

Insufficient diligence: Article 305ter SCC

*Dr Alexander Ressos, TEP
Attorney-at-Law (Switzerland), Solicitor (Hong Kong),
Solicitor (England & Wales)*

Article 305ter(1) SCC punishes any person who, as part of his profession, accepts, holds on deposit or assists in investing or transferring assets belonging to others and fails to ascertain the identity of the beneficial owner with the care required by the circumstances. The offence carries a custodial sentence of up to one year or a monetary penalty.¹ In practice it is an auxiliary offence. Prosecutors charge it when they cannot prove the knowledge or the willful blindness required for Article 305bis SCC but can show that a banker or fiduciary accepted a domiciliary company or a nominee without a credible declaration of beneficial ownership. Its main importance lies in the standard it sets: a relationship manager in Lugano who opens an account for a company in a Caribbean jurisdiction must be able to show which natural person stands behind it and why that statement was credible.

1 The criminal organization after the revision of 2021

The revision of Article 260ter SCC in force since 1 July 2021, adopted together with the implementation of the Council of Europe Convention on the Prevention of Terrorism, changed the definition of the criminal organization. The provision now punishes any person who participates in an organization which pursues one of two objectives. The first is committing violent felonies or securing a financial gain by criminal means. The second is committing violent felonies aimed at intimidating the population or coercing a State or an international organization, and any person who supports such an organization in its activities. The penalty is a custodial sentence of up to ten years or a monetary penalty, and at least three years for a person who exercises a decisive influence in the organization. The court may mitigate the sentence if the offender endeavours to prevent the organization's further activities. Swiss jurisdiction extends to acts abroad if the organization carries out or intends

to carry out its criminal activities wholly or partly in Switzerland (Art. 260ter(1)–(5) SCC).²

The text in force no longer requires, as the version of 1994 did, that the organization keep its structure and membership secret.³ The change matters for the prosecution of Italian Mafia groups in Switzerland. The secrecy requirement had made the proof of an organization depend on evidence of its internal rules, which usually came from Italian wiretaps and from the statements of Italian cooperating witnesses (*collaboratori di giustizia*). Since 2021 the focus has shifted to the objective of the organization and to the participation or support of the accused. The higher maximum penalty of ten years, compared with five years under the old law, and the minimum penalty for leaders also bring Swiss law closer to Italian law, although the gap remains wide.

The forfeiture rule of Article 72 SCC completes the provision. The court orders the forfeiture of all assets subject to the power of disposal of a criminal or terrorist organization, and it presumes that the assets of a person who participated in or supported such an organization are subject to that power until the contrary is proven.⁴ For a Ticino bank or fiduciary that holds assets of a person convicted in Italy of Mafiatype association, this presumption is the reason why such assets are typically frozen for long periods once Swiss or Italian proceedings begin.

2 Notes

1. Art. 305ter(1) SCC, <https://www.droit-bilingue.ch/de-en/3/31/311.0-305ter-373.html> (custodial sentence not exceeding one year or a monetary penalty). ↩
2. Art. 260ter SCC, <https://droit-bilingue.ch/en-de/3/31/311.0-260ter-304.html> (as amended by the Federal Decree of 25 September 2020, in force since 1 July 2021). ↩
3. Art. 260ter(1) SCC in the version inserted by the Federal Act of 18 March 1994, in force from 1 August 1994 (AS 1994 1614), English text as reproduced by lawbrary.ch (version 2020.07), <https://lawbrary.ch/law/art/STGB-v2020.07-en-art-260ter> ("an organisation, the structure and personal composition of which is kept secret"; custodial sentence not exceeding five years or a monetary penalty). The current text (above) contains no secrecy element. ↩

4. Art. 72 SCC, <https://www.droit-bilingue.ch/en-de/3/31/311.0-72-97.html> (version in force since 1 July 2021, as amended by Annex No II 2 of the Federal Decree of 25 September 2020). ↩

For general information only. This article does not constitute legal or tax advice, does not replace advice on an individual case and creates no lawyer-client relationship. It reflects the legal position as of September 2026.

Online version: helveticaregister.com/lugano-insufficient-diligence-article-305ter-scc