

## Article 305bis: money laundering

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In its current wording, Article 305bis(1) SCC punishes "any person who carries out an act that is aimed at frustrating the identification of the origin, the tracing or the forfeiture of assets which he knows or must assume originate from a felony or aggravated tax misdemeanour". The basic offence carries a custodial sentence of up to three years or a monetary penalty. Paragraph 2 provides for a custodial sentence of up to five years or a monetary penalty in serious cases, together with a monetary penalty of up to 500 daily penalty units. A case is serious where the offender acts as a member of a criminal or terrorist organization, as a member of a group formed to carry on money laundering, or commercially with a large turnover or substantial profit. Paragraph 3 extends the offence to predicate offences committed abroad if they are also punishable where they were committed.<sup>1</sup>

Three features of the original design remain decisive in practice. First, the offence is one of abstract endangerment: the act must be capable of frustrating the authorities' access to the assets, but it need not succeed. Second, the predicate offence must be a felony (*Verbrechen*). Until 2006 this meant an offence punishable with penal servitude (*Zuchthaus*), and since 2007 it means an offence punishable with a custodial sentence of more than three years (Art. 10(2) SCC), so that ordinary misdemeanours are excluded. Third, simple tax evasion was outside the scope because under Swiss law it was not a felony. This third limit was decisive for Lugano. The Italian flight capital that formed the bulk of Ticino's private banking business derived in most cases from tax evasion, which Swiss law treated as an administrative matter. Article 305bis therefore did not reach it. Only with effect from 1 January 2016 did Parliament add the "aggravated tax misdemeanour" under paragraph 1bis, covering qualified tax offences with evaded taxes of more than CHF 300,000 per tax period.<sup>2</sup> Chapter E.II describes how the end of banking secrecy vis-à-vis Italy and this extension of the predicate offences changed the treatment of legacy Italian assets.

## 1 Article 305ter: insufficient diligence

Article 305ter(1) SCC punishes "whoever as part of his profession accepts, holds on deposit, or assists in investing or transferring outside assets and fails to ascertain the identity of the beneficial owner of the assets with the care that is required in the circumstances". The penalty is a custodial sentence of up to one year or a monetary penalty.<sup>3</sup> The provision translated the banks' private due diligence agreement into criminal law and extended it to every person who handles third-party assets professionally. The message states expressly that the notion of the "wirtschaftlich Berechtigten", the beneficial owner, was taken from Article 3 of the banks' due diligence agreement of 1987.<sup>4</sup> A fiduciary in Lugano who opened an account for a Panamanian company without knowing who stood behind it was therefore from August 1990 exposed to criminal liability, whether or not the money turned out to be criminal.

## 2 Notes

1. Art. 305bis SCC, English translation and history notes at <https://www.droit-bilingue.ch/de-en/3/31/311.0-305bis-372.html> (current version; para. 2 revised by the Federal Act of 13 December 2002, in force since 1 January 2007, AS 2006 3459, and by the Federal Act of 25 September 2020, in force since 1 July 2021, AS 2021 360). ↩
2. Art. 305bis(1bis) SCC, inserted by the Federal Act of 12 December 2014, in force since 1 January 2016 (AS 2015 1389), at <https://www.droit-bilingue.ch/de-en/3/31/311.0-305bis-372.html>. ↩
3. Art. 305ter(1) SCC, English text in Federal Banking Commission archive, "Art. 305ter StGB", <https://www.finma.ch/FinmaArchiv/gwg/e/themen/pdf/STGBArt305ter.pdf> (penalty wording as revised by the Federal Act of 13 December 2002, in force since 1 January 2007). ↩
4. Botschaft of 12 June 1989 (as above), 1088 ("Der Begriff des <wirtschaftlich Berechtigten> entstammt der VSB (Art. 3 VSB 1987)"). ↩

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