Saverio Lembo / Aurélie Conrad Hari

Money laundering: Extension of the financial intermediary's liability

In a landmark case, the Swiss Federal Supreme Court recently accepted, for the very first time, that the offence of money laundering could be committed by omission.

This new development extends the scope of the offence of money laundering and increases the financial intermediary's exposure. Hence, a person can be found guilty of money laundering on mere grounds of failure to respect the duties which were incumbent upon him, notably the monitoring and verification measures imposed by the anti-money laundering legislation.

The Swiss Federal Supreme Court recognizes money laundering by omission – main points of the decision 6B_908/2009 of November 3, 2010

In this decision, the Swiss Federal Supreme Court recognized that a financial intermediary could, on the sole basis of his passiveness and independently of any other action, be found guilty of a breach of Art. 305bis of the Swiss Criminal Code ("CP") and therefore, be sentenced for money laundering.

In essence, the Swiss Federal Supreme Court held that the financial intermediaries find themselves in a special legal situation that compels them to carry out specific duties since the entry into force of the Federal Anti-Money Laundering Act ("AMLA"). These legal duties entrust the financial intermediary with a guarantor's position. Hence, a criminal offence can be committed by omission if the financial intermediary fails to comply with his duties within the ambit of the fight against money laundering (Art. 11 CP).

In the case at hand, the manager of a bank's branch, who was accountable for part of the duties resulting from the AMLA with respect to his terms of reference and the bank's internal guidelines, was found guilty for money laundering. According to the Supreme Federal Court, he failed to undertake the necessary measures to clarify the funds' origin, even though there were sufficient indications to question the lawfulness of their origin.

In this case, it was admitted that the perpetrator (i) was aware of the civil service function of the account holder in his State and (ii) had been able to observe the very significant increase of funds deposited on the account, which had more than tripled in a very short laps of time. These elements represented sufficient indications with respect to the AMAL and should thus have lead the perpetrator to undertake the necessary measures to clarify the fund's origin and further to possibly report the case to the relevant authority. The perpetrator was sentenced for having limited himself to insufficient and undocumented information and for not having undertaken other measures following the unsatisfactory answers provided by the holders of the referred accounts. In particular, the perpetrator, though having requested complementary information from the account holder, failed to take the necessary steps following the lack of response.

Finally, the perpetrator was sentenced for not having informed the bank's organ which was competent to file a report with the Money Laundering Reporting Office Switzerland ("MROS"). By acting so, the perpetrator prevented that such report be filed.

The Swiss Federal Supreme Court therefore deemed that the director, by incorrectly carrying out his duties pursuant to the AMAL and the bank's internal guidelines, was to be found guilty of money laundering by omission. Hence, within the framework of the fight against money laundering, the Swiss Federal Supreme Court imposes a guarantor's position on the financial intermediaries[1].

A few points of clarification

This decision certainly extends the scope of Art. 305bis CP. However, some nuances are worth to be brought.

The offence by omission is subject to the condition that the financial intermediary commit a breach of his duties resulting from the anti-money laundering legislation. However, obviously, it requires that the unlawful origin be prior established and be constituent of money laundering as per Art. 305bis CP. The sole breach by the financial intermediary of duties resulting from the AMAL may not be regarded as leading ipso iure to the perpetration of the money laundering offence, be it even by omission.

Furthermore, a sentence for money laundering by omission can only be considered in relation with the breach of specific duties imposed to the financial intermediary in presence of doubts pertaining to the lawful origin of the funds (duty to clarify: Art. 6 para 2 AMAL, to report: art. 9 AMAL or freezing of assets: art. 10 AMAL). Hence, the financial intermediary must have been able to realize, on the basis of the information which was available to him, that there were sufficient indications to suspect that money laundering activities might be committed, following which he must not have carried out the specific duties which were incumbent upon him. In the absence of such indications, a sentence for money laundering by omission should be excluded even though the assets involved might have indeed had an illicit origin. This interpretation follows from the intentional nature of the money laundering offence. Thus, the perpetrator must at least have considered that the occurrence of a money laundering activity be a possibility under a dolus eventualis. This requirement therefore implies that the perpetrator has had access to sufficient indications allowing to consider the possibility of an illicit origin of the funds.

[1] This development follows the trend observed in other jurisdictions, notably in Germany, where the perpetratorities tend to extend the criminal liability of employees with financial establishments in the money laundering field by vesting them a warrantor position (see notably the decision of the german Bundesgerichtshof delivered on July 17, 2009 in the cause 5 StR 394/08).

Aurélie Conrad Hari
Tel. +41 58 261 57 00
E-Mail: aurelie.conrad@baerkarrer.ch

Saverio Lembo
Tel. +41 58 261 57 00
E-Mail: saverio.lembo@baerkarrer.ch