

Contraband and the modern criminal law

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The modern law draws a sharp line that the old regime did not. Under the Customs Act, the evasion of customs duties and the import, export or transit of goods in breach of prohibitions or restrictions are offences, prosecuted by the Federal Office for Customs and Border Security under the Federal Act on Administrative Criminal Law.¹ Under Art. 14 para. 4 of the Federal Act on Administrative Criminal Law, a person who commits fraud in matters of duties or customs on a commercial basis or in cooperation with third parties, and thereby obtains an advantage of substantial extent, commits a felony. The provision was first aimed at qualified smuggling and was broadened when the legislature implemented the revised recommendations of the Financial Action Task Force, which removed the elements of smuggling and gang membership. As a felony, the offence is a predicate offence to money laundering under Art. 305bis of the Swiss Criminal Code, with the consequence that a bank or fiduciary that handles the proceeds may commit money laundering and must report under the Anti-Money Laundering Act.² Its application to cross-border cases with Italy is discussed in Chapter G.III.

The history described in this section explains why this rule matters in Ticino. A financial centre that grew up on a border with a long tradition of tolerated contraband carries a specific risk: the social acceptance of smuggling, which the old regime shared, can survive in attitudes towards undeclared money long after the law has changed. The Chiasso scandal of 1977, the money laundering cases of the 1980s and the Italian tax amnesties treated in Parts D and E show that this risk was real. The present legal framework treats the proceeds of qualified customs fraud in the same way as the proceeds of any other serious crime.

Common misconception. Smuggling across the Ticino border is often presented as a romantic tradition of poor mountain people. The historical record shows an organized trade with investors, intermediaries, credit and

a division of labour between carriers and organizers, which responded rationally to the price differences created by monopolies, export bans and tariffs. Its modern successor, the smuggling of cash and undeclared assets, is an offence with serious consequences under Art. 14 para. 4 of the Federal Act on Administrative Criminal Law and Art. 305bis SCC.

1 Notes

1. Customs Act of 18 March 2005 (CustA), SR 631.0, <https://www.fedlex.admin.ch/eli/cc/2007/249/de>; Art. 117 ff. (customs offences, <https://www.droit-bilingue.ch/de-fr/6/63/631.0-117-140.html>) and Art. 128 (prosecution and judgment "nach diesem Gesetz und dem VStrR", with the FOCBS as prosecuting and judging authority, <https://www.droit-bilingue.ch/de-fr/6/63/631.0-128-151.html>). The Federal Act on Administrative Criminal Law is that of 22 March 1974, SR 313.0. ↩

2. Federal Act on Administrative Criminal Law of 22 March 1974 (ACLA), SR 313.0, Art. 14 para. 4. On its wording and on the removal of the elements of smuggling and gang membership in the implementation of the revised FATF recommendations: Bürgi Nägeli Rechtsanwälte, LAWINFO, "Neuerung Verwaltungsstrafrecht", <https://law.ch/lawinfo/geldwaescherei-geldwaeschereigesetz/die-revidierten-empfehlungen-der-gafi-fatf-und-das-schweizer-bundesgesetz-zu-deren-umsetzung/betrachtung-der-geaenderten-bundesgesetze/neuerung-verwaltungsstrafrecht/>. On its character as a felony (Art. 10 para. 2 SCC) and predicate offence: Omnilex, materials on Art. 14 ACLA, <https://app.omnilex.ai/de/sources/commentaries/ch-fedlex--313.0-14>. The text of Art. 14 para. 4 ACLA at droit-bilingue.ch, <https://www.droit-bilingue.ch/de-fr/3/31/313.0-14-17.html>, notes that the paragraph was inserted by the Federal Act of 3 October 2008 implementing the revised FATF recommendations (AS 2009 361) and amended by the Federal Act of 12 December 2014 implementing the 2012 revised FATF recommendations, in force since 1 January 2016 (AS 2015 1389). Swiss Criminal Code, SR 311.0, Art. 305bis para. 1 (assets that originate "from a felony or aggravated tax misdemeanour"), at droit-bilingue.ch, <https://www.droit-bilingue.ch/de-en/3/31/311.0-305bis-372.html>; Federal Act of 10 October 1997 on Combating Money Laundering and Terrorist Financing (Anti-Money Laundering Act, AMLA), SR 955.0, Art. 9 para. 1 (duty to report to the Money Laundering Reporting Office Switzerland), at droit-bilingue.ch, <https://www.droit-bilingue.ch/de-en/9/95/955.0-9-15.html>. ↩

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