THE NEW SWISS ANTI-MONEY LAUNDERING REFORM IN THE INTERNATIONAL FRAMEWORK: A CRITICAL ASSESSMENT

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LIST OF ABBREVIATION

CDB Convention relative à l'obligation de Diligence des Banques

CFB Commission fédérale des banques

DNFBP Designated Non-Financial Business and Professions

FATF Financial Action Task Force

FINMA Autorité fédérale de surveillance des marchés financiers

MROS Bureau de communication en matière de blanchiment d'argent

OECD Organisation for economic cooperation and development

UN United nations

UNODOC United Nation Office for Drugs and Crime

ABSTRACT

Despite its small dimension, Switzerland plays a primary role in the global capital flow, and where there are developed financial markets, there are chances for the criminal economy, financial crimes, tax evasion, money laundering, and terrorism financing as concrete threats to the legal economy.

In this framework, the development of advanced anti-money laundering policies able to counter the development of a criminal submerged economy plays a central role.

However, the single national dimension is insufficient to face the threat of financial crime that moves across borders. In order to strengthen the fight against these criminal activities, international organisations like the OECD or the UN have moved their attention to this issue and developed binding instruments to face the issue. For the same reason, in the year 1989 the G7 launched an initiative to create an intergovernmental organisation aimed exclusively at countering money laundering through soft law, the FATF/GAFI. All those international institutions aim to coordinate the national anti-money laundering policies and set standards addressing generic and specific recommendations and facilitating treaties between those countries.

Switzerland approved its current Anti-Money Laundering Act in the year 1997. Since then, the legislation has passed through several reforms that have shaped it differently, the last one has been approved in the year 2021 and entered into force on the 1st of January 2023.

This research aims to investigate this last reform, the reason and needs that have been brought to it, and whether and to what extent it is compliant with the recommendation of international organisations.

In order to successfully reply to those questions, the research should start with a general overview of the international standards concerning anti-money laundering, and a general overview and analysis of the current anti-money laundering legislative framework in Switzerland, the criminal aspects, the duty of the operators, and the vigilance system.

In the second place, this work will try to go deeper into some issues that the more recent reform of the anti-money laundering act reform have tried to face.

The research will focus in particular on some specific issues of the new reform: the scope of the Anti-money Laundering Act, the due diligence obligations, and the reporting system.

INTRODUCTION

The illegal economy has always existed alongside the legal one, but distinguishing legal activities from illegal ones – such as drug dealing, or human trafficking – is relatively easy, at least from a theoretical point of view, distinguishing capitals coming from illegal activities from capital coming from a legitimate business is not as simple.

Illegal profits are in most of the legislation subject to confiscation, and therefore those involved in criminal business have the necessity to "launder" their profits, in order to make them seem clean and able to circulate in the legal economy. In order to counter this process, states have implemented more and more stringent anti-money laundering policies, including 'know your customer' and due diligence obligations for financial institutions, insurance companies, investment funds, and in general for all those businesses considered more at risk to be involved in money laundering schemes. The steps taken also included specific criminal provisions punishing those involved in the process of money laundering, aiming especially at dissuading those operating in the legal business, with a reputation to defend such as bankers or insurers.[1]

On their side, criminals have developed several schemes to counter the anti-money laundering policies put in place by the governments involving, for example, through

[1] Killian J McCarthy, who runs the laundry in Killian J McCarthy and others, *The Money Laundering Market. Regulating the Criminal Economy* (Agenda Publishing 2018), P.38-42.

the use of cash, derivatives, false custom declaration, insurances[2], gambling,[3] and cryptocurrencies.[4]

In addition, the fact that nowadays capital moves globally makes it easier for criminals to hide the origin of the money, and more difficult for governments to keep illegal money out of the economy. On a global scale, the money laundering process creates a phenomenon of global redistribution, developing countries are usually the ones to pay the higher price for criminal activities in terms of exploitation of their resources from the legal economy[5]. Those resources pass through small states that, due to the reduced dimension of their capital market and their legal economy, have few incentives to keep a high level of vigilance on their financial system. At the same time, they have all the interest to attract money from abroad, independently from their origin, to land as clean money in developed countries where they can be cleanly invested.

In this scenario, the small countries of transit have small to no incentives to develop stricter anti-money laundering policies, and to cooperate with other countries in countering the flow of illegal money. Such countries have all the interest to cover the

[2] Peter J Quirk, 'Money Laundering: Muddying the Macroeconomy' [1997] International Monetary fund P. 8 box 2.

[3] Svenja Berg and Kyllian J McCarthny, introduction to money laundering challenges in Killian J McCarthy and others, *The Money Laundering Market. Regulating the Criminal Economy* (Agenda Publishing 2018), P.18.
Pim Verschuuren, money laundering, sports betting and gambling in Killian J McCarthy and others, *The Money Laundering Market. Regulating the Criminal Economy* (Agenda Publishing 2018), P.131-135.
Banks James, online gambling and crime, a secure bet?, the ETHICOMP Journal (2012). https://shura.shu.ac.uk/6903/1/Banks_online_gambling.pdf last accessed 15/06/2023
FATF, the vulnerability of casino and gaming sector, (FATF 2009) https://www.fatf-gafi.org/content/dam/fatf-gafi/reports/Vulnerabilities%20of%20Casinos%20and%20Gaming%20Sector.pdf.coredownload.pdf last access 15/06/2023

[4] Svenja Berg, Kyllian J McCarthny, introduction to money laundering challenges in Killian J. McCarthy and others, *The Money Laundering Market. Regulating the Criminal Economy* (Agenda Publishing 2018), P.19.
Dantn Bryans, Franske Jesse Anema, mining for an effective solution in Killian J McCarthy and others, *The Money Laundering Market. Regulating the Criminal Economy* (Agenda Publishing 2018), P.139-163.
Leannart Ante, Cryptocurrency, Blockchain and crime in Killian J McCarthy and others, *The Money Laundering Market. Regulating the Criminal Economy* (Agenda Publishing 2018), P.171-191.
FATF, Virtual Currencies: Key Definitions and Potential AML/CFT Risks (FATF 2014). https://www.fatf-gafi.org/content/dam/fatf-gafi/reports/Virtual-currency-key-definitions-and-potential-aml-cft-risks.pdf.coredownload.pdf last accessed 15/06/2023.

[5] Killian J McCarthy, who runs the laundry in Killian J McCarthy and Others, *The Money Laundering Market. Regulating the Criminal Economy* (Agenda Publishing 2018), P.43-46.

origin of money behind a system of bank secrecy, those are called non cooperative jurisdictions.[6]

The phenomenon of money laundering has always been juxtaposed with the one of terrorism financing as far as policies are concerned. Terrorism financing involves the flow of money as well between legal and illegal economy. However, in this case, the direction is the opposite. In fact, while the aim of money laundering is the entry of illegal money into the legal economy, the goal of terrorism financing is to divert money from the legal economy to illegal activities. This difference explains the reason why policies drawn in this field must devote attention to both sides of the transaction: the giver and the receiver.

Another relevant difference between the two cases is that while usually, criminals involved in money laundering are rational, aiming at maximising their profit, those involved in terrorist activities follow are more ideologic approach.[7] Therefore a measure that can disincentivise a financial intermediary, usually considered the weak links in the money-laundering chain,[8] may not have the same effect on actors involved in terrorism financing.[9]

The transnational nature of money flow at the global level made it clear that in order to fight effectively the activities of money laundering it was necessary to act at the international level. Both the UN and the OECD have moved themselves to counter this phenomenon through binding instruments (see Chapter 1.1). In addition to the hard

[6] Killian J McCarthy, who runs the laundry in Killian J McCarthy and Others, *The Money Laundering Market. Regulating the Criminal Economy* (Agenda Publishing 2018), P.43-52.
[7] Killian J McCarthy, who runs the laundry in Killian J McCarthy and others, *The Money Laundering Market. Regulating the Criminal Economy* (Agenda Publishing 2018), P.35.
[8] Killian J McCarthy, who runs the laundry in Killian J McCarthy and others, *The Money Laundering Market. Regulating the Criminal Economy* (Agenda Publishing 2018), P.38-42.
[9] Killian J McCarthy, who runs the laundry in Killian J McCarthy and others, *The Money Laundering Market. Regulating the Criminal Economy* (Agenda Publishing 2018), P.35.

law set up through the classical methods, in the year 1989 under the initiative of the G7 39 states created a new organisation, the FATF[10] with the aim to settle standards in the field of money laundering and anti-terrorism financing (see chapter 2.2).

The fight against money laundering involved also Switzerland. In fact, despite its dimensions, the small landlocked alpine country plays an important role in the global financial markets,[11] and it has been a founding member of the FATF, even before its entry into the UN security council, and in the first line in the fight against washing illicit money.

The evolution of Swiss legislation and its process of compliance with international norms will be the object of the analysis of the following pages. A few pages of analysis will not be able to cover the several issues of Swiss anti-money laundering policies. The research will therefore focus only on money laundering, leaving on the background the terrorism financing. And attention will be paid to the specific aspects peculiar of Swiss legislation, like the right and obligation to report, or the self-regulatory organisation. Only a brief introduction will be given on the historical evolution and other obligations. The reader will be nonetheless able to gather further information on those issues by going through the bibliography.

[10] FATF (FATF) https://www.fatf-gafi.org/en/home.html last accessed 15/06/2023.
[11] Capital flows (Trading Economics) https://tradingeconomics.com/country-list/capital-flows last accessed 15/06/2023.
Switzerland capital flow (Trading Economics) https://tradingeconomics.com/switzerland/capital-flows last accessed 15/06/2023.

CHAPTER 1: THE INTERNATIONAL MONEY LAUNDERING FRAMEWORK

1.1 UN and OECD conventions

At the international level issues concerning money laundering are not object of a single binding legal instrument.[12] However, in the last three decades, the attention on the problem has increased, and money laundering related provisions have been incorporated in different treaties and political declarations at the level of the United Nations (UN).

The first convention to tackle the problem of money laundering was the 1988 Vienna Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.[13] This instrument included for the first time in the international context revolutionary provisions such as the criminalisation of money laundering acts (art. 3 par. 1 lett. b I and II), the possibility to investigate, freeze and seize assets laundered (art. 5 par. 4 lett. b), without possibility to oppose bank secrecy (art. 5 par. 4 lett. c) extradition (art. 6) and mutual legal cooperation (art. 7).[14] However, despite its precursor role, this convention has two big limitations. In the first place, it failed to set any standard in terms of due diligence operation, vigilance, and reporting, limiting its text to create obligations for the signatory states to create adequate policies without telling how they should do it. In the second place, its scope is limited to only drug trafficking and could not be extended to other criminal activities.

[12] UNDOC, Estimating illicit financial flows resulting from drug trafficking and other transnational organized crim – research report" (UNODOC, new York 2011) P. 121 https://www.unodc.org/documents/data-and-analysis/Studies/Illicit_financial_flows_2011_web.pdf last accessed 11/06/2023

[13] Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (UNODOC 1988) https://www.unodc.org/pdf/convention_1988_en.pdf last accessed 13/06/2023.

[14] UNODOC 2011, Estimating illicit financial flows resulting from drug trafficking and other transnational organized crime – research report" (UNODOC, 1988) 2011 p.122

Following the Vienna Convention, and in order to further cooperate with the UN in the fight against drug trafficking, the G7 countries reunited in Paris in 1989 decided to launch an initiative to create an intergovernmental soft law body that could settle global standards for money laundering and evaluate countries policies in this regard. This was the beginning of the FATF (see Chapter 1.2).

Later, in the year 1998, the UN assembly passed a resolution S-20/4 D on Countering Money Laundering.[15] This resolution, contrary to the Vienna Convention, was applicable not only to drug crimes, but also to "other serious crimes".[16]

The document set principles and standards under which the Vienna Convention should be applied. In particular, it required establishing an effective financial and regulatory regime (art. 2) including: implementing know-your-customer policies, keeping bank records, implementing a reporting system, and avoiding the misuse of bank secrecy to cover illicit activities.

Another important feature of this document is that it referred in its preamble to the FATF recommendations as benchmarking standards, and despite the resolution not being binding, it recognised FATF standards as international standards.[17]

The UN Convention on Transnational Organised Crime,[18] signed in the year 2000, brought the same obligations of criminalising money laundering (art. 6) and creating a regulatory and supervisory environment (art. 7) to serious crime (maximum punishment of at least 4 years), crime committed in organized groups, and obstruction

[15] UN Assembly, Resolution s-20 4 D art. 2 a (UN, 1998) https://www.imolin.org/imolin/ungadec.html last accessed 13/06/2023.
[16] Ibid. art. 1
[17] UNODOC 2011, Estimating illicit financial flows resulting from drug trafficking and other transnational organized crime – research report" (UNODOC, New York) 2011 p. 124
[18] Convention against Transnational Organised crime (UNODOC 2000). https://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf Last accessed 16/06/2023.

of justice. However, according to the text of the convention, in order to be prosecutable, the predicate offense has to be prosecutable in both of the countries involved.[19]

The 2003 UN Convention Against Corruption[20] was the first international legal instrument to not refer to money laundering issues with regard to a specific category of crime. In fact, despite the fact that the focus of the convention is on transnational corruption crime, in the specific articles addressed to money laundering issues (art. 14, 52, and 54) no limitation of scope is made.[21]

Differently from its predecessors, this convention does not provide any obligation to criminalising money laundering. However, it goes into further details when describing the regulatory framework that signatories parties should implement laying down some specific obligations of due diligence and know your customer that must be followed. For example verification of beneficial owners, enhanced scrutiny on Politically Exposed Persons (art. 52 par. 1) putting in place a system of effective financial disclosure (art. 52 art. 4).

The greater innovation of these last two conventions is that for the first time in a binding instrument there was a reference to "the relevant initiatives of regional and multilateral organisation against money laundering" as guidelines to follow in implementing national policies (art. 7 par. 3 convention against transnational organised crime, art. 14 par. 3 of the convention against corruption). For the first time, FATF standards were incorporated into a binding instrument.[22]

[19] Ibid. p.124
[20] Convention against corruption (UNODOC 2003). https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf last accessed 16/06/2023.
[21] Ibid. p.125
[22] Ibid. p. 125

The OECD on its side has only one convention covering money laundering related issues,[23] the convention on combating bribery of foreign public officials in international business transactions, this convention is even less effective than the UN ones because it demands for the criminalisation of money laundering in case of transnational bribery only when an offense is considered a predicate offence in the home jurisdiction (art. 3)

The OECD released also in the year 2017 the ten global principles to fight tax crimes[24] and a guideline to counter fiscal crimes. The 7th of these principles requires making tax crimes a predicate offense for the purpose of money laundering. The issue of money laundering related to tax crimes was not faced in any of the UN documents.

The international framework of the international organisation as described above seems to be inadequate to settle global standards. Especially as the disposition that can be related to money laundering are dispersed in different documents laying slightly different kinds of obligations, furthermore in some conventions the scope of the dispositions is confined to a specific type of crime. As a consequence, not all criminal activities are covered by the current treaties. It is, for example, the case of fiscal infractions.[25]

The difficulty to reach a comprehensive international treaty on money laundering is in my opinion one of the reasons that led to the creation of FATF, an intergovernmental organisation has much more space of action and flexibility than an international

[23] Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD 1997) https://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf last accessed 16/06/2023.
[24] OECD 2017 fighting tax crimes: the ten global principles (Paris 2017) https://www.oecd-ilibrary.org/docserver/63530cd2-en.pdf?expires=1686506612&id=id&accname=guest&checksum=B60BD9AFE7EFED0BC0DCC6CB7E63211A last access 11/06/2023
[25] UNODOC 2011, Estimating illicit financial flows resulting from drug trafficking and other transnational organized crime – research report" (UNODOC, New York) 201, P. 124

convention. However, I think that also the opposite is true, the existence of FATF and the efficacy of its action made the development of a single detailed convention on money laundering unnecessary.

2.2 The FATF

In the year 1989 at the G7 summit held in Paris, the leader of the G7 countries called for the creation of an action force with the aim of countering the rising problem of money laundering, especially in the framework of the international efforts against the trade of psychotropic substances, that had led the year before to the Vienna convention.[26] At the moment the FATF counts 31 member states plus Russia that has been suspended. Switzerland has been a member state since the foundation of the task force in the year 1989.

FATF is not a classical international organisation, it has not been an open organization until the year 2019 when the ministers of the member countries agreed to pass from the previous fixed term mandates to an open-ended mandate.[27] It has no charter or binding authorities, it can establish only best practice recommendations and guidelines and monitor the member's compliance.[28]

The activity of FATF moves around 40 recommendations that were formulated already in the year 1990.[29] In their original version, the 40 recommendations were still strictly linked to drug trafficking, but their wording was open to a generalized criminalization

[26] G7, Paris Summit,,Economic Declaration (G7 1989) n 53 http://www.g8.utoronto.ca/summit/1989paris/communique/index.html#drugs last accessed 11/06/2023
[27] History of the FATF, (FATF) https://www.fatf-gafi.org/en/the-fatf/history-of-the-fatf.html last access 11/06/2023
[28] Julia C. Morse, the bankers blacklist, unofficial market enforcement and the global fight against illicit financing (1st ed, Cornell University press, 2021), p. 56
[29] FATF, The forty recommendations of the Financial Action Task Force on money laundering (FATF 1990) https://www.fatf-gafi.org/content/dam/fatf/documents/recommendations/pdfs/FATF%20Recommendations%201990.pdf last access 11/06/2023

of money laundering.[30] However, they represented a revolution because for the first-time clear standards of anti-money laundering policies, including aspects of due diligence for the banking and non-banking sector, criminal norms, and international cooperation, have been settled.

The recommendations were later amended in the year 1996 after a shift in the priority of the task force that did recognize that focusing only on drug trafficking crimes was not enough and that the fight against money laundering should have covered other criminal activities.[31]

In the year 2001, in the aftermath of the 9/11 terroristic attack, the scope of the task force was broadened to fight terrorism financing, and nine new special recommendations concerning specifically those issues were added[32]. The 40 original recommendations passed through other two amendments, in years 2003 and 2012 in order to "address new and emerging threats, clarify and strengthen many of the existing obligations, while maintaining the necessary stability and rigor in the Recommendations."[33]

The FATF has developed four mechanisms to drive countries to comply with its standards. Some of them addressed also non-member countries: self-assessment of the members through questionnaires, process of mutual evaluation carried on by experts from at least two countries different from the one that gets examined, cross-

[30] FATF The forty recommendations of the Financial Action Task Force on money laundering 1990 (FATF 1990) n. 4-5.
[31] FATF, FATF annual report 1995/96 (FATF 1996) P.6
[32] FATF, IX special recommendations (FATF 2010) https://www.fatf-gafi.org/content/dam/fatf-gafi/recommendations/FATF%20Standards%20-%20IX%20Special%20Recommendations%20and%20IN%20rc.pdf.coredownload.pdf Last access 11/06/2023
[33]FATF, International standards on combating money laundering and the financing of terrorism & proliferation, The FATF recommendations (FATF 2023) https://www.fatf-gafi.org/content/dam/fatf-gafi/recommendations/FATF%20Recommendations%202012.pdf.coredownload.inline.pdf (last access 11/06/2010

country reviews, and shaming and blaming through listing.[34] The first two methods were developed during the first years of the FATF activity as a way to evaluate the compliance of the FATF members and are used to assess it ever since.[35]

The mutual evaluation process is assessed on two levels. The first one is effectiveness, it evaluates the capacity of the legal framework to protect the system from abuse.[36] It is divided into 11 key areas: that are rated with 4 different grades: High level of effectiveness, meaning that no or minor improvements are needed, substantial level of effectiveness, meaning that moderate improvements are needed, moderate level of effectiveness, meaning that major improvements are needed, low level of effectiveness, meaning that fundamental improvements are needed.[37]

The other level assessed is technical compliance, it evaluates whether and to which extent the country is compliant with the 40 recommendations.[38] Each is assessed through 5 different grades: compliant, Largely compliant, meaning that there are minor shortcomings, largely compliant, meaning that there are moderate shortcomings, non-compliant, meaning that there are major shortcomings, not applicable, meaning that a requirement does not apply to that specific country.[39]

The more controversial of the above-mentioned systems has been the listing one since it affects also non-member countries. This system is based on recommendation No. 19 requiring FATF members institutions to apply enhanced due diligence in

[34] IAN Roberge, FATF, in Thomas Hale, David Held, The Handbook of Transnational Governance: institution and Innovation (1st ed. Polity press 2011) P.46-47
[35] FATF, FATF annual report report 90/91 (FATF 1996) p. 6-8
[36] FATF, methodology for assessing technical compliance with the FATF recommendation and the effectiveness of AML/ CFT system, (Paris, 2012) P. 15-23 https://www.fatf-gafi.org/content/dam/fatf-gafi/publications/FATF%20Methodology%2022%20Feb%202013.pdf.coredownload.pdf Last accessed 15/06/2023
[37] Ibid.,p. 21
[38] Ibid. P. 23-96
[39] Ibid P.12-13

relationships with natural and legal person from the so-called high-risk countries. Enhanced due diligence means cost increase, and since FATF members are the most developed world economies, it constitutes a strong incentive to comply, even for non-FATF members.[40]

The system as it was designed in the beginning through the Non-cooperative countries and territory list raised, problems of legitimacy and transparency and was highly criticized for having had a big impact on countries that have never given FATF any mandate.[41] In order to address this public concern the FATF adopted a new procedure of listing, the International Cooperation Review Group, This new system was considered fairer toward listed countries because it laid down more precise technocratic standards for the listing, and favoured their participation in the process through regional bodies affiliated to the FATF.[42]

At the moment, the FATF "publish two statements at the end of each plenary meeting, in February, June, and October providing statement on the current state of work and process of compliance of the involved countries. The two lists reflect the level of risk identified: Jurisdictions under Increased Monitoring, countries that, despite their deficiencies with anti-money laundering policies, are cooperating and working closely with the FATF in order to solve them, the so-called grey list, and High-Risk Jurisdictions subject to a Call for Action, countries with high deficiencies in their anti-money laundering Policies against whom FATF requires to its members to put in place

[40] Julia C. Morse, the bankers blacklist, unofficial market enforcement and the global fight against illicit financing (1st ed, Cornell University press, 2021), p. 52-86
[41] Hüssle Raines, Even clubs can't do without legitimacy: why the anti-money laundering was suspended, regulation and governance volume 2 n. 4, (2008) P 625-642.
Tsingou Eleni "global financial governance and the developing anti-money laundering regime: what lesson for international political evonomy? International politics volume 47 n. 6 (2008), P. 617-637.
[42] FATF, FATF annual report 2008/09 (FATF 1996) p. 17

enhanced due diligence and, in the worst cases, to apply specific countermeasures, the so-called black list.[43]

[43] High-risk and other monitored jurisdictions (FATF) https://www.fatf-gafi.org/en/publications/High-risk-and-other-monitored-jurisdictions/More-on-high-risk-and-non-cooperative-jurisdictions.html last access 11/06/2023

CHAPTER 2: THE SWISS ANTI-MONEY LAUNDERING LEGAL FRAMEWORK

2.1 Historic evolution of the Anti-money laundering policies in Switzerland

The attention on issues concerning money laundering in Switzerland right after the scandal of Chiasso, where the subsidiaries of Credit Suisse based in the city of Chiasso registered big losses, after further investigation it came out that the subsidiary of the bank was laundering millions of money of illicit origin coming from Italy.[44] In the aftermath of those events, in the year 1977, the Swiss national banks and the Association of Swiss Bankers formulated the text of the "Agreement on the Swiss Banks" (CDB) code of conduct with regard to the exercise of due diligence. That agreement still survives nowadays as a set of self-given rules. The CDB established the first obligation in terms of identification of the contractual counterpart, and beneficial owner, and provided sanctions up to 10 million CHF for failure to do that.[45]

The convention was later renewed in the year 1982, and again in the year 1987. An important goal pursued by the CDB was to avoid abuses of professional secrecy as a way to cover illicit activities. In order to assess this, the convention provided a form where professionals covered by professional secrecy declared to know the client and guaranteed the legality of the operation, the so-called form B.[46]

However, the self-regulatory efforts made by the banks' associations were far from being enough, given that back then Switzerland had no provision to effectively counter acts of money laundering, and this was made particularly evident with the cases of the

[44] Mariani Giulia buts effects et limites des recommandations du GAFI, avec un regard sur le droit Suisse et compare de la lute contre le blanchiment d'argent, (1st ed, Helbing Lichtenhah 2021) P. 139-141.
[45] Ibid. P. 217.
[46] CDB 1982, art. 5 par.2

Lebanon[47] and pizza connection.[48] On these occasions, the Swiss authorities faced several difficulties to cooperate with their American and Italian counterparts. Switzerland in that period got the fame as "an underregulated offshore center"[49], this situation started a process that will lead in the year 1989 to the approval of the first criminal norms punishing acts of money laundering (see chapter 2.2).

A few years later in the year 1991 the Federal Banking Commission emanated the so-called circular 91/1 that Broadened the scope of the system of the declaration through form B that has revealed itself to be insufficient.[50] This circular followed a case law of the Federal Tribunal that limited the professional secrecy of attorneys and notaries only to that activity strictly correlated with the traditional activities of their professions, excluding those tasks of the said profession such as asset management or investment funds.[51] The form B was later definitely abandoned with the CBD 1992. However, the sunset of the attorney business as a way to deposit illicit funds in banks was the dawn of the use of offshore companies for the same purpose.[52]

In the same year the Federal Banking Commission (CFB), in charge of the vigilance of the banking sector, released circular 91/3 that stated the obligation to train the manpower on the issue of money laundering, giving internal instructions, and creating

[47] Mariani Giulia buts effects et limites des recommandations du GAFI, avec un regard sur le droit Suisse et compare de la lute contre le blanchiment d'argent, (1st ed, Helbing Lichtenhah 2021) P. 144-146.
[48] Ibid. P. 142-143.
[49] Mark Pieth, Zur Einführung: Geldwäscherei und ihre Bekämpfung in der Schweiz, in Mark Pieth, Bekämpfung der Geldwäscherei: Modellfall Schweiz? Mit Beiträgen (1st ed, Helbing Lichtenhah 1992), P. 26
[50] Mark Pieth, die Praxis der Geldwascherei, in Trechsel Stephan, Geldwascherei, Prävention und Massnamen zur Bekämpfung (1st ed, Schultness 1997) P. 16-17.
[51] Arrêt du Tribunal Federal 112 Ib 168
[52] Supra 47

an internal service for Anti-money-laundering purposes.[53] The regulation incorporated the state of art of the international framework at the time.[54]

The FATF evaluated positively the reform that took place in this period, however, recommended further regulation for the non-financial sector. [55]After this first circle of evaluation, the Swiss legislator focused on improving the criminal norms in order to better prosecute organised crime (see Chapter 2.2).

The year 1994 signed a turning point. In the December of this year, the Federal Council (the Swiss government) published the project of the Anti-money laundering legislation, whose aim was to submit all the financial intermediaries to due diligence obligations provided by the CBD 1992 in force at the time.[56] The law was approved in October 1997 and entered into force the April of the following year.

On its side, the FATF commented this last group of measures positively, but it expressed criticism on the restrictive interpretation given to the obligation to report (see Chapter 2.3) and the absence of a criminal procedure at the federal level.[57]

In particular, the latter issue was solved in the year 2002 by an enlargement of the competence of the Federal level for what it concerns organised and economic crime. This led to an enlargement of the federal jurisdiction in those areas for international and intercantonal crimes, and to the creation two years later of a federal criminal court,

[53] Mariani Giulia buts effects et limites des recommandations du GAFI, avec un regard sur le droit Suisse et compare de la Lutte contre le blanchiment d'argent, (1st ed, Helbing Lichtenhah 2021) P. 217
[54]In particular the circular was consistent with the Basel committee recommendation of 12 December 1988, the GAFI recommendations of / August 1990, and was aligned to the requirement of the directive 91/208 CEE, even without any obligation to follow it.
[55] FATF, FATF annual report 1992/93 (FATF 1993) p. 14
[56] Mariani Giulia buts effects et limites des recommandations du GAFI, avec un regard sur le droit Suisse et compare de la lutte contre le blanchiment d'argent, (1st ed, Helbing Lichtenhah 2021) P. 245
[57] FATF, FATF annual report 1997/98 (Paris 1996)

and a federal court of appeal.[58] In the same period, a new norm about the criminal liability of enterprises has been promulgated (see Chapter 2.2) as well.

In the third cycle of evaluation that began in the year 2005, the FATF was more critical toward Switzerland. The critics concerned: the lack of enhanced due diligence in the relationship with banks considered at high risk by the FATF and of legislation that would prevent the physical transfer of bearer securities across borders. Lack of due diligence obligations in the non-banking sector and guarantees that would sanction those intermediaries who breach their duty to report suspect operations were also identified problems. The inadequacy of sanctions, as well as the lack of a regulation assuring the independence of self-regulatory organisations, were on the list. [59]

The Federal Council on its side, following the FATF instructions, proceeded to propose the creation of new criminal norms in order to make them exploitable for money laundering purposes.[60] However, for a ban on bearer securities, one would have to wait until the year 2019.

In the same period, a revision of the Anti-money Laundering Act extended the scope of terrorism financing, and that now provided broader obligations of due diligence and reporting for the professionals in the financial sector (see Chapter 2.3).[61] The Other issues did not require a legislative intervention and were successfully addressed by administrative rules.[62]

[58] Moritz Oehen, Umberto Pajarola, Marc Thommen Kriminelle, Organisation: Art. 260ter StGB, in Jürg-Beat Ackermannn, Kommentar Kriminelles Vermögen, kriminelle Organisationen: Einziehung, Kriminelle Organisation, Finanzierung des Terrorismus, Geldwäscherei vol 2 (1st ed. 2018), n 99, 100, 101, 112.
[59] Mariani Giulia buts effects et limites des recommandations du GAFI, avec un regard sur le droit Suisse et compare de la lute contre le blanchiment d'argent, (1st ed, Helbing Lichtenhah 2021) P. 264-268
[60] Federal Council, Feuille federale 2007 5919, (Federal Council, 2007) p 5926-5936
[61] Mariani Giulia buts effects et limites des recommandations du GAFI, avec un regard sur le droit Suisse et compare de la lute contre le blanchiment d'argent, (1st ed, Helbing Lichtenhah 2021) P. 273-280
[62] Ibid. P. 270-273

In the Year 2007, the Federal Councill created the FINMA, a new authority in charge of supervision of the financial markets. FINMA took the place of the CFB and extended its vigilance power far beyond the banking sector.[63] The FINMA became fully operative from the 1st of January 2009.

In the year 2012, the FATF revised its recommendations (see Chapter 1.3). In order to comply with the new obligation a new law, the Federal law on the enforcement of the FATF recommendations, the so-called FATF Law, was passed. This legislation provided further due diligence obligations, improved the system for the communication of suspects, and created criminal norms to sanction aggravated fiscal crimes, which became at this point a predicate offense for money laundering purposes.[64]

This legislative process was assessed by the FATF in the 4th cycle of evaluation that started in the year 2016. The FATF found that Switzerland made progress with respect to the previous cycle, but still some gaps remained.[65] The main gaps concerned: due diligence and Know Your Customer obligations, the lack of enhanced control for the movement of capital from and to high-risk countries, a too tight material scope of the Anti-Money Laundering Act, and the difficulties of the authorities involved to cooperate with their counterpart in other countries (see chapters 2.3 and 3.1).[66] Those critics were addressed with the reform that took place in the year 2019 (see Chapter 3.1). Other issues like the enhanced control for capital movements from and to high-risk

[63] Financial market supervision act art. 1-3.
Anti-money Laundering Act art. 12.
[64] Mariani Giulia buts effects et limites des recommandations du GAFI, avec un regard sur le droit Suisse et compare de la lute contre le blanchiment d'argent, (1st ed, Helbing Lichtenhah 2021) P. 281-286
[65] FATF, 4th cycle of evaluation mutual evaluation report on Switzerland (Paris 2016) p. 5-6 https://www.fatf-gafi.org/en/publications/Mutualevaluations/Mer-switzerland-2016.html last access 08/06/2003.
[66] Mariani Giulia buts effects et limites des recommandations du GAFI, avec unregard sur le droit Suisse et compare de la lute contre le blanchiment d'argent, (1st ed, Helbing Lichtenhah 2021) P. 292-293.

countries and the regulation behind domiciliary company [67] was covered by administrative regulation.[68]

To complete compliance with the FATF recommendations, the Swiss legislator in the year 2019 the law on the implementation of the recommendation of the global forum on the transparency and exchange of reinstatements for fiscal aims banned with some exceptions the possibility to use bearable securities, with few exceptions.[69]

2.2 Criminal aspects of money laundering in Swiss legislation

Criminal norms play a central role in contrasting money laundering, it represents one of the main ways to discourage actors involved in the formal finance sector, to take part in the money laundering process.[70]

The Swiss legislation provides different types of criminal liability that may involve money laundering. The wording and the number of dispositions have changed over time in order to comply with the evolution of the international standards in money laundering.

The first provision to come into consideration is the art. 305 bis[71] of the criminal code punishing “money laundering”. This consists in a non-qualified offense that can be committed by everyone with an action that could hide the origin of money or could hamper the discovery and the seizure of money when he knows or when he should

[67] Domiciliary company is the terminology used by the Swiss law to define off-shore companies
[68] Mariani Giulia buts effects et limites des recommandations du GAFI, avec un regard sur le droit Suisse et compare de la lute contre le blanchiment d’argent, (1st ed, Helbing Lichtenhah 2021) P. 302-304
[69] The law modified the art.622 of the obligation code limiting the possibility to use bearable securities with few exceptions for public companies.
[70] Killian J McCarthy, who runs the laundry in Killian J McCarthy and others, *The Money Laundering Market. Regulating the Criminal Economy* (Agenda Publishing 2018), P.38-42.
[71] Switzerland, as other civil law countries, use make sometimes use of latin numerology (bis, ter, quarter etc...) instead of letters to numerate articles of law.

know that such money comes from felony or aggravated tax misdemeanour. The crime is prosecutable even if the illicit act that originated the money to launder is committed abroad, but only when the act is considered sanctionable also in the foreign jurisdiction (art. 305 bis par. 3).

The Federal Tribunal has specified that this double criminality criterion must be interpreted as an abstract one, the judge should consider the act "as if" it was committed in Switzerland.[72] This interpretation avoids that the country can become a hub of money laundering for those crime that, applying a concrete criterion would not otherwise be punishable.[73]

The sanctions for acts of money laundering get heavier when the act takes place in one of the following circumstances: acting as a member of a criminal or terroristic organisation as described by the art. 260 ter of the criminal code, acting as a member of an organisation created to perform money laundering, making substantial gains performing money laundering professionally. This list doesn't have to be intended as exhaustive as it was pointed out by the legislator,[74] and the case law.[75]

This disposition was drafted and approved in the year 1990, just one year after the accession to the FATF, and it followed some major scandals[76] that "have dealt serious

[72] Arrêt du Tribunal Federal 136 IV 79, 186-187,
Tribunal federal 8/12/2011 6b 729/2010 4.1.3
[73] In the above-mentioned Federal tribunal decision 136 IV 79 the underlying crime was the corruption of a foreign officer in his country, under the Swiss law corruption is punishable only when it involves a Swiss officer, therefore with the application of the concrete criterion the money of a corrupted foreign public officer could be laundered without any consequence in Switzerland.
[74] Federal Council, Feuille federale 2007 5919, (Federal Counciil, 2007), p 5926-5936.
[75] Tribunal federal 17/075/2911, 6B_1013/2010, c.6.2 s,
Tribunal federal 28/07/2014 6b_217/2013
Tribunal Federal 6b_217/2013 c.4.1-c.4.3,
Tribunal Federal 05/01/2016 6B-535/2014 c.3.2.3.
[76] Mariani Giulia buts effects et limites des recommandations du GAFI, avec un regard sur le droit Suisse et compare de la lute contre le blanchiment d'argent, (1st ed, Helbing Lichtenhah 2021) P. 142-146

damages to the image of Switzerland and of its banking sectors.[77] Switzerland was praised by the FATF for this initiative.[78]

In the year 2014 the word “aggravated tax misdemeanour” was added to the original formulation in order to comply with the FATF recommendation of the year 2012.[79] However, this provision covers only the behaviour of using fake, altered, or incorrect documents to evade the tax provided in two federal laws (federal law 14 December 1990 on the federal direct taxation, and the federal law 14 December 1990 and the federal law 14 December 1990 on the harmonisation of direct taxation of cantons and municipalities). In other words, only tax frauds covering taxation of income and capital gains, and the tax on real estate gains are punishable by law.[80] The scope of the provision is further limited by the threshold of 300.000 CHF under which no fiscal fraud is prosecutable as act of money laundering.[81]

The second provision that came into consideration for our purpose is art 305 ter. “Insufficient diligence in financial transactions and right to report”. This norm sanctions those professionals (as defined in Art. 2 par 2 of the money laundering act) who fail to exercise the diligence required by the circumstances in identifying the beneficial owner (as defined in Art. 4-5 anti-money laundering Act) when they are taking in custody, helping to place or to transfer patrimonial values.

After the first cycle of evaluation of the FATF, the legislator added to the art. 305 ter. a second paragraph containing the right of the above-mentioned professional to report to an *ad hoc* office of the federal police, called “reporting office office” (MROS), clues

[77] Federal Council, Feuille federale, 1989 961, (Federal Council, 1989) p 985.
[78] Supra n. 52
[79] Federal Council, Feuille federale 2014 9465, (Federal Council, 2014) p 9465.
[80] Ursula Cassani, introduction général in Ursula Cassani, Christian Bovet, Katia Villard, *Loi sur le blanchiment d’argent* (2021st edn, Helbing & Lichtenhahn 2021) p.25
[81] Ibid.

about the illicit origin of funds as described in art. 305 bis. This disposition plays a central role because it allows the operator to violate the bank secrecy (art. 47 of the Bank Act) or other professional secrecy rules.[82] However, the right to report was later overlapped by the duty to report contained in the Anti-money Laundering Act which was approved subsequently (see Chapter 2.3).

Another relevant criminal norm is Art. 260 quinquies of the criminal code that punish terrorist financing intended as “acts of violence aimed at terrorising the population, or forcing a country, or an international organisation to omit an act.” This crime was created in the year 2003 following the third cycle of FATF evaluation in the aftermath of the 9/11 attack.

The last disposition that deserves to be mentioned here is art. 102 of the criminal code regulating corporate responsibility. In the original formulation, the company in whose framework the crime took place could have been considered liable only if the physical author of the crime was impossible for organisational deficiencies of the company.

However, in the year 2015, a new reform introduced a second paragraph under which for determined crime a company can be found liable independently by the identification of the physical author, unless when the organisation has taken all the reasonable and indispensable internal measures to avoid the criminal act to happen. In the list of crimes that can trigger this disposition, we can find the art. 305 bis and 260 quinquies mentioned above, no mention is however made about the art. 305 ter. Therefore, a company can be held liable for acts of money laundering or terrorism financing, but this would not happen for the deficiencies of procedures to identify the beneficial

[82] Ibid p.30

owner, unless in the rare case when it would not be possible to identify the author of the said omission.

2.3 The Anti-Money Laundering Act

As it was stated in Chapter 1.2 an important role in the development of the Swiss anti-money laundering policies was played by the development in the year 1997 of a specific Anti-money laundering legislation that entered into force the 1st January 1999.

The approval and enforcement of a specific legislation was useful to extend gradually the due diligence and know your customer obligations, outside of the banking sector, in a first moment to financial intermediaries, and later, in order to comply with the FATF recommendations revised in the year 2012, it was extended also to traders of goods (art. 2 par. 1). A further category, the one of consultants should have been added with the last reform, however, the parliament decided to delete that part from the proposal.

In order to have the definition of the scope of the legislation flexible enough, the legislator has opted for two different approaches to define it: the first one is an exhaustive list of professionals to whom the law applies (art. 2 par.2), the second is an open-ended list of activities whose performer falls inevitably within the scope of the law (art. 2 par. 3). This system has allowed the Swiss legislation to cover innovations in the financial sector without the need to change legislation.[83]

The Anti-Money Laundering Act does not apply to specific types of intermediaries: public institutions, institutions involved in social security, and organisation dealing only with intermediaries under vigilance (art. 2 par.4)

[83] Jeremy Bacharac, Christian Bovet, Benoit Chapuis, Fabio Burgener, art. 2, in Ursula Cassani, Christian Bovet, Katia Villard, *Loi sur le blanchiment d'argent* (2021st edn, Helbing & Lichtenhahn 2021) p.61-64

The persons mentioned above are the recipients of the due diligence and know your customer obligations (art. 3-8) and the obligations in case of suspect transactions (art. 9-11). Under this regard particular attention should be developed to the obligation to report (art. 9). This norm was developed to overcome the misuse of professional secrecy as a way to cover criminal activity and plays an important role in a country where bank secrecy is a pillar of the banking system.

Under the Bank secrecy rule (art. 47 of the Bank Act) any member of a body, employee, agent, or liquidator of a bank is criminally and civilly liable in case of disclosure of information concerning a client obtained during his professional activity. The only exception is in case of obligation to provide information to a public authority.

The obligation to report is an instrument useful to overcome the bank secrecy and force the exchange of information between the subject falling in the scope of the legislation and the MROS.

As a legal instrument to overcome the issues related to bank secrecy, the obligation to report overlaps the right to report granted by art. 305 ter of the criminal code (see chapter 2.2) that played a similar function before the entry into force of the Anti-Money Laundering Act. After the year 1999, the right to report has played only a residual role. Some authors have even suggested that the right to report has lost its *raison d'etre,*[84] However, according to the interpretation given by the federal council[85] and the reporting office,[86] the two norms rely on a different level of suspicion, and therefore there is place for them to coexist.

[84] Katia Villard, art. 9 in Ursula Cassani, christian Bovet, Katia Villard, *Loi sur le blanchiment d'argent* (2021st edn, Helbing & Lichtenhahn 2021) p.446
[85] Federal Council, Feuille federale, 1989 Volume III 1057 (Federal Council, 1989) p 1087.
[86] MROS, 1er rapport d'Aactivitè (Fedpol 1998), P. 14
https://www.fedpol.admin.ch/dam/fedpol/fr/data/kriminalitaet/geldwaescherei/jabe/jb-mros-1998-f.pdf.download.pdf/jb-mros-1998-f.pdf last accessed 16/06/2023

Despite the fact that the FATF raised doubt about this dual reporting system, the Federal council while drafting the last reform decided after consultation to keep both the dispositions (see chapter 3.1)

The fact that the obligation to report coexists with a bank secrecy provision pose a serious risk on those intermediaries working for banks: in fact from one side they could be sanctioned if they do not report a suspicious activity, but on the other side they could be sanctioned if they report information when it was not required by the law, for this reason, it becomes extremely important to determine when the obligation to report is triggered. The case law replied to this question with reference to art. 6 of the money laundering law. The latter imposes to carry on internal investigation in cases that can raise suspects or that present particularly high risk, for example in case of Politically exposed persons. only when, after a careful internal investigation, the suspect is not dissipated the obligation to report arises.[87] This interpretation was later confirmed by the par. 1 quarter was added in the year 2020 to comply with the FATF recommendation (see Chapter 3.1).

In order to establish safer conditions for the operator reporting information, art. 11 of the Anti-Money Laundering Act provides an exception to criminal and civil liability for the person who reports. [88] This article has been modified in order to comply with FATF recommendations, in the original version the exemption was granted only when the person acted with diligence, while in the current text, the only requirement is good faith.

[87] Tribunal Federal 27/11/20084A_313/2008 point 4.2.2.3,
Tribunal Federal 11/01/2021 6b 786/2020 points 2.1.3 and 2.1.4
[88] Federal Council, Feuille federale, 1989 Volume III 1057 (Federal Council, 1989) p 1087.

The subject in charge to report the information to the reporting office are the directors. However, they can delegate such a duty to third parties not directly involved in the transaction at stake.[89] This task can also be delegated to someone external to the organisation when the dimension of the financial intermediary does not allow the creation of an internal service[90]

The only professionals exempted from this obligation are attorneys and notaries. In the past the exemption granted to them was generalised, however, the case law has reduced its scope to the activity strictly related to their professions (see Chapter 2.1).

Chapter 3 of the law concerns the vigilance on the subjects falling in the scope of the legislation. The repartition of the competencies in this regard is regulated in art. 12: Federal Commission on Casinos for casinos, the Intercantonal Supervisory and Executive Authority on Gambling for promoters of large-scale games, Central Office for Precious Metals Control for Jewelry shops, FINMA for the other intermediaries of the exhaustive list including banks, insurances, investment funds, self-regulatory organisations for those falling in the scope of the open-ended list.

The system of self-regulatory organisations is a tradition in Switzerland,[91] and the legislator decided to apply that even to this field. However, those organisms have limited regulatory power for anti-money laundering purposes, and it would be more appropriate to talk about self-vigilant organisations.[92]

[89] FINMA Anti-Money Laundering ordinance 03/06/2015 art. 25
[90] Ibid. art. 25 **a**
[91] Jean-Baptiste Zuffrey, La réglementation des systèmes sur les marchés financiers secondaires: contribution dogmatique et comparative à l'élaboration d'un droit suisse des marchés financiers, (Universitè de Freibourg, 1994), P. 1553
[92] Jean-Baptiste Zuffrey, art. 24 in Ursula Cassani, christian Bovet, Katia Villard, *Loi sur le blanchiment d'argent* (2021st edn, Helbing & Lichtenhahn 2021) p.621.

However, the use of self-regulatory organisations may raise doubt concerning their independence, with such a system in place there is a strong risk of race to the bottom, anticompetitive behaviour, and delaying the intervention of public authorities.[93] The Swiss legislator was well aware of this, and, for these reasons, decided to put the self-regulatory organisations under the vigilance of the FINMA with whom those organisations must cooperate with the FINMA (art. 27 Anti-Money Laundering Act), that is in charge of authorising them, approving their regulation, and act on their behalf to make sure that the affiliates will respect the regulations (art. 18 Anit-Money Laundering Law) and revoke their authorisation (art. 28 Anti Money Laundering law),

The FATF has put a lot of attention on this mechanism in order to assess that the activity of control of the FINMA is sufficient. In the last report of the year 2016, the task force valued that "The management, coordination and follow-up of FINMA's controls of the OARs are generally satisfactory", even though it found space for further improving the system.[94]

[93] Ibid.
[94] FATF, 4th cycle of evaluation mutual evaluation report on Switzerland (Paris 2016) p. 105-6 https://www.fatf-gafi.org/en/publications/Mutualevaluations/Mer-switzerland-2016.html last access 16/06/2003.

CHAPTER 3: A CRITICAL ASSESSMENT OF THE NEW REFORM

3.1 The 2016 mutual evaluation of Switzerland and the consequent reforms

During the 4th cycle of mutual evaluation Switzerland had been evaluated by the FATF experts, the outcome is overall positive.[95] On the technical level the country has been found fully compliant on 6 recommendations, largely compliant, on 25 recommendations, and partially compliant only on 9 recommendations (R. 08 on non-profit organisation, R. 10 on customer due diligence, R. 16 on wire transfers, R. 19 on higher-risk countries, R. 22 on DNFBP due diligence, R. 23 on DNFBP other measures, R. 33 statistics, R. 35 sanctions, R. 40 on other forms of international cooperation).[96] On the side of effectiveness Switzerland was substantially compliant in 7 areas, and partially compliant in 4 (International cooperation, supervision, preventive measures, legal persons and arrangements).[97]

Switzerland addressed this weakness with legislative reforms that covered 8 areas: obligation for people offering consultancy in relation to society and trusts, lowering the threshold in the jewellery sector, explicit provisions for the verification of the beneficial owner clearly written in the law general obligation to keep the data of the clients updated, strengthening the reporting system, transparency for association at high risk to being involved in terrorist financing, introduction of controls for the purchase on a professional basis of precious metals, the attribution of vigilance tasks to the office of control of precious metals.[98]The main changes involved the anti-money laundering Act

[95] FATF, 4th cycle of evaluation mutual evaluation report on Switzerland (FATF 2016) https://www.fatf-gafi.org/en/publications/Mutualevaluations/Mer-switzerland-2016.html last access 16/06/2003.
[96] Ibid., 2016 P. 153-240
[97] FATF, Switzerland mutual evaluation report, 2016 P. 14-152
[98] Federal Council, Feuille federale, 2019 5237 (Federal Council, 2019) p 5238-9.

as well, but some other points were addressed by other laws and administrative regulations.[99]

Here we will focus our attention on the changes that concerned the enlargement of the scope of the legislation, the due diligence obligations, and the reporting system.

The part concerning the enlargement of the scope has been the one that has encountered more difficulties. In order to comply with FATF recommendation 22 the original draft provided the enlargement of the scope to a new category, the of consultants, subject to obligations similar to the ones applied to the already existing category of traders.[100] The change was important to extend the scope of legislation to consultants, especially real estate agents, lawyers and notaries, even when they were not dealing with a financial transaction. This is, for example, the case when attorneys offer services for the constitution of companies, acquisition of real estate, or when they act as nominee shareholders. With the new reform, categories like the attorneys would have been made subject to due diligence and reporting requirements.[101] However the lobbying activity of the industry was strong enough to convince the parliament to delete this part of the reform, leaving only a residual addition to the scope of the legislation concerning trusts and asset manager. In this way the Swiss legislation will not be compliant with current international standards. [102]

On the side of due diligence, the reform aimed to address two deficiencies underlined by FATF: the absence of a generalised obligation to verify the beneficial owner, and to

[99] Ibid. p 5246 4548
[100] Ibid.p. 5252-5258, 5292-5294, 5298-5311
[101] Ibid. 5252-3
[102] Katy Romy, Switzerland doing too little in fight against money laundering, says expert, Swiss info.ch (Bern 17/03/2021) https://www.swissinfo.ch/eng/business/switzerland-doing-too-little-in-fight-against-money-laundering--says-expert/46449620 las https://www.swissinfo.ch/eng/business/switzerland-doing-too-little-in-fight-against-money-laundering--says-expert/46449620 accessed 16/06/2023.

keep the information collected updated.[103] The Federal Council noted that the FATF did not complain about the lack of due diligence procedure, but only for the fact that the procedure was not applied systematically. Switzerland, therefore opted to fully transpose in the legislation what was recommended and and to add in the legislation new generalised obligation to verify the beneficial owner.[104]

Similarly, the obligation to keep the information on the client updated was not new to Swiss law as it was already enshrined into article 5 of the Anti-Money laundering Act. However, that provision had two limitations: it was applicable only in those cases where doubt on the identities arose, and It could only cover the identity of the counterpart and the beneficial owner.[105] The law was changed in order to broaden the *ex post* scrutiny to cover, also different elements than the identity, for example, the object and the aim of the relationship.[106] This changes should be enough to comply with the recommendation 10 of the FATF.

The reporting system was another aspect targeted by the reform. On this point Switzerland was considered largely compliant, and the main critics regarded the dual reporting system composed by the right to report, and the obligation to report (see chapter 2.1 and 2.3) that, according to the FATF, could create confusion in the operator. [107] In the original proposal the idea was to eliminate the right to communicate, such an idea was however criticised during the consultation, and in the final draft it was opted to leave the right to report in the system, adding just a

[103] FATF, 4th cycle of evaluation mutual evaluation report on Switzerland (FATF 2016) P. 178-179 https://www.fatf-gafi.org/en/publications/Mutualevaluations/Mer-switzerland-2016.html last access 16/06/2003.
[104] Federal Council, Feuille federale, 2019 5237 (Federal Council, 2019) p 5260-1.
[105] Ibid. P5261-2
[106] Ibid.
[107] FATF, 4th cycle of evaluation mutual evaluation report on Switzerland (Paris 2016) P. 195 https://www.fatf-gafi.org/en/publications/Mutualevaluations/Mer-switzerland-2016.html last access 16/06/2003.

clarification on what does trigger the obligation to report in the Anti-Money Laundering Ordinance.[108]

I agree with the decision taken in this case. The dual reporting system has existed in Swiss law for 25 years, and it's established. The case law has clarified the limits of the obligation to report, and it is clear to everyone that the right to report plays now only a secondary role in respect to obligation to report. In this view, the right to report constitute an additional basis for the operator to report suspect cases, that, in a country where strong sanctions protect the bank secrecy, is a valuable asset in order to reach FATF goal.

[108] Federal Council, Feuille federale, 2019 5237 (Bern, 2019) p 5262.

CONCLUSION

In the previous pages we have seen in these pages how the international framework has evolved in the last three and a half decades, and the prominent role that the FATF, alongside with the relevant treaties, have played in it in Switzerland.

The FATF occupies a singular role in the framework of traditional international organisations, in particular for its ability to coerce member and non-member countries to comply with its standards.[109] This is, in my opinion the reason why, in the fight for against money laundering unilateral actions from single countries, like the United States, in other areas concerning financial and capital markets have often use their power to force change in policies in other countries.

I think that, despite the criticism that the action of the Task force has arisen, this is a positive outcome, that have granted more cohesion of goals in the international community, and multilateralism in the international framework of fight against money laundering.

In particular, in this analysis I focused on the mutual evaluation process, taking Switzerland as an example. The small alpine land-locked country was at the end of 80 in front of a dilemma between becoming an off-shore port with lax regulation, and being compliant with the standard that were arising in those years, following other developed countries Switzerland chose the latter.

In this work I had the chance to give a closer look to how the legislation has changed in the last decades, and how the dialogue between the FATF and the national legislator

[109] Julia C. Morse, the bankers blacklist, unofficial market enforcement and the global fight against illicit financing (1st ed, Cornell University press, 2021), p. 30-172.

has worked to bring the country to more and more compliant with international standards.

As we have seen in the last chapter this compliance process is not always going forward, and it does not always consist of a mere transposition of international recommendations in the national legislation. The research in that chapter showed how much lobbies can work against the international compliance to favour their interests, as it happened with the extension of the scope of the Anti-Money Laundering Act to consultant. It showed also how much sometimes it is necessary to adapt the international recommendations to the national legal framework in a way that is compatible with the international standards goals, as it happened with the dual reporting system.

To conclude this work with my considerations, I think that despite some small step back, Switzerland, as the other FATF member countries, is marching toward being a good level of compliance with international standards.

BIBLIOGRAPHY

International conventions:

Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (UNODOC 1988).

Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD 1997).

Convention against Transnational Organised crime, (UNODOC 2000).

Convention against corruption (UNODOC 2003).

International recommendations:

FATF, International standards on combating money laundering and the financing of terrorism & proliferation, The FATF recommendations (FATF 2023).

FATF The forty recommendations of the Financial Action Task Force on money laundering 1990 (FATF 1990).

FATF, IX special recommendations (FATF 2010).

OECD 2017 fighting tax crimes: the ten global principles (Paris 2017).

UN assembly, Resolution s-20 4 D (UN, 1998).

Swiss legislation:

Loi sur les banques (Bank Act) 1934

Code pénal suisse (Swiss Criminal Code) 1937.

Convention relative à l'obligation de diligence des banques (Convention concerning the obligation of diligence of Banks) 1977.

Convention relative à l'obligation de diligence des banques (Convention concerning the obligation of diligence of Banks) 1982.

Convention relative à l'obligation de diligence des banques (Convention concerning the obligation of diligence of Banks) 1987.

Loi sur le blanchiment d'argent (Anti-Money Laundering Act) 1997.

Loi sur la surveillance des marchés financiers (Financial Market Supervision Act) 2007.

Ordonnance de la FINMA sur le blanchiment d'argent (Anti-Money Laundering Ordinance) 03/06/2015.

Cases

Arrêt du Tribunal Federal 136 IV 79, 186-187.

Tribunal Federal 27/11/2008 4A_313/2008 point 4.2.2.3.

Tribunal federal 8/12/2011 6b 729/2010 4.1.3.

Tribunal federal 17/07/2011, 6B_1013/2010, c.6.2 s.

Tribunal federal 28/07/2014 6b_217/2013.

Tribunal Federal 6b_217/2013 c.4.1-c.4.3.

Tribunal Federal 05/01/2016 6B-535/2014 c.3.2.

Tribunal Federal 11/01/2021 6b 786/2020 points 2.1.3 and 2.1.4.

Institution reports:

FATF, FATF annual report 90/91 (Paris 1996).

FATF, FATF annual report 1992/93 (FATF 1993).

FATF, FATF annual report 1995/96 (FATF 1996).

FATF, FATF annual report 1996/97 (FATF 1997).

FATF, FATF annual report 2008/09 (FATF 2009).

FATF, methodology for assessing technical compliance with the FATF recommendation and the effectiveness of AML/ CFT system, (FATF, 2012).

FATF, Virtual Currencies: Key Definitions and Potential AML/CFT Risks (FATF 2014).

FATF, vulnerability of casino and gaming sector, (FATF 2009).

FATF, 4th cycle of evaluation mutual evaluation report on Switzerland (FTAF 2016).

Federal Council, Feuille federale, 1989 961.

Federal Council, Feuille federale, 1989 Volume III 1057 (Federal Council, 1989).

Federal Council, Feuille federale 2007 5919, (Federal Council, 2007).

Federal Council, Feuille federale 2014 9465, (Federal Council, 2014).

Federal Council, Feuille federale, 2019 5237 (Federal Council, 2019).

G7 Paris summit,,Economic declaration (G7 1989).

MROS, 1er rapport d'Aactivitè (Fedpol 1998).

UNDOC, "Estimating illicit financial flows resulting from drug trafficking and other transnational organized crim – research report" (UNODOC, new York 2011).

Books:

Leannart Ante, Cryptocurrency, Blockchain and crime in Killian J McCarthy and others, *The Money Laundering Market. Regulating the Criminal Economy*

Jeremy Bacharac, Christian Bovet, Benoit Chapuis, Fabio Burgener, art. 2, in Ursula Cassani, Christian Bovet, Katia Villard, *Loi sur le blanchiment d'argent* (2021st edn, Helbing & Lichtenhahn 2021)

Svenja Berg and Kyllian J McCarthny, introduction to money laundering challenges in Killian J McCarthy and others, *The Money Laundering Market. Regulating the Criminal Economy* (Agenda Publishing 2018).

Dantn Bryans, Franske Jesse Anema, mining for an effective solution in Killian J McCarthy and others, *The Money Laundering Market. Regulating the Criminal Economy* (Agenda Publishing 2018)

Ursula Cassani, introduction général in Ursula Cassani, Christian Bovet, Katia Villard, *Loi sur le blanchiment d'argent* (2021st edn, Helbing & Lichtenhahn 2021)

Mariani Giulia buts effects et limites des recommandations du GAFI, avec un regard sur le droit Suisse et compare de la lutte contre le blanchiment d'argent, (1st ed, Helbing Lichtenhah 2021)

Killian J McCarthy, who runs the laundry in Killian J McCarthy and others, *The Money Laundering Market. Regulating the Criminal Economy* (Agenda Publishing 2018).

Julia C. Morse, the bankers blacklist, unofficial market enforcement and the global fight against illicit financing (1st ed, Cornell University press, 2021).

Moritz Oehen, Umberto Pajarola, Marc Thommen Kriminelle, Organisation: Art. 260ter StGB, in Jürg-Beat Ackermannn, Kommentar Kriminelles Vermögen, kriminelle Organisationen: Einziehung, Kriminelle Organisation, Finanzierung des Terrorismus, Geldwäscherei vol 2 (1st ed. 2018)

Mark Pieth, die Praxis der Geldwascherei, in Trechsel Stephan, Geldwascherei, Prävention und Massnamen zur Bekämpfung (1st ed, Schultness 1997).

Mark Pieth, Zur Einführung: Geldwäscherei und ihre Bekämpfung in der Schweiz, in Mark Pieth, Bekämpfung der Geldwäscherei: Modellfall Schweiz? Mit Beiträgen (1st ed, Helbing Lichtenhah 1992).

IAN Roberge, FATF, in Thomas Hale, David Held, The Handbook of Transnational Governance: institution and Innovation (1st ed. Polity press 2011).

Pim Verschuuren, money laundering, sport betting and gambling in Killian J McCarthy and others, *The Money Laundering Market. Regulating the Criminal Economy* (Agenda Publishing 2018).

Katia Villard, art. 9 in Ursula Cassani, christian Bovet, Katia Villard, *Loi sur le blanchiment d'argent* (2021st edn, Helbing & Lichtenhahn 2021).

Jean-Baptiste Zuffrey, La réglementation des systèmes sur les marchés financiers secondaires: contribution dogmatique et comparative à l'élaboration d'un droit suisse des marchés financiers, (Universitè de Freibourg, 1994).

Jean-Baptiste Zuffrey, art. 24 in Ursula Cassani, christian Bovet, Katia Villard, *Loi sur le blanchiment d'argent* (2021st edn, Helbing & Lichtenhahn 2021).

Scholar Journal:

Hüssle Raines, Even clubs can't do without legitimacy: why the anti-money laundering was suspended, regulation and governance volume 2 n. 4, (2008).

Tsingou Eleni "global financial governance and the developing anti-money laundering regime: what lesson for international political economy? International politics volume 47 n. 6 (2008).

Banks James, online gambling and crime, a secure bet? the ethicomp Journal (2012).

Online Newspaper:

Katy Romy, Switzerland doing too little in fight against money laundering, says expert, Swissinfo.ch (Bern 17/03/2021).

Website:

Capital flows (Trading Economics) https://tradingeconomics.com/country-list/capital-flows.

High-risk and other monitored jurisdictions (FATF) https://www.fatf-gafi.org/en/publications/High-risk-and-other-monitored-jurisdictions/More-on-high-risk-and-non-cooperative-jurisdictions.html

History of the FATF, (FATF) https://www.fatf-gafi.org/en/the-fatf/history-of-the-fatf.html

Switzerland capital flow (Trading Economics) https://tradingeconomics.com/switzerland/capital-flows

Other sources:

Peter J Quirk, 'Money Laundering: Muddying the Macroeconomy' [1997] International Monetary fund.