

CAS Compliance Management 2023

Managing Criminal Liability

Dr. iur. Christina Galeazzi, RA

Prof. Dr. iur. Marc Thommen

Criminal Liability

1. Round of Introductions
2. Money Laundering
3. Corporate Criminal Liability
4. Case Study

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Criminal Liability

What kind of criminal liability issues do you encounter in current position?



Criminal Liability

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Money Laundering

Art. 305^{bis} SCC

Money Laundering

«Money Laundering is a process by which one conceals the existence, illegal source or illegal application of income, and then disguises that income to make it appear legitimate.»



Ronald Wilson Reagan
Commission on Organized Crime, 1984

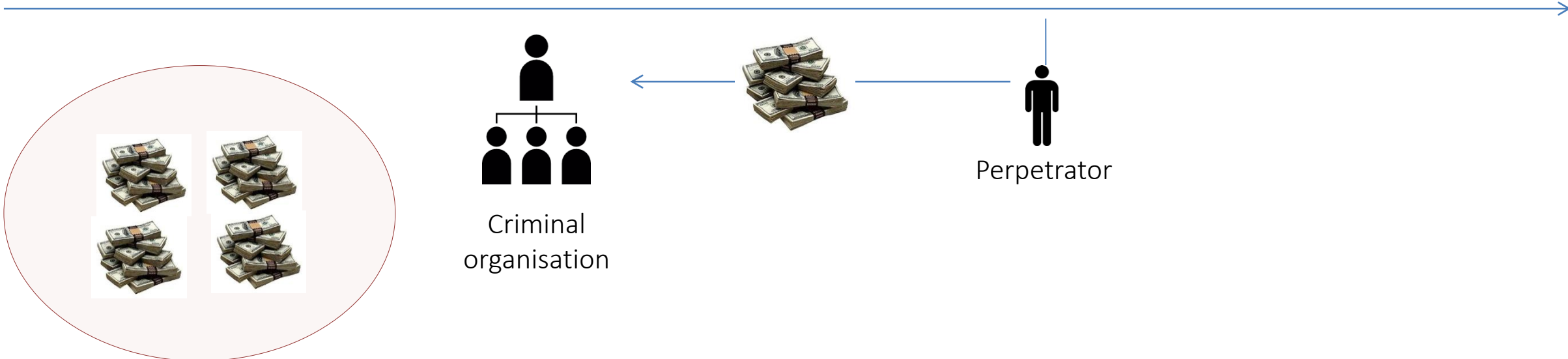
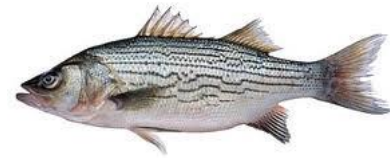
Money Laundering

Combatting money laundering is hitting organized crime at its «Achilles' heel»

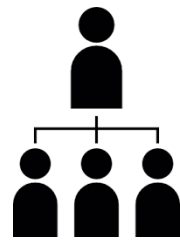
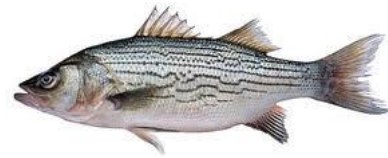


Ronald Wilson Reagan
Commission on Organized Crime, 1984

Money Laundering



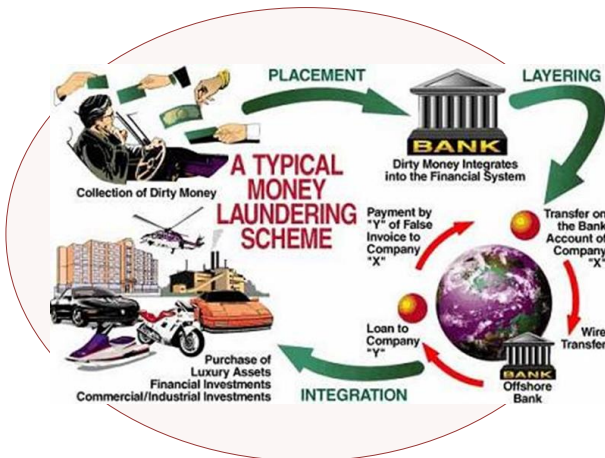
Money Laundering



Criminal
organisation



Perpetrator



Money Laundering

«Crime must not pay.»



Money Laundering

- In the wake of several scandals in the early 1990s it became clear that Switzerland needed legislation on Money Laundering too.



Money Laundering

- Lebanese-Turkish drug trafficking ring transfers CHF 1.4 billion to Switzerland
- SKA, SBG, Bankverein provide services
- Recipient of the drug money: Shakarchi Trading AG, Board of Directors Hans W. Kopp.



Federal Councillor Elisabeth Kopp, Hans Kopp

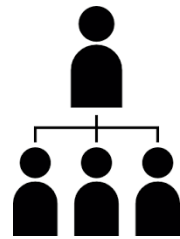
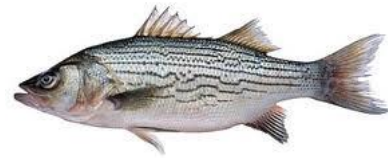
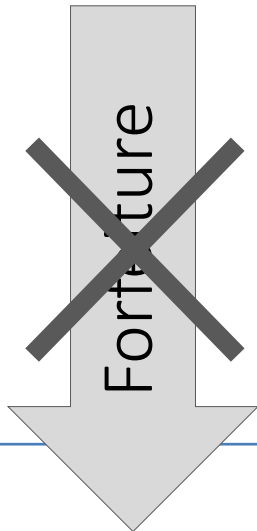
Money Laundering

- Wrong of money laundering consists in obstruction of confiscation
- Making criminal prosecution more difficult/onerous



President of the Swiss Confederation J.-P. Delamuraz
Money Laundering Message, BBl 1989 II 1081

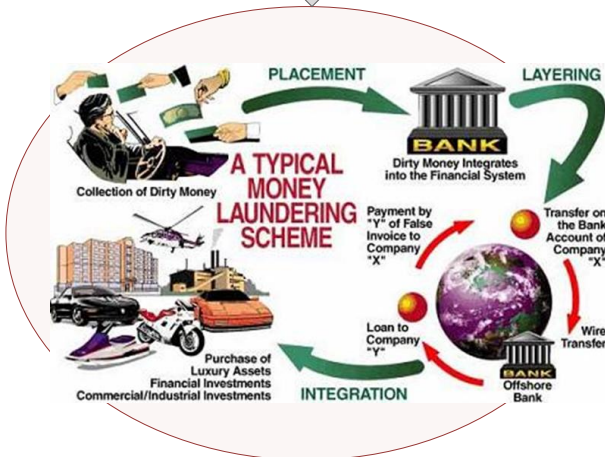
Money Laundering



Criminal
organisation



Perpetrator



Money Laundering

1. Title: Life and Limb
2. Title: Property
3. Title: Personal Honour
4. Title: Liberty
5. Title: Sexual Integrity
12. Title: Public Order [Organized Crime]
17. Title: Justice [Money Laundering]



StGB
Schweizerisches
Strafgesetzbuch

Money Laundering

1. Title: Life and Limb
2. Title: Property
3. Title: Personal Honour
4. Title: Liberty
5. Title: Sexual Integrity
12. Title: Public Order [Organized Crime]
17. Title: Justice [Money Laundering]



StGB
Schweizerisches
Strafgesetzbuch

Art. 305^{bis} – Money Laundering

1. Any person who carries out an act that is aimed at frustrating the identification of the origin, the tracing or the forfeiture of assets which he knows or must assume originate from a felony or aggravated tax misdemeanour is liable to a custodial sentence not exceeding three years or to a monetary penalty.

1bis. An aggravated tax misdemeanour is any of the offences set out in Article 186 of the Federal Act of 14 December 19903 on Direct Federal Taxation and Article 59 paragraph 1 clause one of the Federal Act of 14 December 19904 on the Harmonisation of Direct Federal Taxation at Cantonal and Communal Levels, if the tax evaded in any tax period exceeds 300 000 francs.

2. In serious cases, the penalty is a custodial sentence not exceeding five years or a monetary penalty. A custodial sentence is combined with a monetary penalty not exceeding 500 daily penalty units.

A serious case is constituted, in particular, where the offender:

- a. acts as a member of a criminal organisation;
 - b. acts as a member of a group that has been formed for the purpose of the continued conduct of money laundering activities; or;
 - c. achieves a large turnover or substantial profit through commercial money laundering.
3. The offender is also liable to the foregoing penalties where the main offence was committed abroad, provided such an offence is also liable to prosecution at the place of commission.



StGB
Schweizerisches
Strafgesetzbuch

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Basic offence

Money laundering and tax offences

Increased penalty

International dimension

Art. 305^{bis} – Money Laundering

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Objective elements (actus reus)

- Perpetrator
- Object
- Action
- «Result»

Subjective elements (mens rea)

- Intent
- Dolus eventualis

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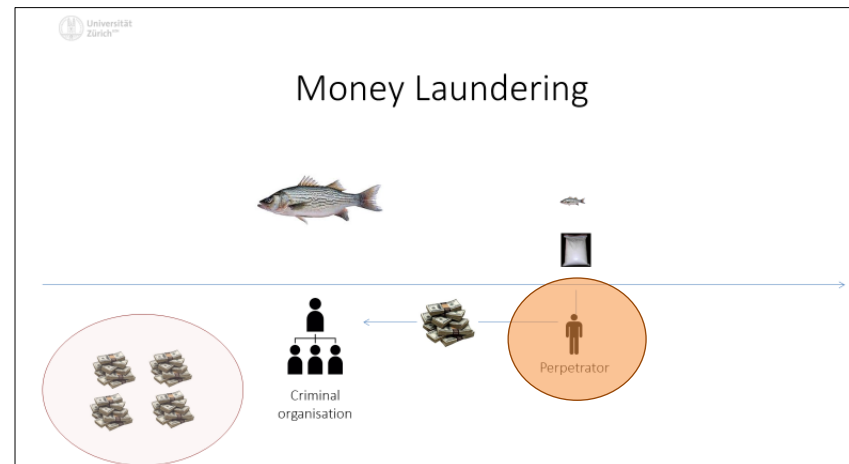
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- Object
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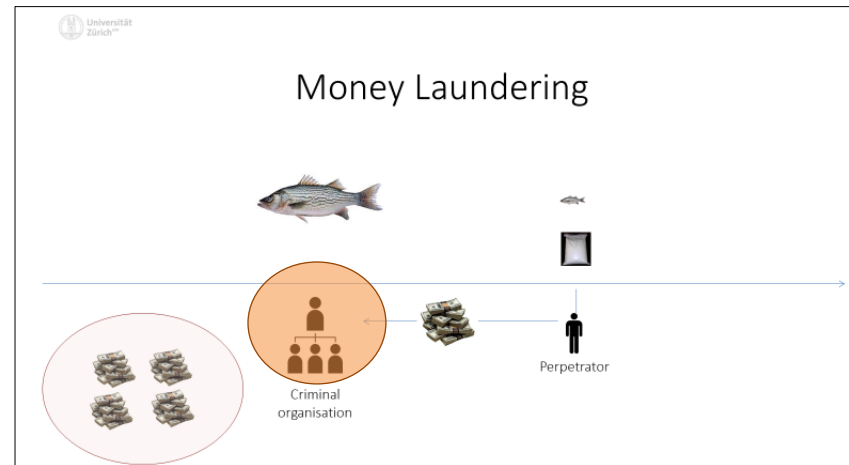
Perpetrator

- Drug dealer
- Robber
- Thief
- Fraudster
- Blackmailer
- “Godfather”
- Financial intermediary
- Company



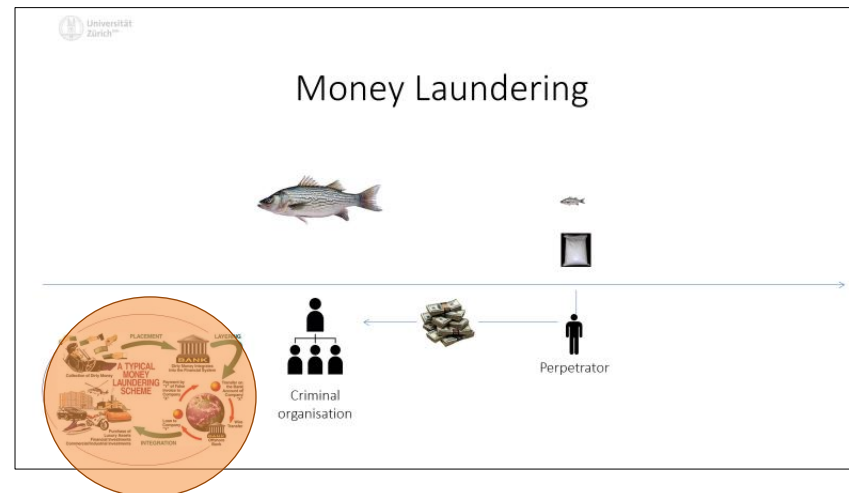
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Federal Criminal Court SK.2020.21
15 December 2021

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Objective elements (actus reus)

- Perpetrator
- Object (corpus delicti)
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- «Result»

Subjective elements (mens rea)

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Assets

«The concept of assets... includes, in addition to money in all forms and currencies, securities, creditors' rights in general, precious metals and stones, all other types of chattels, and even real estate and rights to such.»



Message on Money Laundering, BBl 1989 II 1081

Assets

No assets:

- Monopoly Play Money
- Monopoly Property



Assets

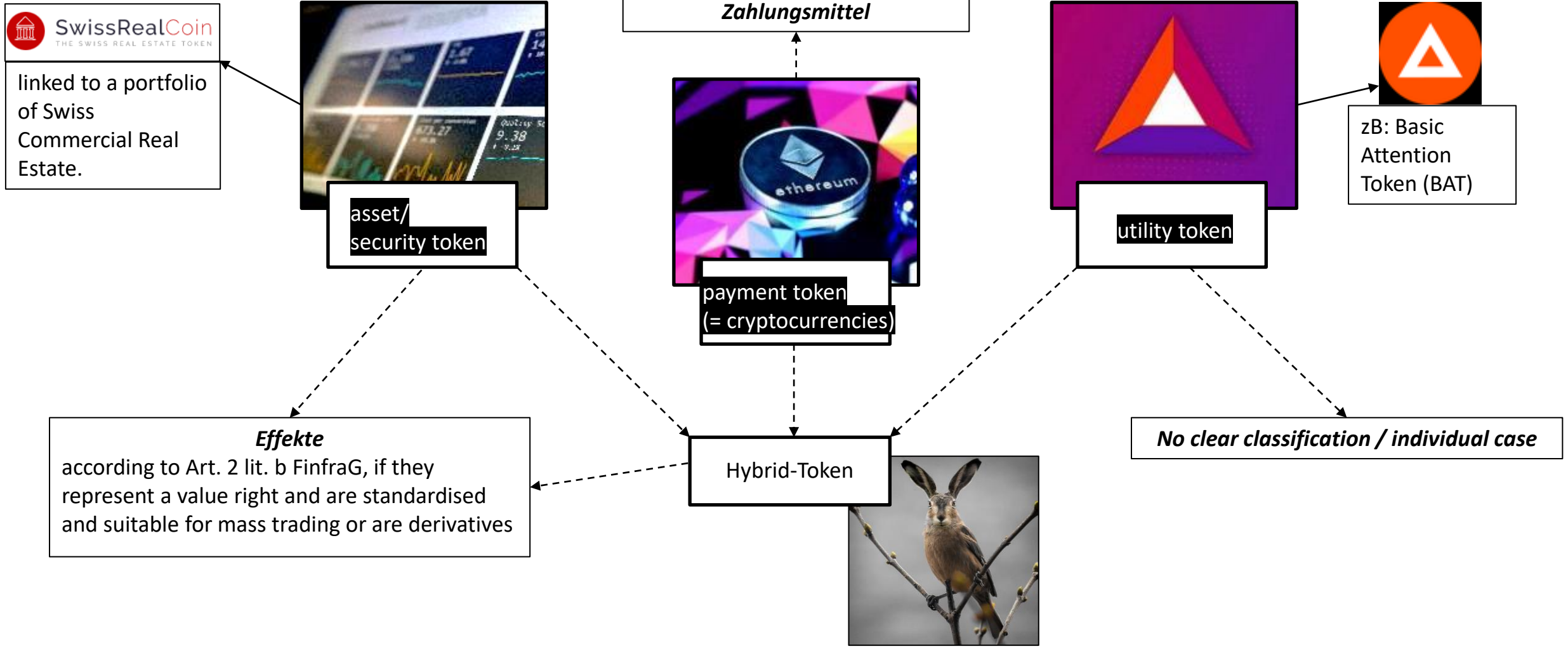
Second life

Linden Dollars

Rate: 1 USD = 320 LD (25.3.22).

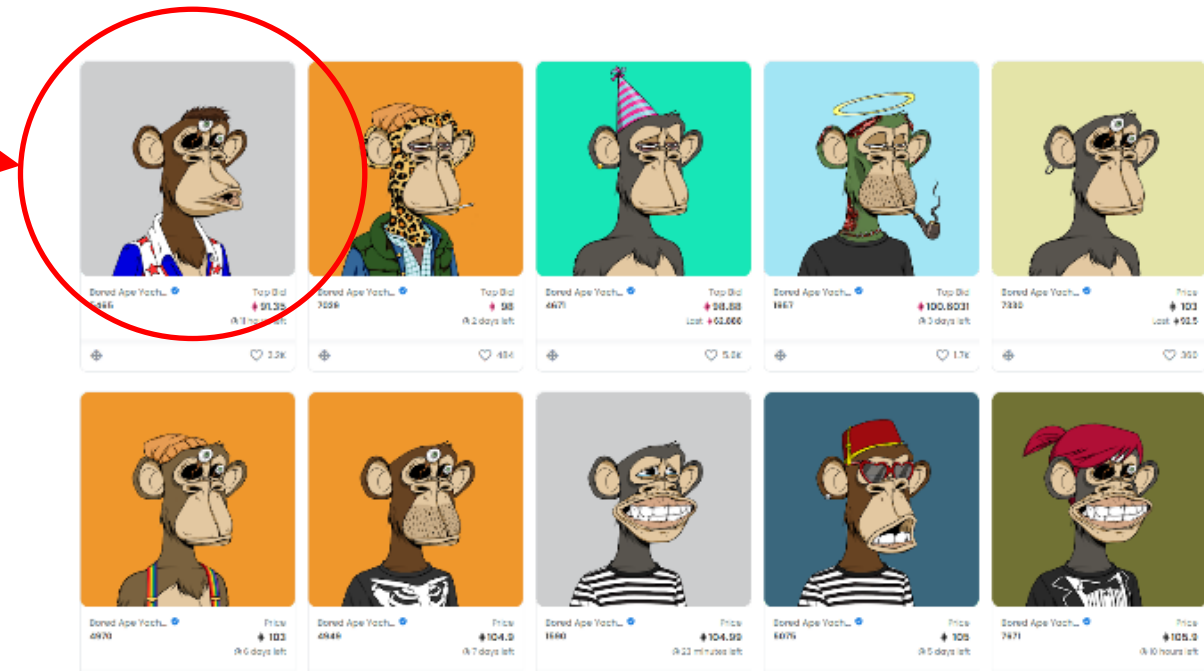


TOKENS AS ASSETS



NON FUNGIBLE TOKENS

#5465
\$284.515,97



„Bored Ape Yacht Club“ (BAYC) on Opensea

NON-FUNGIBLE TOKEN
**NFT-Plattform Opensea: Angreifer stehlen
NFTs von Kunden**
Die NFT-Handelsplattform Opensea untersucht derzeit einen
Phishing-Angriff. Es sollen 32 Nutzer betroffen sein.

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Assets

«The assets must derive from the predicate offence, in other words be ... causally connected with the offence. »



Federal Supreme Court Decision [138 IV 1](#)

Assets

Not only original dirty assets but
also its surrogates (layering)



Assets

“In the case of money laundering of assets of a criminal organisation, no higher requirements may be placed on the proof of the predicate offence than in the other cases of money laundering. Proof that a crime preceded it is sufficient. Exact knowledge of the crime and the perpetrator is not required.”



Federal Supreme Court Decision [138 IV 1](#)

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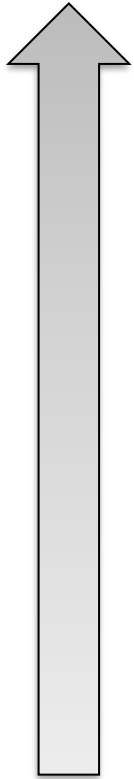
- Perpetrator
- Object (corpus delicti)
- Action
- «Result»

Subjective elements (mens rea)

- Intent
- Dolus eventualis

Crime taxonomy

Severity



	Sanction	example
Felonies	Custodial sentence of more than 3 years (Art. 10 Abs. 2)	Fraud (Art. 146)
Misdemeanours	Custodial sentence not exceeding 3 years or monetary penalty (Art. 10 Abs. 3)	Removal of property (Art. 141)
Contraventions	Fine (Art. 103)	Petty Theft (Art. 139/172 ^{ter})

Art. 305^{bis} – Money Laundering

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Art. 305^{bis} – Money Laundering

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Subjective elements (mens rea)

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Act

- Any disguise of beneficial owner
- Cut paper trail
- Cash pay out
- International money transfers
- Creation of off-shore accounts
- Hiding drug money in flowerpots



Federal Supreme Court Decision [119 IV 59](#)

Act

«...a financial intermediary may be guilty of a violation of Art. 305^{bis} StGB by omission.»



Federal Supreme Court Decision [136 IV 188](#)

[Thommen \(2021\)](#)

Act

Guarantor status of financial intermediary:

- Art. 6 AMLA – Due diligence obligations
- Art. 9 AMLA – Reporting obligations



Federal Supreme Court Decision [136 IV 188](#)

[Thommen \(2021\)](#)

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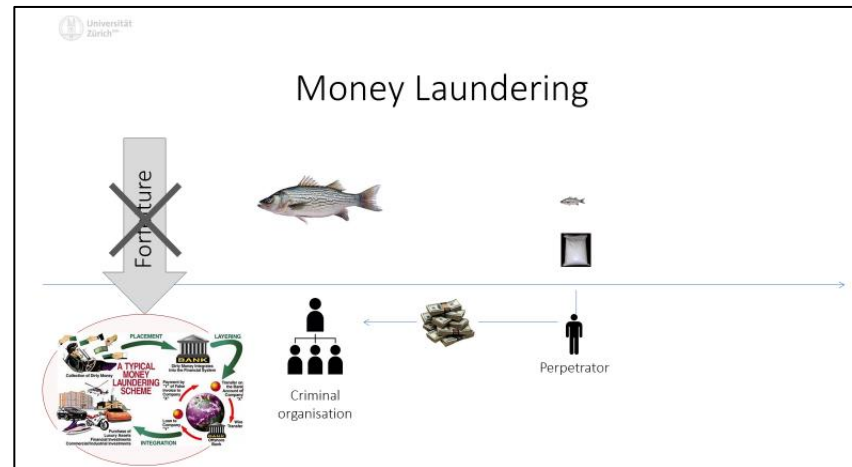
- Perpetrator
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- Action
- «Result»

Subjective elements (mens rea)

- Intent
- Dolus eventualis

«Result»

Any act that is suitable to make
confiscation more onerous



«Result»

The concealment of the proceeds of crime is an act that is suitable to make confiscation harder



Federal Supreme Court Decision [119 IV 59](#)

«Result»

"The aim of the money launderer in concealing the proceeds of crime is rather to let the first storm of prosecution pass."

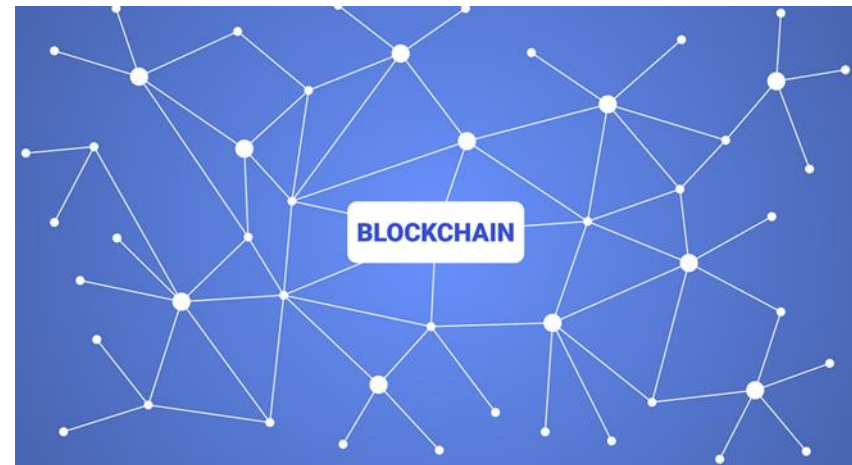


Federal Supreme Court Decision [119 IV 59](#)

«Result»

Does transferring proceeds of crime to crypto currency constitute a concealment?

Is a blockchain transaction not as transparent as possible?



Cold Storage



© Boris Lobastov, From Wikimedia Commons
https://commons.wikimedia.org/wiki/File:Spectroscope_diy.jpg

Deep Cold Storage



Art. 305^{bis} – Money Laundering

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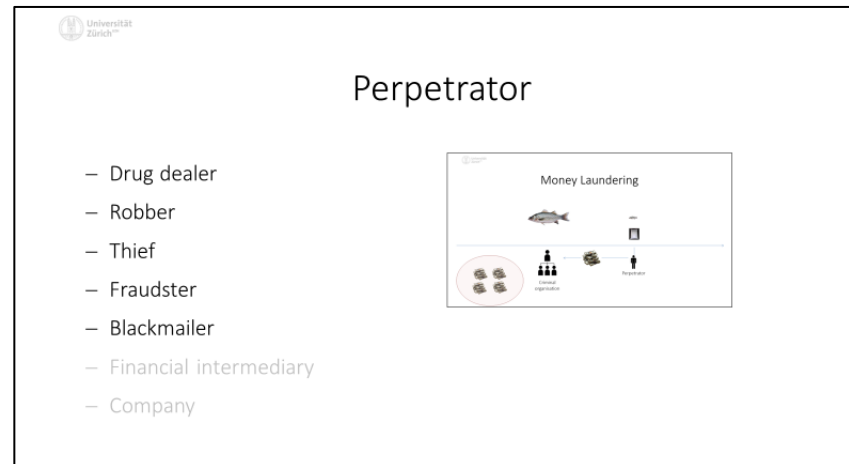
Subjective elements (mens rea)

- Intent
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Intent

Perpetrators of the main offence:

- *Know* of the criminal origin
- *Want* to make confiscation harder



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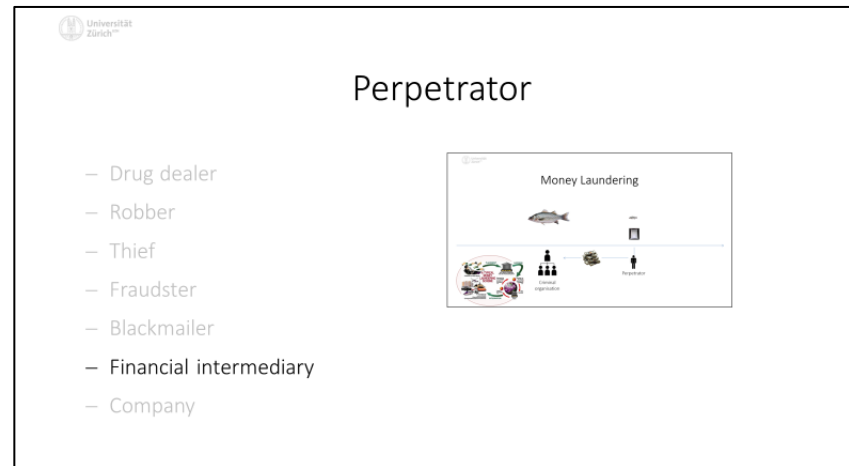
Subjective elements (mens rea)

- Intent
- Dolus eventualis

Dolus eventualis

Financial intermediaries:

- *Deem possible* criminal origin
- *Accept* to make confiscation harder



Dolus eventualis

Willful blindness counts as dolus eventualis: «He who knows that he does not know, does not err.»



Federal Supreme Court Decision [135 IV 12](#)

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Criminal Liability

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Art. 102 SCC – Corporate Criminal Liability

A Swiss court has found the Zurich-based Falcon Private Bank guilty of money-laundering offences.

Swissinfo.ch, 15.12.2021

Verdict dated 15 December
2021 (SK.2020.21)

BANKS

Credit Suisse faces money laundering charges in trial of Bulgarian cocaine traffickers

CNBC, 06.02.2022

Verdict dated 27 June 2022
(SK.2020.62)

Art. 102 – Corporate Criminal Liability

1 If a felony or misdemeanour is committed in a company in the course its business activities and this act cannot be attributed to any specific natural person due to the company's poor organisation, the felony or misdemeanour will be attributed to the company. In this cases, the company will be fined up to CHF 5 million.

Secondary liability

2 If the offence committed falls under articles 260^{ter}, 260^{quinquies}, 305^{bis}, 322^{ter}, 322^{quinquies}, 322^{septies} para. 1 or 322^{octies}, the company will be punished, irrespective of the criminal liability of any natural person, provided the company has failed to take all necessary and reasonable organisational measures to prevent such an offence.

Primary liability

3 The court sets a fine in particular in accordance with the gravity of the offence, the seriousness of the lack of organisation and the damage caused as well as the economic capacity of the company.

Sentencing

4 For the purpose of this title, the following is considered company

- a. any legal entity under private law;
- b. any legal entity under public law with exception of local authorities;
- c. associations;
- d. sole proprietorships.

Definition of a company

Art. 102 para. 2 SCC

If the offence committed falls under articles 260^{ter}, 260^{quinquies}, 305^{bis}, 322^{ter}, 322^{quinquies}, 322^{septies} para. 1 or 322^{octies}, the company will be punished, irrespective of the criminal liability of any natural person, provided the company has failed to take all necessary and reasonable organisational measures to prevent such an offence.

- **Main offence**
 - Committed in a company in the course of its business activities
 - Exhaustive enumeration: Criminal organisation (art. 260^{ter}), financing terrorism (art. 260^{quinquies}), money laundering (art. 305^{bis}), acts of corruption (art. 322^{ter}, 322^{quinquies}, 322^{septies}, 322^{octies})
- **Deficient organisation**
 - Failure to prevent the commission of a listed offence

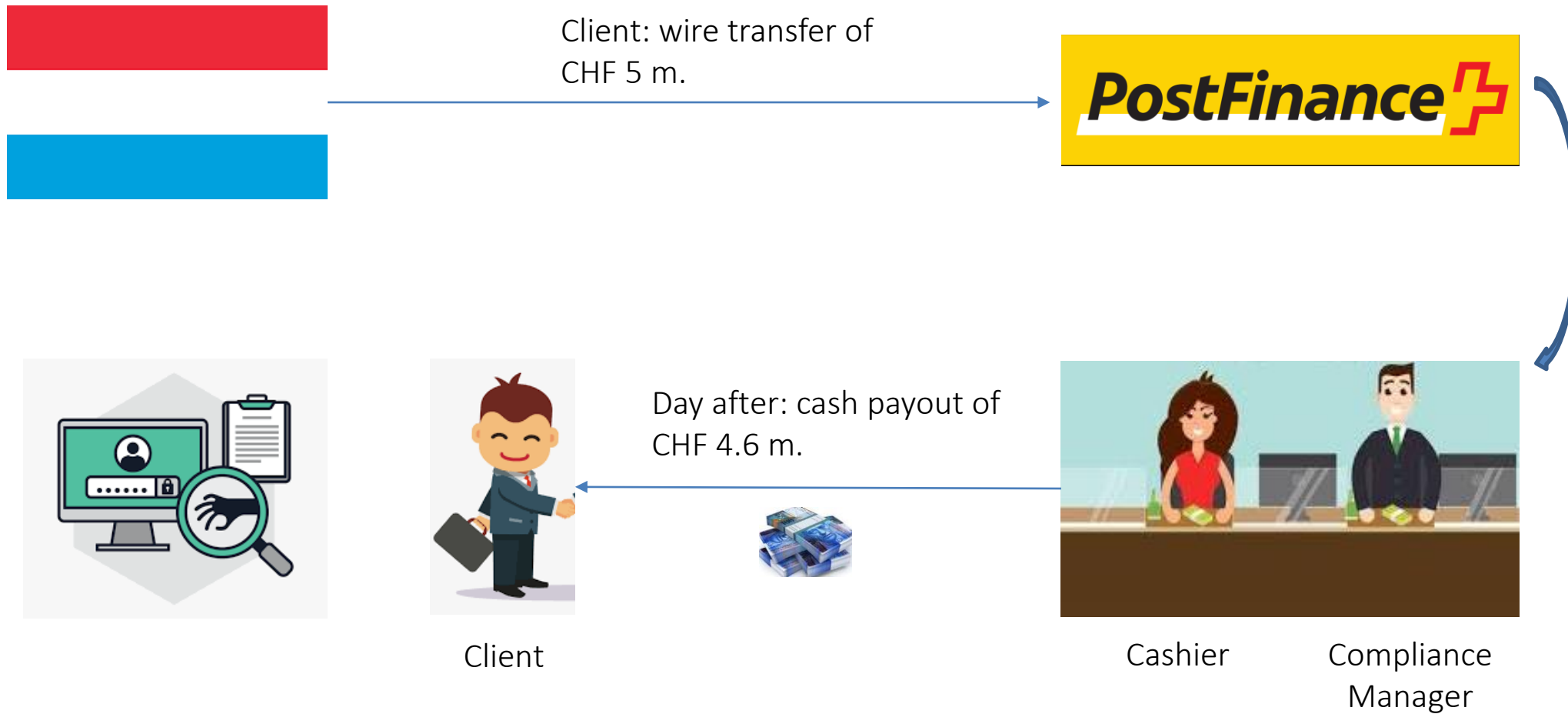
Art. 102 para. 2 SCC – Main Offence

If the offence committed falls under articles 260^{ter}, 260^{quinquies}, 305^{bis}, 322^{ter}, 322^{quinquies}, 322^{septies} para. 1 or 322^{octies}, the company will be punished, **irrespective of the criminal liability of any natural person**, provided the company has failed to take all necessary and reasonable organisational measures to prevent such an offence.

BGE 142 IV 333, E. 4.1

«The provision is therefore linked to a committed misdemeanour or felony. It must be proven that the objective and subjective elements of the offence are fulfilled. If this is not proven, the company is not liable to prosecution..»

BGE 142 IV 333



Art. 102 para. 2 SCC

If the offence committed falls under articles 260^{ter}, 260^{quinquies}, 305^{bis}, 322^{ter}, 322^{quinquies}, 322^{septies} para. 1 or 322^{octies}, the company will be punished, irrespective of the criminal liability of any natural person, provided **the company has failed to take all necessary and reasonable organisational measures to prevent such an offence.**

Deficient organisation

Reasonable organisational measures?

Suitable and **proportionate** to the typical and specific risks associated with the company's business activity

Art. 102 – Consequences

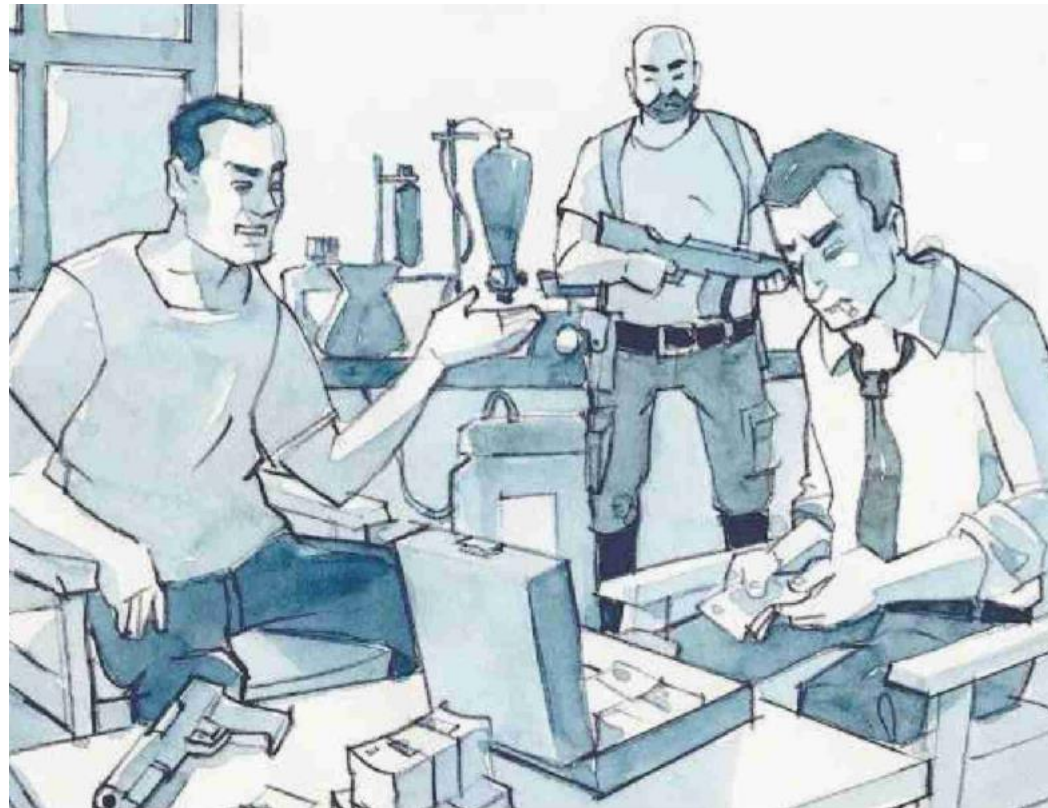


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Case Study



Case study

Brian is a client of the Bank C in Zurich. He is linked to several accounts that he opened as beneficial owner in the name of various offshore companies. His client advisor Debbie regularly meets him on the premises of the Bank C in Zurich. On these occasions, Brian places suitcases full of cash in safe deposit boxes. Later, Brian asks Debbie to pay the cash into the aforementioned bank accounts. The amounts are each below the anti-money laundering alert threshold. Afterwards, the money is being used to purchase real estate in various countries. Debbie carries out these transactions on Brian's instructions.

The cash stems from drug trafficking carried out by a Bulgarian drug cartel which is led by Brian. However, he explains to Debbie that the cash is the profits from his real estate construction businesses in Bulgaria.

One by one, the international media reveals that Brian is leading one of Bulgaria's drug cartels. Especially when Andrew, a high ranked member of a rivalling Bulgarian drug cartel, is shot dead in the street of Sofia and it is suspected that Brian gave the order to murder Andrew, the international media reports more and more details about Brian and his drug cartel.

Despite these media reports, Debbie continues to meet Brian at the bank branch and carries out his instructions as she did before.

Later, Brian is convicted of drug trafficking in various countries.

Discuss the (corporate) criminal liability of Debbie and the Bank C in consideration that Brian is convicted for drug trafficking, a felony acc. to article 10 para 2 SCC.

Case Study



Deposits on Brian's
various bank accounts



Criminal Liability of Brian



Convictions for drug trafficking in various countries

→ predicate offence to money laundering

Criminal Liability of Debbie?

Debbie could be liable of money laundering (305^{bis} SCC) for having carried out the transactions on Brian's instructions.



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Objective elements (actus reus)

- Perpetrator
- Object
- Action
- «Result»

Subjective elements (mens rea)

- Intent
- Dolus eventualis

Art. 305^{bis} – Money Laundering

Asset of criminal origin (Object)

- Knowing/Deeming possible [should have known, must assume]
- Wanting/Accepting

Frustration of Forfeiture («Result»)

- Knowing/Deeming possible
- Wanting/Accepting

Objective elements

- Perpetrator
- Object
- Action
- «Result»

Subjective elements

- Intent
- Dolus eventualis
- [Negligence]

Corporate Criminal Liability of Bank C?

Bank C could be held criminal liable for having failed to take all the reasonable organizational measures that were required to prevent the offence of money laundering (article 305^{bis} in conjunction with article 102 para 2 SCC).



Art. 102 para. 2 – Primary Liability

If the offence committed falls under articles 260^{ter}, 260^{quinquies}, 305^{bis}, 322^{ter}, 322^{quinquies}, 322^{septies} para. 1 or 322^{octies}, the company will be punished, irrespective of the criminal liability of any natural person, provided the company has failed to take all necessary and reasonable organisational measures to prevent such an offence.

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- Exhaustive enumeration: Criminal organisation (art. 260^{ter}), financing terrorism (art. 260^{quinquies}), money laundering (art. 305^{bis}), acts of corruption (art. 322^{ter}, 322^{quinquies}, 322^{septies}, 322^{octies})

- **Deficient organisation**

- Failure to prevent the commission of a listed offence

Take Out

“Our client is being unfairly accused, because Swiss law requires that a person be implicated in order to condemn a bank,” attorneys at law firm MANGEAT LLC, representing the ex-employee, told Reuters. “She is innocent, outraged by the accusations. We will plead for her full and complete acquittal.”

CNBC, 06.02.2022; Credit Suisse faces charges in trial of Bulgarian cocaine traffickers (cnbc.com)

CAS Compliance Management 2023

Managing Criminal Liability

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