

The right to report: Article 305ter(2) SCC

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The same Act added a second paragraph to Article 305ter SCC. It provides that the persons covered by paragraph 1 "are entitled to report to the internal law enforcement authorities or the federal authorities designated by law any observations that indicate that assets originate from a felony". The provision entered into force on 1 August 1994.¹ It solved a dilemma that bankers in Lugano had faced since 1990. A bank employee who suspected that a client's money was criminal and informed the prosecutor risked prosecution for breach of banking secrecy under Article 47 BankA. If he did nothing and the suspicion proved correct, he risked prosecution for money laundering. The right to report removed the first risk. The Federal Office of Police describes it as the first legal mechanism that allowed financial intermediaries to report suspected money laundering without incurring liability, four years before the Anti- Money Laundering Act.² In the National Council a minority from the left proposed to replace the right with a duty to report, but the chamber rejected the proposal. In the Council of States a minority proposal for an immunity regime for cooperating witnesses also failed.³

1 Confiscation revised

The third element of the package was a complete revision of the law of confiscation, then contained in Articles 58 and following of the Criminal Code.⁴ The revision allowed the forfeiture of assets acquired through an offence regardless of whether a person could be convicted, provided for compensation claims where the assets themselves were no longer available, and introduced a special rule for criminal organizations: the court was to forfeit all assets subject to the power of disposal of a criminal organization, with a presumption that the assets of a person who participated in or supported the organization were subject to that power until the contrary was proven. These rules are today found, with later amendments, in Articles 70 to 72 SCC, which are treated in the last section of this chapter.⁵

In figures. The legislative response, 1989–1998: - 12 June 1989: Federal Council message on money laundering (BBl 1989 II 1061),⁶ - 23 March 1990: adoption of Articles 305bis and 305ter SCC, in force 1 August 1990,⁷ - 30 June 1993: Federal Council message on criminal organizations (BBl 1993 III 277),⁸ - 18 March 1994: final votes of 43 to 0 and 167 to 0 for Article 260ter, the right to report and the new confiscation law, in force 1 August 1994,⁹ - 10 October 1997: adoption of the Anti-Money Laundering Act, in force 1 April 1998.¹⁰

2 The first great test in Bellinzona

The offence of criminal organization proved difficult to apply. Prosecutors had to prove the existence of a secret, structured organization and the accused person's participation in or support of it, which often depended on evidence gathered in Italy. The difficulty became visible in what was described in 2009 as the largest organized crime case ever tried in Switzerland. A court in Bellinzona tried nine defendants accused of laundering for the Camorra and the Sacra Corona Unita the proceeds of cigarette smuggling, with more than USD 1 billion allegedly moved through Swiss banks between 1994 and 2001. Only two Italian defendants were convicted of supporting or participating in a criminal organization. Seven defendants were acquitted, among them the Swiss financier Franco Della Torre.¹¹ Chapter G.III and Chapter J.II describe the later case law of the Federal Criminal Court, which since 2004 has heard such cases in Bellinzona.

3 Notes

1. Art. 305ter(2) SCC, Federal Act of 18 March 1994, in force since 1 August 1994, Federal Banking Commission archive (as above). ↩
2. Federal Office of Police, "Art. 305ter para. 2 SCC", https://www.bj.admin.ch/fedpol/en/home/kriminalitaet/geldwaescherei/meldung/meldeformular/art_305_stgb.html. ↩
3. Business 93.058 (as above). ↩
4. Business 93.058 (as above) ("Art. 58ff.": comprehensive revision of the law of forfeiture). ↩
5. For the current provisions see Art. 70, 71 and 72 SCC at <https://www.droit-bilingue.ch/en-de/3/31/311.0-70-95.html>, <https://www.droit-bilingue.ch/en-de/3/31/311.0-71-96.html> and <https://www.droit-bilingue.ch/en-de/3/31/311.0-72-97.html>. ↩
6. Botschaft of 12 June 1989 (as above). ↩

7. Business 89.043 (as above); Art. 305bis SCC, history note (as above).
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8. Business 93.058 (as above); Art. 260ter SCC, history note (as above).
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9. Business 93.058 (as above); Art. 305ter SCC, history note (as above).
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10. Federal Finance Administration, Geldwäscherei (as above). ↩
11. "Top Swiss organized crime case ends with only two convicted",
Center for Public Integrity, 16 July 2009,
<https://publicintegrity.org/health/top-swiss-organized-crime-case-ends-only-two-convicted/>. ↩

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