CENTRE DE DROIT
BANCAIRE ET FINANCIER

The fight against money laundering

Commentary on the MROS Annual Report 2023

Par Natacha A. Polli le 29 May 2024

The MROS Annual Report 2023 has been published discreetly. Only certain points are commented on.

The statistics include 11,876 communications corresponding to 21,500 business relationships (+56 %, a tenfold increase in 10 years), 90.5 % of which came from banks, while asset managers, lawyers, notaries and trustees remain largely under-represented. Fraud remains the leading predicate offence (see this analysis). 14.5 % of reports concerned crypto-currencies, the importance of which is probably underestimated (see this specific report, commented on in Tharin, cdbf.ch/1335/). No surge in communications linked to sanctions against Russia. MROS has the “impression that FIs are very good at distinguishing between the different communication systems and the different competencies”. Anti-money laundering and sanctions are related, but their aims are not identical and they are implemented by different authorities. The proposal in the draft law on the transparency of legal persons (LTPM) to include measures to prevent breaches of the AMLA in art. 8 AMLA seems unnecessary. 866 whistleblowers were reported, based on an average of 1.8 reports received between 2017 and 2023. The 30 % drop is the result of MROS’s risk-based approach.

MROS notes that financial intermediaries (FIs) deliver structured data using goAML (>90 % of cases), while authorities struggle to provide such data (<20 % of cases). The lack of data quality may lead MROS to reject an FI’s report pursuant to art. 3 OBCBA, and the FI could be criticised for failing to submit its report on time (see Analysis of MROS’s 2020 annual report). The introduction of a register of beneficiaries envisaged in the draft LTPM does not change this : despite the creation of a register managed by the Federal Department of Justice and Police and a supervisory body attached to the Federal Department of Finance, FIs would be obliged to report discrepancies without a time limit for processing and responding imposed on the register. Is it right for FIs to be responsible for the quality of third-party data processed by the authorities ?

The risk-based approach (RBA) applied by MROS is based on the type of crime, the authorities’ strategy and the reputational risk. Active intelligence” and “information networking” should improve the relevance of their work. One consequence of this is that fewer communications will be subject to in-depth analysis (2023 : 20 %, 2021 : 45 %). FIs are increasing the number of disclosures, but receiving less feedback from MROS, so the ability to assess the follow-up to disclosed business relationships is deteriorating. FIs apply a MLA (Art. 6 MLA). The case law on art. 37 MLA (concerning late reports, reports of closed business relationships and negligent breaches of the obligation), however, seems to be tending towards an exhaustive obligation of result. This impression is reinforced by the tension between MROS's constant reminder to clarify before reporting in order to provide quality relevant information and the injunction to act promptly in art. 17 MLO-FINMA. The principle of RBA thus seems to be variable.

Among the causes of inflation in disclosures, MROS mentions the increase in convictions for breaches of the obligation to disclose against "compliance officers (sic) from lower hierarchical levels", including in cases of negligence. Are we being faithful to the anti-money laundering provisions if the increase is the result of the sanctioning of employees in the second line of defence acting through negligence ? The power to communicate lies with the highest level of management, unless delegated to Compliance (art. 25a MLO-FINMA). The models frequently assign this responsibility to a joint committee (including a representative of management) or to Compliance (its head or the Money Laundering Reporting Officer). For financial institutions, this is part of the governance of the organisational regulations approved by FINMA. Sanctioning compliance officers at lower levels in the hierarchy takes no account of their responsibilities under supervisory law or the anti-money laundering standards. The resulting reflex of "communicating too much rather than too little" will cause an exponential inflation of lower quality communications, moving away from the intended goal.

MROS's activities (including cooperation with national authorities and its foreign counterparts) show how the fight against money laundering has evolved. The many revisions to our reporting system – in response to the FATF's comments, or as a result of legislative compromises – have resulted in a system that is unsatisfactory for stakeholders, some of whom feel that their resources are insufficient and others who feel that the delegation of state tasks with exorbitant responsibility is excessive.

Fundamental reflection is needed, particularly on :

- re-evaluating the boundaries of responsibilities between the authorities and the FIs
- the creation of a truly independent centre of expertise in the fight against money laundering, avoiding the current dispersal,
- differentiated treatment of cases depending on their size and complexity (de minimis rule, RBA including reporting),
- a system of sanctions that targets the FI first and foremost, and only allows personal liability to be sought in the event of a significant role in the breach of the duty to report, whatever the function or hierarchical level, excluding breaches of the duty to report due to negligence under art. 37 para. 2 AMLA.

The duty to report is an important component of a credible anti-money laundering system. It deserves to be addressed in a way other than as an urgent and partial response to external pressure.

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