationale Rechtshilfe im Steuerrecht, 2011, p. 326; Aepli Michael in: Niggli Marc Alexander/ Heimgartner Stefan (Hrsg.), Basler-Kommentar zum Internationalen Strafrecht (IRSG), 1. Auflage, Basel 2015, Art. 74a N 38 (zit. Autor in: BSK ISRG); Federal Criminal Court, RR.2012.47, 22 November 2012, par. 3.3.

75 Internationale Rechtshilfe im Steuerrecht 2011, p. 320; Federal Supreme Court, 1A.218/2000, 6 November 2000, par. 2a; Internationale Rechtshilfe im Steuerrecht, 2011, p. 326; Aepli Michael in: BSK ISRG, Art. 74a N 38.

76 Cassani Ursula, L'extension du système de lutte contre le blanchiment d'argent aux infractions fiscales: Much Ado About (Almost) Nothing, RSDA 2015 78, p. 89 et seq.

77 Swiss Federal Criminal Court, RR.2017.340, 29 March 2018, par. 2.4.3-2.4.4; see also Swiss Federal Criminal Court, 2017 160, 27 December 2017, par. 9.3 et seq.

78 Swiss Federal Criminal Court, RR.2016.266, 30.03.2017, par. 2.2.3 and references.

79 Swiss Federal Criminal Court, RR.2018.210, 30.10.2018. par. 2.3: *"Pas plus qu'il n'y a d'éléments pour retenir que l'état de fait pourrait être constitutif de blanchiment d'argent au sens de l'art. 305bis al. 1bis CP, dès lors que, comme précédemment souligné, il n'est notamment pas possible de déterminer si les impôts potentiellement soustraits par période fiscale se montent à plus de CHF 300'000".*

80 Swiss Federal Criminal Court, RR.2017.340, 29 March 2018, par. 2.4.4: *"In concreto va rilevato come il comportamento definito all'art. 5 D.L. 74/2000 (Nuova disciplina dei reati in materia di imposte sui redditi e sul valore aggiunto) sia unicamente di carattere omissivo, punendo chiunque, al fine di evadere le imposte sui redditi o sul valore aggiunto, non presenta, essendovi obbligato, una delle dichiarazioni annuali relative a dette imposte. Tale norma, trasposta nel diritto svizzero, non equivale dunque né all'art. 186 cpv. 1 LIFD né all'art. 59 cpv. 1 LAID, per cui una violazione dell'art. 5 D.L. 74/2000 non può costituire un reato fiscale qualificato ai sensi dell'art. 305 bis n. 1 e 1bis CP".*

7. Conclusion

82 The introduction of aggravated tax misdemeanours as predicate offences to money laundering initially attracted considerable attention in the legal and financial industries. However, since then, only few cases have been reported to MROS by financial intermediaries and issues pertaining to this new provision have hardly been litigated in court.

83 Important legal questions relating to Art. 305bis(1bis) SCC remain unresolved. The most saliant issue is that of the localization of proceeds amenable to confiscation and therefore subject to money laundering. Whether the FIFO or LIFO approach must be applied will have substantial repercussions on the number of cases that will be prosecuted.

84 Such legal uncertainties have likely deterred Swiss actors – financial intermediaries as well as prosecution authorities – from focusing on Art. 305bis(1bis) SCC.

85 Drawing from our experience, the lack of cases may be because prosecution authorities find it easier to focus on, whenever possible, predicate offences other than aggravated tax misdemeanours such as fraud (including in tax matters), criminal mismanagement or embezzlement. Furthermore, for tax offences presumably committed in Switzerland, prosecutors may prefer to only investigate cases involving tax offences rather than extend the scope of their investigation to possible resulting money laundering activities. These policy decisions are likely based on efficiency and expediency concerns.

86 If the suspected predicate offence occurred abroad, alternative offences – such as ordinary fraud (Art. 146 SCC) or tax fraud in respect of indirect taxes (Art. 14(4) AMLA) – may be preferred as they are easier to evidence, notably because the CHF 300,000 threshold or the use of Qualified documents would not apply. In some cases, foreign authorities requesting MLA from Switzerland may neglect to address these specific requirements in their requests, leading to their dismissal for lack of dual criminality. Foreign authorities may eventually learn through experience to avoid these errors, which could give rise to an increase of MLA matters involving Art. 305bis(1bis) SCC.

87 However, previous experience has shown that legal developments require a certain transition period before becoming relevant in practice (as we have for example seen with the introduction of corporate criminal liability into Swiss law). Moreover, developments in Switzerland are typically prompted by external pressure. An increase in the relevant cases may occur if and when foreign States pressure Swiss authorities into prosecuting local financial intermediaries for money laundering resulting from foreign tax offences.