CENTRE DE DROIT
BANCAIRE ET FINANCIER

Money laundering

Analysis of the 2020 annual report of the MROS

Par Natacha A. Polli le 7 June 2021

After a Report 2019 reduced to statistics, the Report 2020 returns to a format more in line with the tasks of the MROS, which include raising awareness among financial intermediaries (see typologies in section 5) and informing the public about developments in the fight against money laundering.

Statistics (section 4)

MROS has changed its working method, making direct comparison with previous years difficult. However, it provides information that allows a certain degree of comparability to be restored.

The trends of previous years are confirmed :

- 25 % increase in the number of relationships reported (5,334 reports concerning an average of 1.8 business relationships),
- 89.5 % of reports made by banks,
- most frequently mentioned prior offence (58 % of communications) : fraud ; the Covid crisis partly explains this, as this kind of situation is generally criminogenic and the granting of Covid loans has created new opportunities for fraud.

In addition :

- right to communicate according to art. 305ter para. 2 CP on the decline but still significant (36.6 % of communications) ;
- no reports from traders according to art. 9 para. 1bis LBA, which raises the question of the effectiveness of imposing anti-money laundering standards on professions far removed from the financial sector.

Some changes and new developments :

- increase in reports from cryptocurrency financial service providers, with no mention of the proportion that should be attributed to them in the ‘Other’ category (185 reports) ;
- after a wave sparked by major international corruption cases (Petrobras, PDVSA, 1MDB, etc.), a sharp decline in reports mentioning corruption as a predicate offence ;
- the emergence of transaction monitoring as the most frequently mentioned element giving rise to suspicion ; it is not certain that this reveals a real change in the importance

of the triggering elements ; indeed, it is now possible to indicate several triggers for the report ; however, it is usual for the report to be based both on information from the media and on investigations linked to transaction monitoring.

The number of reports to the criminal prosecution authorities is 1,939. Since a report, which no longer consists of the simple transmission of a communication, can contain information related to several communications, no specific interpretation can be made of this figure in relation to the 5,334 communications.

MROS practice

goAML (ch. 3)

The Report welcomes the adoption of the new goAML information system, which must now be used to make suspicious activity reports electronically. This system, which also allows MROS to manage the transmission of analysis reports, information and documents with the competent Swiss authorities, is presented as a significant step forward for MROS's activities and the fight against money laundering.

However, the integration of goAML requires significant resources for banks and its use by other financial intermediaries remains a challenge. MROS publishes useful support documents, but they reveal the complexity of the system. It is regrettable that there was no real impact analysis for financial intermediaries at the time of the revision of the OBCBA, which made the use of goAML mandatory. A new version has been announced : it will have to be better.

Poor quality of communications (ch. 3.5) ?

MROS deplores the lack of quality of the information attached to the communications. Referring to art. 3 OBCBA, it reserves the right, after an examination that can only be summary, not to confirm receipt, as the processing time limit of art. 23 para. 5 LBA only begins to run when the communication is deemed complete (art. 4 para. 1 OBCBA). MROS acts in this way when it considers that clarifications according to art. 6 LBA are missing, but also when a communication does not contain a suspicious transaction. Firstly, this raises the question of the legal basis that would authorise MROS to postpone acknowledging receipt of a communication, or even to reject it. Secondly, one may wonder about the consequences of such a decision for the financial intermediary, as it is subject to the supervision of FINMA or its OAR and the administrative criminal law procedure for violation of the obligation to communicate (art. 37 LBA) is the responsibility of the Legal Service of the Federal Department of Finance and not of MROS.

Regarding the supposedly missing information, this can be explained in various ways, without there being a lack of diligence on the part of the financial intermediary, in particular :

- The risk-based approach is not intended to systematically gather probative documents related to all KYC and transactional elements.
- A simple unresolved doubt, or even a feeling of unease, can lead to a report.
- In the event of a well-founded suspicion following information about a person and/or the origin of their wealth, it may be difficult to identify suspicious transactions in the business relationship within a reasonable period of time.
- In view of the case law on violation of the obligation to report, financial intermediaries

are under considerable pressure regarding the time limit within which they must make reports, so that, despite their efforts, they will sometimes have to report before having finalised the clarification.

In conclusion, it would be advisable to review this practice of delaying the processing or rejecting disclosures, including by questioning its compatibility with an effective anti-money laundering policy.

Order for the production of documents or seizure by criminal prosecution authorities and obligation to communicate (ch. 6.3)

The MROS returns to the question of the obligation to communicate after receiving an order from a criminal prosecution authority.

It cites ATF 144 IV 391, widely commented on by legal scholars, and reiterates that, if the financial intermediary establishes through the clarifications made pursuant to art. 6, para. 2, letter b of the LBA that there is reasonable suspicion regarding business relationships other than those covered by the order, there is an obligation to communicate. The MROS applies the same reasoning to suspicious transactions that fall outside the period covered by the ordinance. This corresponds to practice and is logical since, in both cases, the criminal prosecution authority could not have knowledge of these facts on the basis of the documents received. However, the MROS extends its reasoning to the identification of the persons mentioned if they are *" instructors and beneficiaries of internal or international transfers*, which is a very specific type of search reserved for certain circumstances, as well as *'additional or new elements of suspicion in relation to the same (…) persons mentioned in the order to produce documents and/or seize assets or involved in the business relationship whose assets are the subject of the seizure (…) and for new elements that may give rise to suspicion'*. He adds that *'when the financial intermediary receives an order (…), he undertakes, through the correct application of the due diligence obligations (…) to identify any other elements of suspicion. As long as this activity is not completed, the financial intermediary is not in a position to exclude the existence of a well-founded suspicion.'* How could a financial intermediary who receives an order as an attached third party, containing *'factual circumstances, generally succinctly indicated by the criminal prosecution authority'*, identify that an element would be new for the criminal prosecution authority, when it is not necessarily in a position to know precisely who is being prosecuted and what the facts already identified are ? It should be noted that the situation is even more difficult in the case of a request from MROS under art. 11a para. 2 LBA, since it does not even indicate the potentially relevant offences, including whether they involve organised crime or the financing of terrorism.

The obligation to clarify under art. 6 LBA is intended to ensure, on the one hand, adequate risk management and, on the other hand, compliance by financial intermediaries with their obligation to communicate, but not to require the financial intermediary to then guide the criminal prosecution authority in the analysis of the documents submitted. This is all the more so since the time constraints of communication and criminal proceedings are fundamentally different. When the criminal authority receives all the requested documents on the basis of its order, when there is no other business relationship concerned and when the period concerned is fully covered, it must be considered that there is no longer any obligation to report, even if the criminal authority has not yet identified all the elements of suspicion.

In view of the prudential consequences for financial intermediaries and the administrative criminal law consequences for their employees, the scope of the obligation to communicate cannot be extended in an exaggerated manner, attributing to financial intermediaries a responsibility that falls to the authorities.

Outlook

The difficulties pointed out by the MROS must be taken into account, as any weakness in the anti-money laundering system is detrimental to the Swiss financial centre. However, particularly with a view to a possible public-private partnership as mentioned by the MROS, it is essential to (re)define the responsibilities of all partners. This cannot be resolved by a form of material outsourcing that is even more extensive to the private sector, whether in terms of resources or responsibilities.
