E. Taxation

Corporate income tax rates range from 15–25 percent. "Priority" category investments are subject to a 15–20 percent corporate income tax rate and non-priority category investments are taxed at rates ranging from 21–25 percent. If any two of the following conditions are met, a project is considered to be a "priority" project:

(1) paid-up capital of more than U.S. $10 million;
(2) technology that results in significant socio-economic improvements and significantly promotes the competitiveness of the products in the international market;
(3) projects that export at least 80 percent of the products or earn at least 80 percent of their turnover in foreign currency;
(4) projects that have a rate of profit significantly lower when compared with other projects;
(5) projects located in regions where conditions are not favorable; or
(6) projects where the investment was made within the first five years of the implementation of the Foreign Investment Law.

Switzerland*

I. New Provisions Against Money Laundering

On August 1, 1990, two new criminal provisions relating respectively to money laundering and to the lack of vigilance in the field of financial transactions came into force in Switzerland.

In 1979, although money laundering was not expressly illegal in Switzerland, Swiss banks, responding to criticism from abroad regarding the abuse of Swiss banking secrecy for criminal purposes, adopted a code of conduct called the Diligence Convention (the Convention). Its present version has been in force since July 1, 1987.[1] The main aim of the Convention was to establish, among other things, a duty of due care in the identification of account holders and depositors and an oversight board to adjudge violations of the Convention and to assess monetary fines. In part as a result of the Marcos and Duvalier affairs, the

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1. This took the form of a private agreement between the Swiss Bankers Association, the Swiss National Bank (or Central Bank), and the individual banks operating in Switzerland, which were put under pressure to sign by the Banking Commission (the regulatory authority supervising banks).

conditions of the Convention were made progressively more restrictive. Later on the Convention itself appeared an inadequate solution to many, especially in the wake of the so-called "Lebanon Connection."[2] As a result, in view of the accelerated expansion in recent years of crime organized on an international scale, which was also demonstrated by the Lebanon Connection revelations, in December 1988 the Swiss Federal Council asked the Federal Parliament to consider legislation to criminalize money laundering. It was adopted in March 1990 after an accelerated passage through the Parliament.

The new legislation consists of two provisions introduced into the Swiss Penal Code (SPC), articles 305 bis and 305 ter.

II. SPC Article 305 Bis: Money Laundering

A. Text of the Provision

1. He who shall have committed an act tending to impede the identification of the source, the discovery or the confiscation of assets which he knew or should have known to be of criminal origin shall be punished by imprisonment or a fine.

2. In serious cases, the punishment shall be criminal confinement for no more than five years. The imprisonment shall be concurrent with a fine of up to one million francs.

The case is serious, particularly when the perpetrator:

a. acts as member of a criminal organization;

b. acts as member of a gang formed to systematically engage in money laundering;

c. makes a significant turnover or gain in engaging in money laundering by profession.

3. The perpetrator shall also be punished when the principal offense has been committed outside of Switzerland and it is also punishable in the country in which it has been perpetrated.

B. Objective Elements of the Offense

The notion of assets *(valeurs patrimoniales)* should be understood in as broad a sense as possible, since money laundering covers all imaginable forms of economic transactions and pecuniary advantage. In addition to cash or currencies it includes securities, rights and obligations in general, metals, precious stones, other movable and immovable goods, and the rights attaching thereto.

Under article 305 bis, the notion of crime means that the doubtful assets have their source in either an offense committed in Switzerland that constitutes a crime, according to the definition given by Swiss criminal law,[3] or an offense

2. In Nov. 1988, it was revealed that a Lebanese-Turkish drug dealing ring had transferred SFr. 1 billion into Switzerland over a period of two years. In recycling what were, in part, allegedly illegal drug profits, the ring availed itself of the services of the three major Swiss banks. *See* Feuille Fédérale [FF] 1989 II at 977.

3. According to SPC art. 9, ¶¶ 1, 35, offenses punishable by imprisonment of one to twenty years are crimes. These include the following offenses in particular: theft (SPC art. 137); robbery (SPC art. 139); receiving stolen goods (SPC art. 133); fraud (SPC art. 148); extortion and blackmail

committed outside Switzerland, but considered in Switzerland to be a crime. One should remember that tax fraud constitutes, on the federal level, a simple misdemeanor and not a crime.[4] This is also generally admitted in cases of international judicial assistance.

Article 305 bis affects only assets that are the product or the result of a crime. The wording of the provision, however, does not clarify how far the original "dirty" funds may be followed through investments, disinvestments, exchanges, and the like. Courts will certainly decide this question.[5]

The new provision targets all acts likely to frustrate the identification of the origin, discovery, or the confiscation of the assets described above. Evidence that the impediment has been effective is not necessary; impediment per se is sufficient. Ordinary banking transactions, such as the simple acceptance of funds on deposit, may already constitute laundering, in accordance with article 305 bis, in circumstances where the subjective element of the offense exists.

C. Subjective Element of the Offense

Article 305 bis only applies where the relevant person "knew or should have known" that the assets at stake stemmed from a crime. This subjective element of the offense, which was extensively discussed before the Parliament, is essential.

The Federal Council, in its commentary of the bill,[6] pointed out that article 305 bis is an intentional offense; negligence is not punishable.[7] Note, however, that by virtue of a general principle of Swiss criminal law, intention includes the knowledge that the results of an act may prove illicit (*dol éventuel* or *Eventualvorsatz*). Consequently, article 305 bis also applies where the relevant person accepts the possibility that the assets in question have a criminal source and that his or her actions may contribute to their laundering.

III. SPC Article 305 Ter: Lack of Vigilance in the Field of Financial Transactions

A. Text of the Provision

> He who, in the conduct of his profession, shall have accepted, kept on deposit, helped to invest or transfer assets belonging to a third party and who shall have omitted

(SPC art. 156); usury (SPC art. 157); and fraudulent bankruptcy (SPC art. 163). In addition, some violations of the federal narcotics law are classified as crimes (Narcotics Act ch. 2, art. 19).

4. The classification of tax fraud on the cantonal level varies from canton to canton, but is generally classified as a misdemeanor.

5. *See* FF 1989 II at 982.

6. *See id.* at 984.

7. On this point the Parliament did not share the opinion of the Federal Banking Commission (CFB), which recommended that gross negligence also be punished (CFB 1988 annual report, at 25).

to verify with the vigilance commanded by the circumstances the identity of the beneficial owner, shall be punished by imprisonment for at most one year or by arrest and/or a fine.

B. Objective Elements of the Provision

The provision applies only to persons who engage professionally in the acceptance, keeping, investment, or transfer of third-party assets. In contrast to the Diligence Convention, this legislation is not limited in scope to banks. Article 305 ter applies to all members of Switzerland's financial community: fiduciary institutions, asset managers and finance companies, money changers, and lawyers, among others. Only a natural person, however, may be guilty of an offense under article 305 ter or article 305 bis.

The punishable act is the failure to exercise the due care necessary, under the circumstances of the particular case, to verify the identity of the beneficial owner of the assets. The notion of *ayant droit économique* is the equivalent of the "beneficial owner" in Anglo-Saxon countries,[8] and, where necessary, the verification requested by article 305 ter without doubt will go beyond the identity of the direct co-contractor.[9]

C. Subjective Element of the Offense

The obligation imposed by article 305 ter is absolute and shall apply in abstracto. Consequently, violation of the obligation of identification is an offense under article 305 ter, regardless of whether the handled assets stem from a crime.

IV. Conclusion

Clearly, one of the most important effects of the legislation will be to provide foreign legal officers with a basis for obtaining judicial assistance in connection with cross-border money-laundering operations and for breaking through Swiss banking secrecy barriers. While the new provision of SPC article 305 bis addresses money laundering only if engaged in with criminal intent, SPC article 305 ter reaches beyond mere negligent money-laundering: it creates a positive duty on all professionals to investigate the background of all financial transactions and the counterparties with whom they are transacted. One may, in this respect, regret that the Swiss legislators refrained from regulating the standards for the duty of due care in identification.

One may also question what the right conduct would be for a bank or finance company when, having satisfied itself at the time of the opening of a banking

8. *See* FF 1989 II at 998 n.118.

9. The concept of *ayant droit économique* is rather new in Swiss criminal law; however, it was already adopted by art. 3 of the Diligence Convention of July 1, 1987. It seems that the measures required by the Diligence Convention will constitute, at least generally, if not in all cases, the standard of vigilance as far as verification of identity is concerned.