

Self-regulation alongside the criminal law

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The criminal provisions gave the banks' self-regulation a sharper edge. The due diligence agreement had been renewed in 1987 after its first ten years, and the 1987 version required the bank to obtain a written declaration from the contracting partner whenever the partner was not the beneficial owner or the bank had doubts. The declaration was made on a standard document that became known as Form A.¹ After 1990 a Lugano banker who accepted a Form A that he knew to be false could no longer treat the matter as a breach of a private contract. He risked prosecution under Article 305ter SCC and, where the money was criminal, under Article 305bis SCC. The arbitration board of the agreement continued to impose contractual penalties on banks, while the Federal Banking Commission treated serious breaches as a question of the bank's fitness for its licence.

This combination of private rules, supervisory guidance and criminal law became the typical Swiss pattern. The details of identification were left to the banks' agreement, later revised in 1992, 1998, 2003, 2008, 2016 and 2020. The sanctions for the gravest failures were set by the Criminal Code. Supervisory consequences followed from the Banking Act. Chapter D.III traces the development of the agreement from CDB 77 to CDB 20. For the banks of Lugano the result was a single compliance standard that applied to Italian flight capital and to suspicious money alike. Identification of the beneficial owner now had to be done for every account, whatever the client's motive for banking in Switzerland.

1 The first judgments

The Federal Court soon had to interpret the new offence. In a judgment of 20 January 1993 it held that a man who hid drug money in his flat, first on the balcony and then in the kitchen, committed money laundering because hiding the proceeds was capable of frustrating their confiscation. The court rejected the argument that the offence was limited to sophisticated

financial transactions or to organized crime. It relied on the parliamentary debates, which had shown that Article 305bis was deliberately drafted in open terms and applied to proceeds of all serious offences.² In a judgment of 21 September 1994 concerning a forged telex that instructed the Union Bank of Switzerland to transfer USD 10 million, the court held that attempted money laundering is punishable.³ Later decisions confirmed that the perpetrator of the predicate offence can also be liable for laundering his own proceeds and that a financial intermediary who has a duty to act may commit the offence by omission.⁴ The Federal Court also held that a foreign predicate offence that is not time-barred under the foreign law still gives rise to a Swiss confiscation claim, so that the person who frustrates it commits money laundering in Switzerland.⁵

Essentials. Article 305bis SCC (in force since 1 August 1990) punishes any act capable of frustrating the identification of the origin, the tracing or the forfeiture of assets that the offender knows or must assume derive from a felony, and since 2016 from an aggravated tax misdemeanour. It is an offence against the administration of justice and of abstract endangerment. Article 305ter(1) SCC punishes financial professionals who fail to identify the beneficial owner with the care required by the circumstances, whether or not the assets are criminal. The concept of the beneficial owner came from the banks' due diligence agreement. The design goes back to the report of the former Sottoceneri prosecutor Paolo Bernasconi of 1986.

2 Notes

1. On the agreement's history see Chapter D.III. The Botschaft of 12 June 1989 (as above), 1088, confirms that the notion of the beneficial owner was taken from Art. 3 VSB 1987. ↩
2. BGE 119 IV 59 (as above). ↩
3. BGE 120 IV 323 (as above). ↩
4. Marc Thommen, Strafrecht BT I: Rechtspflegedelikte, Art. 305bis StGB, lecture slides, University of Zurich, 17 December 2024, [https://ius.uzh.ch/dam/jcr:ef6382cc-75ab-47c3-8b5f-ca7aef88d64a/19_Rechtspflegedelikte_%20305bis%20\(17.%20Dezember%202024\).pdf](https://ius.uzh.ch/dam/jcr:ef6382cc-75ab-47c3-8b5f-ca7aef88d64a/19_Rechtspflegedelikte_%20305bis%20(17.%20Dezember%202024).pdf) (BGE 144 IV 172 on self-laundering; BGE 136 IV 188 on omission by financial intermediaries; BGE 129 IV 322 on the protected interest). ↩

5. Federal Court, judgment of 29 November 2000, BGE 126 IV 255,
<https://servat.unibe.ch/dfr/bge/c4126255.html>. ↩

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