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Money Laundering -
A Comparative Study between the Law in Switzerland and in the U.S.A.

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May 1995

A thesis submitted to the Faculty of Graduate Studies and Research
in partial fulfilment of the requirements of the degree of L.L.M..

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In order to help the fight against organised crime, particularly drug dealing, the problem of money laundering has become more significant.

The various techniques used by money launderers are also subject of this thesis. Through the many ways utilised to launder money, it shows how difficult it is to pinpoint what action is on the border of legality and what is not.

These difficulties become more apparent when precise analysis is made of the law as applied in both Switzerland and the U.S.A..

Neither approach has proven successful. On the contrary, the question of constitutionality of many rules becomes relevant. Many authors do not find the application of the laws easy from the point of view of constitutional law.

The present thesis suggests to review the present laws and redefine them in a more simpler manner which makes them acceptable internationally.

Dans la lutte contre le crime organisé, en particulier le commerce de la drogue, le blanchiment d'argent occupe le devant de la scène.

Les différentes astuces à disposition des blanchisseurs sont traitées dans cette thèse.

Aussi compte-tenu des moyens multiples utilisées dans le blanchiment des fonds, il est difficle de faire le distinguo entre ce qui est legal et ce qui ne l'est pas.

Les difficultés deviennent plus apparentes lorsqu'une analyse approfondie est faite dans l'application des lois en vigeur aussi bien en Suisse qu'aux Etats-Unis.
Ni les unes, ni les autres, ne donnent pas vraiment satisfaction. Au contraire: la question de leur constitutionnalité saute aux yeux. Plusieurs légistes mettent en question l'application de certaines lois sous l'angle du droit constitutionnel.

Cette thèse ambitionne une refonte des lois actuelles et une redéfinition de certaines d'entre-elles afin de permettere une application plus simple dans la pratique.

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I. Introduction

1.1. Signs of the Time - The Making of a Law

On March 23 1990, the Swiss Federal Parliament adopted two new provisions supplementing the Swiss Criminal Code (hereafter StGB) relating respectively to money laundering (Art. 305bis StGB) and the lack of vigilance in the field of financial transactions (Art. 305ter StGB). Both provisions came into force on August 1st 1990.

In Switzerland, the process of law-making is long-winded[1]. A consensus must be reached on every level of the law-making-process. Even if the parliament has finally adopted a text, a referendum against the law is still possible. That the new provisions of the StGB came into force only 4 years after the publication of the preliminary draft[2] by the Federal Justice and Police Department (hereafter EJPD) and that no referendum was taken, demonstrates how concerned both the general public and the legislators were about the problem of money laundering in Switzerland.

Several prior cases[3] had made it obvious that Swiss law, because it laecked provisions against money laundering, was completely ineffective in

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[1] An example of how time consuming implementing a law in Switzerland can be if the many interest groups feel concerned is the Swiss Environmental Law. It came into effect on January 1st 1985 - about 20 years after Mr. Julius Binder, M.P., asked parliament to discuss environmental problems and adopt a law regulating pollution. Yet the law in effect is considered as ineffective by many experts. To become operational, both Cantons (the Swiss States) and municipalities must adopt ordinances. The result is a dilution of the legal text which itself is a product of compromises to accommodate each pressure group. See Saladin P., Schweizerisches Umweltschutzrecht - eine Uebersicht, recht- Zeitschrift für juristische Ausbildung und Praxis (hereafter recht), Bern 1989, p. 1 - 12.

[2] Vorschläge des EJPD zur Strafrechtlichen Erfassung der Geldwäscherei, Bern 1987. This report was based on a preliminary report submitted to the EJPD on September 15 1986. See Bernasconi P., Die Geldwäscherei im Schweizerischen Strafrecht. Expertenbericht im Auftrag des EJPD, Bern 1986.

[3] See below p. 3, FN 11.

deterring money launderers from being active in Switzerland[4] . The implementation of the new provisions have not solved the problem so far[5] . It will astonish the North-American reader to hear that Switzerland has, to date, neither a specific law against organised crime[6,7] nor a specialised agency to fight it[8] . In general, the danger of organised criminality was underestimated and believed to be a typically Italian problem only[9] .

An increase in cases concerning money laundering[10] made the public aware that money laundering was going on in Switzerland. It was the cases

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4 Bernasconi P., Finanzunterwelt, Zurich & Wiesbaden 1988, at p. 37 - 39

5 Neue Zürcher Zeitung (NZZ), Zurich Mai 4 1994, at p. 21, col. 4: Breite Front gegen das Geldwäschereigesetz: Ziele unbestritten - Kritik an "unbestimmten Rechtsbegriffen".

6 Based on the recommendations of the Financial Action Task Force on Money Laundering (FATF) dated February 7 1990, the EJPD has prepared a preliminary draft for a law against criminal organisations. See: Revision des Strafgesetzbuches und Militärstrafrechts betreffend der Strafbarkeit der kriminellen Organisationen, die Einziehung, das Melderecht des Financiers sowie die Verantwortlichkeit des Unternehmens. Vorentwurf des EJPD vom März 1991.

7 Switzerland is not the only European country realising it underestimated the danger of organised crime. Legislative efforts have begun all over Europe. See for example for Germany: Entwurf eines Gesetzes zur Bekämpfung des illegalen Rauschgifthandels und anderer Erscheinungsformen der organisierten Kriminalität (OrgKG) vom 10. August 1990 des Deutschen Bundestags mit Stellungnahme der Bundesregierung (Paragraph 261 StGB).

8 Del Olmo R., Discourse on the War of Drugs: The Hidden Face of Drugs, p. 10 - 48, at p. 23, Social Justice, San Francisco 1991, vol. 18, no. 4. In the U.S., the strict law to fight money laundering such as the Comprehensive Drug Abuse Act, the Prevention and Control Act, the Racketeering Influenced Corrupt Organization (RICO) Act and the Continuing Criminal Enterprise Statute were accompanied by the creation of a specialised federal agency: the Drug Enforcement Agency (DEA). Switzerland, on the other hand, has, because of the separation of tasks and duties between the federal government and the cantons, not even a federal police (Schweizerische Bundesverfassung Art. 9).

9 Kaiser G., Kriminologie, Heidelberg 1980, at p. 221 stated as late as 1980 in his reference book for Swiss students that in Europe, syndicated crime is located in Italy and that European criminal organisations do not have the capacities and longevity of their U.S. counterparts. Furthermore, he stated that smaller European nations are said to have no difficulties controlling the few existing forms of organised crime and that in Germany, the phenomena has not reached a threatening level.

10 See for examples Graber Ch. K., Geldwäscherei, Bern 1990, at. p. 35 - 49.

of the "Pizza Connection" and "The Lebanon Connection"[11] that traumatised the general public and gave legislators great impetus. In both cases, Swiss banks had accepted cash from couriers to be deposited in accounts. It was later learned that the money originated from dealings with illicit drugs. The sums were incredible: although not all of the cash that the Pizza Connection generated was laundered or deposited in Switzerland, the market value of the heroin this organisation imported into the U.S. from 1979 to 1984 is estimated to be U.S.$ 1,65 billion[12] . The Lebanon Connection is said to have laundered in Switzerland alone about Swiss Francs 1.5 billion[13] . These staggering figures brought to the attention of the general public the extent of money laundering in Switzerland. A great majority felt that the judgments[14] in both cases - based mainly on the "Betäubungsmittelgesetz" or Narcotics Law - not only ridiculed the Swiss legal system but stained Switzerland's international image. In the case of the Lebanon Connection, Mrs. Elisabeth Kopp, Minister of Justice and the first woman to be a member of the Swiss government was forced to resign from office[15] . The political turmoil caused by the case - the EJPD was investigated by a special prosecutor[16] - caused enough political pressure to force legislators to enact an effective law in order to fight money laundering within a short period of time.

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[11] See Graber Ch. K., above p. 2, FN 10, at p. 36 - 42 and Zulauf U., Die Eidgenössische Bankenkommission und Geldwäscherei, recht, Bern 1989, p. 79 - 90, at p. 90.

[12] Bernasconi P., above p. 2, FN 4, at p. 31.

[13] Graber Ch. K., above p. 2, FN 10, at p. 42 : SFr. 1,4 billion and Zulauf U., above , FN. 11, at p. 79 : SFr. 1,5 billion.

[14] Graber Ch. K., above p. 2, FN 10, at p. 38 - 42: Fines from SFr. 300'000,00 to SFr. 10'000,00 and imprisonment from 15 to 2 years.

[15] Mr. Kopp, her husband, a well known lawyer and specialist of media law, was on the board of the Shakarchi Trading Company. This company dealt in gold and currencies and was believed to be the actual launderer of money originating from crimes. The company had already been investigated during the Pizza Connection case. Mrs. Kopp admitted having advised her husband to retire from the board of Shakarchi Trading Company after learning that the company was under investigation and that her husband might be implicated as well. See Graber Ch.K., above p. 2, FN. 10, at p. 42 and Pieth M., Bekämpfung der Geldwäscherei - Modellfall Schweiz?, Basel & Stuttgart 1992, at p. V - VI (Introduction).

[16] Vorkommnisse im EJPD - Bericht der Parlamentarischen Untersuchungskommission (PUK) vom 22.11.1989, Bern 1989

Up to this date, the EJPD had not been inactive. The detection of the Pizza Connection had lead to the creation of a commission to investigate money laundering in Switzerland in order to suggest, if needed, changes in the Swiss Criminal Code (StGB). The findings of the commission were disenchanting: not only was the presence of money laundering on Swiss territory confirmed but the findings also demonstrated the impossibility of subsuming money laundering under Swiss laws in effect at the time. Furthermore, the commission found indications of the presence of organised crime operating in Switzerland and the absence of laws or even concepts to control and fight such activities[17] . The EJPD concurred with the findings of its commission and published a preliminary draft in January 1987[18] and submitted it to the parliament. In March 1988 the results of the "Konsultativverfahren" or consultation in parliament were published[19] . Several suggestions such as the application of strict liability[20] and the punishment of negligence[21] were strongly criticised by lawyers and professionals in banking and finance. It seemed as if discussions would go on eternally without a result[22] . During this time, the Lebanon Connection[23] case was uncovered[24] . One can affirm that without the scandal around the case, legislators and pressure groups would not have demonstrated much assiduity in implementing a law punishing money laundering. In order to go ahead faster, the Swiss government decided in November 1988 to separate the problem of money laundering from the problem of organised crime and implement legislation fighting money laundering alone. The

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17 Bernasconi P., Die Geldwäscherei im Schweizerischen Strafrecht. Expertenbericht im Auftrag des EJPD, Bern 1986. The commission submitted the report on September 15 1986 to the EJPD.

18 Vorschläge des EJPD zur strafrechtlichen Erfassung der Geldwäscherei, Bern 1987

19 Ereignisse des Konsultativverfahrens zum Vorentwurf für eine Gesetzgebung über die Geldwäscherei, Bern 1988

20 Above , FN 18, at p. 100

21 Above , FN 18, at p.131

22 On the long process of implementing a law in Switzerland, see above p. 1, FN 1.

23 Above p. 3 , FN 11 & FN 15

24 Tages Anzeiger, Zurich November 4 1988 reported the discovery of a huge money laundering organisation.

result of this decision was the draft of the Swiss Government of June 12 1989[25] . To avoid lengthy discussions of this draft and enact the law, parliament agreed on a compromise to settle the question of strict liability: only gross negligence would be punishable. Both chambers approved the text of law submitted by the government. The argument for the vote in the Ständerat or Senate was to have "better the second best than the best later or never" [26] .

1.2. The Idea for a Thesis

When I first began working on this thesis, my intent was to compare the newly implemented Swiss law with the rules and regulations already in use in the U.S.[27] . My main interest was to shed some light on the different degrees of awareness on both sides of the Atlantic. An example which demonstrates the differences in recognition of the problem of money laundering in Switzerland before the implementation of Art. 305bis and Art. 305ter StGB is the opinion of Mr. Trechsel expressed in an older essay about the reception of stolen goods or property[28] : The author is of the opinion that the professional receiver of stolen goods or property will never be a receiver of illicit money since money will always find a receiver without the services of professional receiver of stolen goods [29] . The U.S. approach

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[25] Botschaft über die Aenderung des Schweizerischen Strafgesetzbuches (Gesetzgebung über Geldwäscherei und mangelnde Sorgfalt bei Geldgeschäften) vom 12.6.1989, BBl 1989 II 1061

[26] Graber Ch. K., above 2, FN. 10, at p. 106

[27] Laws against money laundering go back to 1961 (Travel Act, 18 U.S.C. 1952, the 1970 Racketeer Influenced and Corrupt Organisations Act, RICO, 18 U.S.C. 1961-1968) and 1970 (Bank Record and Foreign Transactions Act or Record Act, Pub.L. No. 91-508, 401(a), 84 Stat. 1140 (1970))

[28] Trechsel S., Zum Tatbestand der Hehlerei, Schweizerische Zeitschrift für Strafrecht ZStR, Bern 1975, vol. 91,p. 385 - 399.

[29] Trechsel S., above, FN. 28, at p. 396: "Gerade der gewerbsmässige Hehler wird nie ein Geldhehler sein... Geld bedarf nicht der Absatzhilfe.",

to the reception of stolen goods or property is more pragmatical and coincides with the newer Swiss legal theory[30] : Receiving stolen property (18 U.S.C. 662) is acknowledged to be the predecessor[31] of the U.S. Money Laundering Statutes (18 U.S.C. 1956 and 1957 [32]).

One reason that money laundering was not an issue in Switzerland in the past is that classic offences against property such as robbery, fraud, blackmail or fraudulent bankruptcy produce relatively small sums compared to the amounts generated by dealings in illicit drugs. The general public might be disgusted in cases of classic offences against property involving relatively modest sums, but on the other hand, not be aware of both the existence of and extend of money laundering because there is no apparent victim. Since Switzerland is used by money launderers mostly for its discreet banking system, public awareness is difficult to restore. The use of a bank account or the order to transfer money are not externally visible acts. Furthermore, a victim is not in existence: only assets change hands[33].

Envy must be considered a factor when explaining the rapid change of attitude towards money laundering. The money launderer can never claim to have acted for a cause whatsoever. It is obvious that his profit is made on the back of poor people. In this context, the fact that classic crime does not pay will astonish more than one reader! A study by Professor Schmid[34] of the University of Zurich brought to light that only 13% of the criminals having committed an offence against property were enriched in the sense

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[30] Rehberg J., Strafrecht III - Delikte gegen den Einzelnen, Zurich 1987, Art. 144 StGB, p. 75 - 81,at p. 79 and p. 80

[31] U.S. House of Representatives: Hearings on the Money Laundering Control Act of 1986 and the Regulations Implementing the Bank Secrecy Act: Hearings before the Subcomm. on Financial Institutions Supervision, Regulation and Insurance of the Comm. on banking, Finance and Urban Affairs, at p. 105: "In many ways this statute (18 U.S.C. 1957) is analogous to the receiving stolen property status."

[32] Pub.L. 99-570, Title XIII 1352(a)m Oct. 27, 1986, 100 Stat. 3207-18

[33] Concerning this problem see Kaiser G., above p.2, FN. 9, at p. 477 on "white-collar-criminality".

[34] Schmid N., Banken zwischen Legalität und Kriminalität: Zur Wirtschaftkriminalität im Bankwesen, Heidelberg 1980, at p. 52

of a growth of assets or less debt. On the other hand, newer criminality such as drug dealing and money laundering are profitable. The sales of illicit drugs in 1989 were about U.S.$ 122 billion[35] in the U.S. alone. The global profit of the major dealers was estimated in 1990 to generate approximately U.S.$ 30 billion per year[36] . This amount of money is visible through exterior signs of prosperity. A demonstration of wealth (by foreigners) and questions concerning how they acquired a permit of residence in Switzerland, led to rumours about the corruption of high government officials and bankers. These were investigated by the special commission of the EJPD [37] .

It was my intention to demonstrate, by a comparative study, the theoretically and politically different approaches of both the Swiss and the U.S. law(s) when they were implemented. To my misfortune, Mr. Ackermann[38] published a comparative study on exactly the same subject. His work is the most complete[39] compilation of literature, laws and cases on the subject available to date which I have come across.

From the moment I found the publication of Mr. Ackermann's thesis on, I began working on the legal theory behind the laws against money laundering. I have found that because of a lack of definition of relevant terms and theoretical coherence, laws intended to fight money laundering have a dangerous potential to overlap into fields other than fighting

[35] Estimation stated in the Group of 7 Declaration of 16 July 1989 at the Economic Summit in Paris that same year. The NZZ, Zurich 25./26.11.89 at p. 33 states a turnover of U.S.$ 110 billion. If converted into U.S.$ 20 bills, the paper mountain would weight 13 tons and one would need a truck convoy from the East- to the West-coast and back in order to handle the volume.

[36] Financial Action Task Force on Money Laundering, Report of 6 February 1990, at p. 6

[37] Above, p. 3., FN. 16

[38] Ackermann J.-B., Geldwäscherei - Money Laundering; Eine vergleichende Darstellung des Rechts und der Erscheinungsformen in den U.S.A. und in der Schweiz, Zurich 1992

[39] Mr. Ackermann analysed 184 U.S. and 66 Swiss cases of money laundering from 1965 until 1992. Furthermore, he studied all published (and certain non-published)decisions , indictments and plea-agreements in connection with the Bank Secrecy Act (Pub.L.No. 91-508, 4018A), 84. Stat. 114 (1970) or money laundering regulations in the U.S. and the few judgments available in Switzerland and cases concerning mutual judicial assistance.

organised crime such as the inviolability of each person's rights.

To lead the reader to the core question of balancing a government's interest in fighting organised crime with inviolable rights, such as the right to secrecy and the right of individual freedom, I have arranged the thesis the following way:

II. Definition of money laundering;

III. The Procedure of Money Laundering;

IV. Specific Techniques of Money Laundering;

V. Money Laundering and Organised Crime;

VI. Comparative Summary of U.S. and Swiss Law on Money Laundering

VII. Fighting Money Laundering de lege lata and de lege ferenda

VIII. Conclusion

II. Definition of Money Laundering

2.1. Laundering Money

In early 1994, Mr. Arnold Batliner retired at age 88 from a unique job: he laundered money in a fully legal manner[40] . Before retiring, Mr. Batliner worked at the St. Francis Hotel in San Francisco. There, at the beginning of the century, the owner noticed that dirty money was staining the immaculate gloves of his exclusive clients. He ordered all coins to be cleaned regularly. From that day on, the cashier at the St. Francis Hotel had shiny coins in his cash register - coins cleaned by specialists like Mr. Batliner [41] .

This little example demonstrates what money laundering is all about: dirty money is processed in order to become as white as snow. Since the facts are not always as clear as in the example above, a definition of money laundering is needed.

2.2. The Definition of Money Laundering

"Money laundering is the process by which one conceals the existence, illegal source, or illegal application of income, and then disguises that

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[40] About the impossibility to launder money "legally", see below p. 11, FN 47.

[41] Raufer X., Les Résaux de l'argent sale, L'Express Internationale, Paris 14 April 1994, p. 24 - 40, at p. 24

income in order to make it appear legitimate." [42]

This definition, short and to the point, describes three characteristic features of money laundering: the object of money laundering and both the action and the intention of the money launderer.

2.2.1. The Object of Money Laundering

Any property assets which derive directly or indirectly from a punishable act [43] or which are intended for the accomplishment of such acts [44] may be objects of money laundering.

In the following discussion, the laundering of assets not declared to tax authorities will not be regarded as an act of money laundering. The subject of interest is money laundering in relation to organised crime. Tax-offence cases concern the law regarding criminal prosecution for tax offences

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[42] President's Report on Organised Crime, Interim Report to the President and the Attorney General, 2. The Cash Connection: Organized Crime, Financial Institutions ad Money Laundering, Washington, October 1994, at p. 7. . This definition is not only in use in the U.S. but also referred to by most Swiss authors: Graber Ch. K., above p. 2, FN. 10, at p. 55, referring to further concurring opinions in FN 44. Further, see Ackerman J.-B., above p. 7, FN 38, at p. 5

[43] In the past, friction between foreign prosecutors and Swiss authorities originated in the different interpretations of offences concerning tax matters. See: Keller G.: Das Schweizerische Vorverfahren zum Rechtshilfeabkommen zwischen de nVereinigten Staaten von Amerika und der Schweiz, Zurich 1981, at p. 4. The Swiss point of view is clear: the concealment of assets not declared to tax authorities is not an offence in general and of money laundering in specific (Ackerman J.-B., above p. 7, FN 38, at p. 6) , although one can assume that this might change in the near future (Tages Anzeiger, Zurich April 13 1994, at p. 37: The Swiss Federal Bank Commission stated in a report that the acceptance of funds destined to corruption are not conveyable with the banking licence) . In the U.S., the older legal theory does not differentiate between the laundering of money from a illicit source and money from a tax law offence (Ackerman J.-B., above p. 7, FN 38, at p. 6, FN 1) .

[44] The suggestions of the EJPD to fight money laundering (above p. 1, FN 2, at p. 20) do not indicate that it was intended to punish the provision of money to finance criminal activities. The draft discusses the concealment of funds from illicit sources in order to make them appear as legal income. Concurring opinion with more citations Ackerman J.-B., above p. 7, FN 38, at p. 5, FN 1. Same conclusion after reading Bundesrat Koller, Amtl. Bull. 1990, S. 195.

unless defined otherwise by the criminal code[45]. That this separation can not always be maintained will be demonstrated below [46,47] .

2.2.2. Actus Reus and Mens Rea

Legislation against money laundering seeks to punish the intentional concealment of the existence, origin or appropriation of assets deriving directly or indirectly from a punishable action, with the further intention to make the assets appear[48] as lawful income in the second phase[49] .

---

[45] See below , FN 47

[46] Below, p. 31 at 4.4.1. and p. 38 at 4.5.4.

[47] In Switzerland, the restriction of money laundering to acts subsumed under Art. 305bis StGB seems to be changing. The Neue Zürcher Zeitung, Zurich March 25 1991, at p. 11 described a plea agreement, in a tax evasion case between a bank in the U.S. and the prosecutor as a "U.S.-Money Laundering-Judgement". According to Swiss legal theory (below, p. 58- 69) such interpretation is wrong and could give rise to the erroneous dual definition of money laundering as either "legal" money laundering (tax matters) or illegal money laundering (criminal matters).

[48] As will be explained below, p.12, FN 50 and p. 32, organised crime launders money with the intention of reinvesting it. Therefore, hiding money cannot be money laundering as defined above. (Ackerman J.B., above p. 7, FN 38, at p. 34 with concurring opinion.) Unfortunately, the Swiss legislature wilfully described money laundering as an act suitable to prevent the discovery of the source or confiscation of funds which originate, known or assumed, from a crime (Art. 305bis StGB). The interpretation of this formulation led to the conviction of a drug addict for hiding money in a flower pot (!) (judgment confirmed by the Swiss Supreme Court, BGE 119 IV 59.

[49] The U.S. Law is explicit on that point: 18 U.S.C. 1956 (1988) creates two substantive offences. One is about conducting financial transactions involving illegally generated funds with the intention to promote "specified unlawful activity"; or with the intention to evade certain provisions of the Internal Revenue Code; or knowing that the transaction is designed to conceal the source, nature, ownership or location of the proceeds of specified unlawful activity (18 U.S.C. 1956 (a)1). The second offence is transporting or transferring monetary instruments or funds into, out of, or through the United States with such intent or knowledge (18 U.S.C. 1956 (a)2). For an analysis of the statute see Plombeck Ch. T., Confidentiality and Disclosure: The Money Laundering Act of 1986 and Banking Secrecy, The International Lawyer, 1988, vol. 22, p. 69 - 81.

2.3. Money Laundering and Organised Crime

The definition of money laundering is closely connected with the fight against organised crime. Large-scale money laundering operations are used by organised crime to disguise both amounts and sources of unlawful income. This fact was confirmed in 1984[50] by the President's Commission on Organized Crime[51] . One of the conclusions of the Commission was that the profits made through crime were re-injected into the organisation[52] . Organised crime is active in highly cash intensive businesses: prostitution, gambling, and drug trafficking for example. Indeed, "in the case of heroin and cocaine, the physical volume of notes received from street dealing is much larger than the volume of the drugs themselves[53] . Reliance on cash as the central medium of exchange gives rise to at least three common factors[54] :

- drug dealers need to conceal the true ownership and origin of the money;
- they need to control the money; and
- they need to change the form of the money.

These factors help to define money laundering as the conversion of illicit cash into other assets to conceal the true ownership in order to create the perception of legitimacy of both the source and ownership.

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50 Above p. 10, FN 42, at p. 10 - 13 , p. 29 - 49.

51 U.S. President Ronald Reagan established the commission by executive order 12435 on 28 July 1984. The commission was empowered to analyse the nature and extend of organised crime, to discover the sources of its income and the ways which the income was spent. Further, it had to evaluate the efficiency of current laws and procedures and to recommend administrative and legislative improvements.

52 In a letter to the President, Irving R. Kaufman, Chairman of the President's Commission on Organised Crime, called the money to be re-injected the "life-blood" of organised crime. (Letter printed in Interim Report, above p.10, FN 42, at p. 1, FN 1 at iii.) Concurring opinion Bernasconi P., above p. 2, FN 4, at p. 27 - 29.

53 O'Brien P.,Tracking Narco-Dollars: The Evolution of a Potent Weapon in the Drug War, The International Lawyer, 1990, vol. 21, p. 637-672, at p. 643

54 Bank of England, Money Laundering: Guidance Notes for Banks and Building Societies, London, December 1990, at p. 2

What comes to light is the major importance of cash transfers for the organised crime wanting to launder its illicit profits.

According to the above[55] definition of money laundering, there are two distinct phases in the money laundering process: the concealment of illegal funds and their reappearance as legal assets. As opposed to the reception of stolen goods, where the offence consists of impeding restitution by hiding the assets or passing them to a third party, money laundering refers to the concealment of profits from crimes without reference to the wronged party[56] . The offence of money laundering is directed against the transfer of the value of the assets (their contre-valeur) since to transfer such money benefits its concealment . Thus it is not the assets in their original form that must be followed, but their value[57] . In our computerised world, following this paper-trail[58] of money is possible, as long as it has not been withdrawn in cash from the bank account[59] . As the distance and the time between the source and the initial owner of the assets grow, it becomes more difficult to determine the trustworthiness of the actual owner. Furthermore, local interpretation of legality can be the source of much controversy when mutual judicial assistance is needed.

In order to discuss all of the problems involved with money laundering, it is necessary to understand its basic principles and procedures. The first

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55 Above, p. 11: 2.2.2. Actus Reus ad Mens Rea

56 Concerning theoretical similarities between money laundering an the reception of stolen goods, see above p. 5, FN 29 and p. 6, FN 30 and FN 31.

57 This requires bookkeeping skills. Most helpful is the fact that banks keeps records of electronic transfers.

58 The paper trail is the records of the banks concerning electronic transfers. See Ackermann J.-B., above p. 7, FN 38 at p. 14. See also at p. 34: 4.5. Integration.

59 This is the reason for the recommendation which all reports issue, to monitor important transfers of cash or other similar monetary instruments such as banker's checks. See for example the recommendation in the report of the Financial Task Force on Money Laundering of February 6 1990, chapter B, paragraph 3, subsection c.: ".. financial institutions report routinely all deposits,transfers and withdrawals of cash over $ 10,000."

description of money laundering below is by Avv. Bernasconi, former public prosecutor of the canton of Ticino in Switzerland. Mr. Bernasconi is a well known public figure in the fight against both organised crime and money laundering. He was chairman of many government committees investigating money laundering[60] . The second is by Mr. André Zünd and has the advantage of being very graphical. Mr. Zünd used it to explain the process of money laundering to students of economy at the Hochschule St. Gallen in Switzerland[61] .

3.1. Money Laundering Explained through its Different Phases

Mr. Bernasconi organises money laundering in technical, geographical and chronological phases:

3.1.1. Money Laundering of the First and Second Degrees[62]

Money originating from an violation of the law such as prostitution, illegal gambling or kidnapping must be hidden because it is directly connected to the initial offence. Deliberate concealing of this type of money is called money laundering of the first degree[63] . Originally[64] , the term money laundering concerned ransom money alone. According to Mr. Bernasconi, the acceptance of such money is money laundering of the first degree. The money laundered in the first degree is then turned into another property asset, for example a banker's check or a municipal bond. The new form of the money - its contre-valeur - is no longer connected with the initial offence. This process is called money laundering of the second degree. Whenever money that has gone through this second degree process is invested in a legal activity, its concealment has reached a point where the

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60 See above p. 1, FN 2

61 Paper delivered by Mr. Zünd at the Hochschule of St. Gallen in the course of a public lecture on 9 ad 17 June 1989.

62 Bernasconi P., above p. 2, FN 4, at p. 29 - 31

63 Bernasconi P., above p. 2, FN 4, at p. 30

64 Bernasconi P., above p. 2, FN 4, at p.30

likelihood of discovery of its origins is close to zero[65] .

3.1.2. Countries of Dealing and Countries of Money Laundering

In Mr. Bernasconi's explanatory model of money laundering, the geographical distinction between countries in which the illegal substances are produced, refined and distributed and countries of money laundering is made [66] . It is sometime difficult to clearly distinguish countries of dealing and countries of money laundering. The U.S. and Hong Kong, for example, are countries of both dealing and money laundering. Notwithstanding this similarity, countries of dealing tend to be not identical to countries of money laundering[67] . Since local money laundering has receded in order to minimise the risk of discovery[68] , the principal function of the country in the money laundering process is relevant. If this criterion is applied, the U.S.[69] is clearly a country of dealing and Hong Kong a country of money laundering.

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[65] Bernasconi P., above p. 2, FN 4, at p. 30

[66] Countries of money laundering are either well known financial centres or so-called "tax-havens". Against public opinion, such countries need not to be merely banana republics: it is true that the Channel Islands, the Isle of Man and Liechtenstein live from revenues of off-shore companies, as well, there is a lot of money laundering occurring in countries such as the the United Kingdom, the Netherlands and Luxembourg, to cite some examples. See Zünd A., Geldwäscherei - Motive , Formen, Abwehr, Schweizerischer Treuhänder, Zurich 1990, vol. 9, p. 403 - 408 and Seicht G., Jahrbuch für Controlling und Rechnungswesen 1991, Vienna 1991, p. 251 - 216

[67] Doherty V.P. and Smith M.E., Ponzi Schemes and Laundering - How Illicit Funds are Acquired and Concealed, FBI Law Enforcement Bulletin, November 1981, p. 5 - 11, at p. 8 differentiate between domestic laundering as a preparation for foreign money laundering only. Following Mr. Bernasconi's distinction above at p. 15, FN 62 , domestic money laundering would be money laundering of a first degree.

[68] This is the case when the paper trail is too easy to follow and the source of the income difficult to explain.

[69] This apparent truism must not mislead the reader, legislators and politicians about the immense amount of money laundering occurring in the U.S.. According to the report of the Financial Action Task Force on Money Laundering dated June 2 1992, of the US$ 460 billion worldwide being laundered, US$ 270 or 58,70% was laundered in the U.S. .

3.1.3. The Time Factor in Money Laundering

The different phases of the process of money laundering must be coordinated time-wise. Every phase necessitates a different amount of time. At the beginning of the process, the different phases will follow one another very quickly: the stigma of dirty money is diminished with each transaction. During the recycling of the money, that is the phase in which the money is brought back into the country of its origins, the amount of time separating the transactions is greatest.

3.2. The Cycle of Rain Water As Metaphor for Money Laundering

In order to explain money laundering in a comprehensive manner to the general public, Mr. André Zünd refers to the cyclical character of rain water[70] . Money launderers tend to react instantaneously to any changes in legislation worldwide.This model is of a very basic quality when explaining the procedure of money laundering.

3.2.1. Precipitation - Inflow of Cash

In the country of dealing[71] or, in in other terms, the country of the offence, crimes such as the selling of illicit drugs or bank robberies generate assets - ordinarily cash.

3.2.2. Rain Flows Away - Money Laundering of the First Degree[72]

The illicitly earned assets are collected in a central location within the criminal organisation. There, the form is changed for the first time: small bills are exchanged for large bills, for example. This first laundering process takes place in the country of dealing[73] .

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[70] Above at p. 16, FN 66

[71] Above at p. 16

[72] Above at p. 15

[73] Above at p. 16

3.2.3. Streams of Underground Water - Creation of Pools

The assets, prewashed at a first degree, are pooled in order to change into another form. An example of such surrogates are gems or banker's checks.

3.2.4. Underground Lakes/Flowing Off - Preparation and Transfer Abroad

The pooled assets are handed over to either a specialised division of the criminal organisation or a specialised person or group outside of the organisation. The reason for the use of specialists in finance is that financial transactions are of another corporate culture than the operative business generating income.

3.2.5. A New Underground Lake - Preparation for Legalisation

The assets are brought either legally or illegally into the country of money laundering[74] and taken care of by local specialists.

3.2.6. Water Station - Injection into the Legal World of Finance

Accounts are opened with banks and other financial institutions. Property assets such as bonds and stocks are bought. With this method, illicit assets enter the normal monetary system.

3.2.7. Sewage Treatment Plant - Money Laundering of a Second Degree[75]

For the second degree of laundering, the interposition of a middle man such as a broker or a lawyer is needed. This person must be inclined to believe a more or less plausible story about the provenance of the funds in order to accept them. Another possibility is the creation of an off-shore or shell-corporation destined to be very successful within a short period of time.

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[74] Above, at p. 16

[75] Above, at p. 15

3.2.8. Feeding/Utilisation - Transfer and Investment

At this point in the process, the assets have left all obstacles of national legislation behind and have entered the international banking system. To suppress the remaining traces leading to the original offence, the assets will be transferred from one bank account to another. Further, short-term investments are changed into medium- and long-term investments, new corporations are founded; this way, as time goes by, the property assets acquire a fully legal character.

3.2.9. Vaporisation - Legal Repatriation

Once the paper-trail leading back to the origins of the funds has vanished, the laundered money can be legally transferred into any country the owner chooses. Since it does not make sense to have a large bank account abroad and live in poverty in the country of dealing, the laundered assets will most likely be repatriated into the country of origin[76] .

3.2.10. New Precipitations - New Inflow of Illicit Cash

It is estimated that one third of laundered and repatriated assets are to be used to finance new illegal activities[77], one third used for investments in the international financial markets[78] and one third used for legal commercial activities[79] .

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[76] For the different techniques, see below at p. 20.

[77] Zünd A., above p. 16, FN 66

[78] Neue Zürcher Zeitung, Zurich July 7 1989, at p. 34. According to the anti-mafia-commission in Italy, the Sicilian mafia, the 'Naragheta from Sardegna and the Camorra from Naples are buying Italian Government Bonds on the secondary market at an alarming pace.

[79] Weltwoche, Zurich January 26 1989, at p. 28: Colombia organised crime controls the nation's dairy industry, a drug-store-chain and a chemical company.

IV. SpecificTechniques of Money Laundering

4.1. General Observations

The choice of an appropriate technique to launder money will depend upon the activities to which the laundered assets are destined. Money intended to finance further illegal activity does not require the same degree of laundering as money which will finance a "legitimate" business.

Fundamentally, four categories of money laundering can be differentiated[80]: :

- Crossing a country's border;
- Placement;
- Layering;
- Integration.

Each category offers a choice of forms for a certain function within the process of money laundering. Some forms have multiple purposes and can be attributed to more than one category. Successive use of different forms during the process of money laundering is freely conceivable. It is this facility to alternate forms in an unpredictable manner that characterises innovative money laundering. In order to launder money in accordance with the four categories above , the launderer has to overcome four obstacles. He must:

- circumvent the obligation to declare capital import or export;
- escape scrutiny in order to enter the national/international financial system;

[80] Bank of England, above p. 12, FN 54, at p. 2 and Money Laundering: A Banker's Guide to Avoiding Problems, Supervision Policy/Research, Office of the Comptroller of Currency, Washington D.C. D.C., December 1990, at p. 2.

[81] Ackerman J.-B., above p. 7, FN 38, at p. 22.

- avoid discovery by using the legal possibilities of the financial system;
- pool the laundered money undetected in the country of its destination.

The following description of the different forms of money laundering is not intended to be conclusive. As will be demonstrated, money launderers have been most innovative in the past. One subject of this thesis is to create awareness of the fact that justice is not confronted with petty criminals, but with highly intelligent people at the top of their profession.

4.2. Crossing a Country's Borders

A number of forms of this category of laundering are possible:

4.2.1. Transportation of Cash

Whenever the obligation to declare the import or export of capital is not implemented between two countries or within an economic area or common market, the transport of cash is legal and therefore not problematic. "The man with the suitcase" often referred to in literature or movies is well known. Even within, or between, countries which have created a duty to declare cash transactions, the same method is applied. The more restrictive the regulations of a country are, the higher the odds that the money will be smuggled out of the country[81] . In this case, money launderers will take advantage of existing synergies between people smuggling cash and their partners smuggling drugs. One major problem is that cash is more bulky than its equivalent in drugs. Nevertheless, money launderers have found ingenious ways to overcome that obstacle by using

[81] Ackerman J.-B., above p. 7, FN 38, at p. 22.

rational methods that have in fact attained industrial size[82] .

4.2.2. Transfer by Using Goods of Consumption

A expensive but highly effective method of bringing money out of a country is the use of luxurious goods such as expensive cars[83] .

4.2.3. Direct Electronic Transfer

The most convenient way to cross borders is to wire money from one bank to another. The disadvantage of this method is the presence of a paper trail which must be made to disappear once the money is credited on the account.

4.2.4. Compensation

A way to avoid the risks of moving money physically across a border is to

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[82] Other, similar examples are known. See: NZZ, Zurich November, 24 1990, at p. 9: In New York, custom officials seized U.S.$ 6,4 million. The cash was hidden in containers declared to contain bull-sperm destined to Bogota, Colombia. In another case, a witness told the D.E.A. that a Colombian drug cartel smuggled money out of the U.S. using cardboxes specifically designed for packing money with the logo of a freight forwarder . See Drugs, Law Enforcement and Foreign Policy: A Report on Anti-Money Laundering Law Enforcement by the Subcomm. on Narcotics and Terrorism of the Comm. on Foreign Relations, 101th Cong., 2nd Sess. (1990), at p. 118. The SonntagsZeitung, Zurich May 21 1990, at p. 12 reported the discovery of a tunnel 60 meters long from Arizona to Mexico. It was used to smuggle drugs to the U.S. and money back to Mexico.

[83] Cosandey P., Aktuelle Formen der Geldwäscherei, Masukript des Referats der 47. Konferenz der Inspektoren Schweizerischer Kantonalbanken vom September 27/28 in Delémont (Switzerland): Mr. Cosandey cites the case of money launderers who bought expensive cars in the U.S. and exported them to Central America. There, the cars were sold with a profit.

compensate the amount in the country of destination[84] . This technique is as old as tax evasion.

4.2.5. Underground Banking

The logical continuation and accomplishment of the compensation-method is underground-banking. Parallel to normal banking, the same know-how is offered[85] . This system originated with the members of families from the Middle East, the Indian sub-continent and Asia moving to other locations around the world[86]. Underground banking works like the system of compensation. The difference is that it is based upon trust in the name and honour of the family. The consequences of irregularities are known to all participants. An advantage of underground banking is the lack of any paper trail. Bookkeeping consists of a comparison of the balances alone. If matching, the documents are destroyed.

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[84] Bernasconi P., Das Schweizerische Bankgeheimnis vor neuen Normen gegen die Geldwäscherei, Internationale Steuerinformationen, 1988, vol. 4, p. 90 - 106, explains how a member of a crime syndicate living in the U.S. wants to have his illicit profit in an account in the Bahamas. He credits the account of a shell-corporation having accounts both in the U.S. and on the Bahamas. Simultaneously, a person living in the U.S. , but having a non-declared account in the Bahamas will credit the same amount to the account of the company in the Bahamas. Once both amounts are credited, the company will credit the account of the U.S. criminal in the Bahamas and remit the equivalent of the amount credited to the person with the account in the Bahamas needing his non declared money in the U.S..

[85] Time Magazine, New York, July 291991: Within the Bank of Credit and Commerce International (B.C.C.I.), dubbed Bank of Crooks and Criminals International by the banking community, employees operated a bank within the bank - a secrect parallel network.

[86] Financial Action Task Force on Money Laundering , Report of 6 February 1990, Document 'B', London 1990, at p. 5. The report underlines the importance of informal financial institutions, including informal bankers (so-called hawalla bankers) and finds that their existence is closely linked to Asian families with a tradition in business. "They are often involved in the gold buillon, gold jewellry or currency exchange, and may be a member of a family with similar businesses in several countries, or at the end of the scale, a street corner confectionery shop. Bona fide employees of foreign banks may operate such systems outside banking hours."

4.3. Placement

4.3.1. Definition

Placement is "the physical disposal of cash proceeds derived from illegal activity" [87] . Placement originates from certain practices of the banking industry applied in order to evade the duty to declare the transaction or to report the clients name. An estimated 80% of the annual turnover in drugs in the U.S. is credited on bank accounts by using forms of placement[88] . Once credited, the money can be wired all over the world. Not only banks are targeted by money launderers, but all businesses offering financial services involving cash[89] . The reason these financial service businesses are addressed is the absence or insufficiency of regulations[90] .

Within the whole process of money laundering, it is this phase of conversion of cash that is the most risky because it is so easily noticeable[91] .

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[87] Bank of England, above p. 12, FN 54, at p. 2

[88] NZZ, Zurich January 25/261990, at p. 33

[89] Money Laundering Alert, Miami, March 1991, at p. 6 -11 published a non-exhaustive list (without citing the five forms of banks differentiated in the U.S.):" Institutions insured under the National Housing Act; Thrift Institutions; Securities brokers or dealers registered with the Security Exchange Commission;Brokers or dealers in securities or commodities; Currency exchange houses; Issuers, redeemers or cashiers of traveller's checks, checks, money orders or similar instruments; Operators of credit card systems; Insurance companies; Travel agencies; Dealers in precious metals, stones and jewels, Pawnbrokers; Loan or finance companies; Licensed money transmitters or senders; Telegraph companies; Dealers and sellers of automobiles; aeroplanes, boats and other vehicles; Persons who close and settle real estate transactions; the U.S. Postal Service; Federal, state or local government agencies with duties or powers similar to those listed here."

[90] U.S. House of Representatives, Current Problem of Money Laundering: Hearings before the Subcommittee on Crime of the Committee on the Judiciary, 99th Congress, 2nd Session 1984, at p. 146 stating for example explicitly the lack of regulations for check cashing places.

[91] President's Commission on Organized Crime and Money Laundering, Record of Hearing II, New York 1984, at p. 29 and Amtliches Bulletin der Bundesversammlung NR 1989, 1844.

4.3.2. Deception

The most basic method of laundering money is to find a credulous person[92] who will believe a more or less plausible story, in order to act as a middle-man. This function can also be fulfilled by a legal entity such as a off-shore[93] corporation with bearer shares. In this case, the credulous person acts as the director of the corporation on the orders of the anonymous beneficial owner.

4.3.3. Corruption

One way to circumvent the duty to declare a transaction or to identify the client is by corruption or blackmailing of the person in charge. The lure of easy money can easily turn at some point a deceived person into a corrupt

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92 Le Nouvel Observateur, Paris 14 April 1994, at p. 9. The Wafa Bank, a Moroccan private bank, approached the young director of the Crédit Agricole in Arles, France. It had the intention of renting an office in the bank and using the Crédit Agricole's transfer facility. The idea was to enable the many immigrant workers from Morocco in Southern France to transfer their savings to their families in Morocco. On the base of the expected earnings from these transfers, the young director convinced his superiors to agree to the deal with Wafa Bank. The Moroccan bankers received considerable amounts of money from immigrant workers. It was transferred from the Wafa Bank account with Crédit Agricole to Morocco. The French bank did not realise that major Moroccan drug dealers operating in France were in business relation with Wafa Bank and thereby indirectly with the Crédit Agricole. What the young director had forgotten to demand, when signing the agreement with the Moroccan bank, was the discretionary right to control the transactions Wafa Bank conducted within Crédit Agricole.

93 Below at p. 38

one[94] . In some cases, money launderers are know to own[95] or control[96] banks in order to assure the bank's cooperation.

4.3.4. Smurfing

Once money launderers realised that moving large quantities of cash through banks without risking investigation became factually impossible,

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[94] Powis, R.E., The Money Launderers, Chicago & Cambridge , 1992, at p. 168. In the paragraph "Greedy Bankers", Mr. Powis cites a speech Mr. William Von Raab, Commissioner of Customs, held in 1982 in front of Florida bankers. Von Raab referred to his audience as "sleazy bankers" for knowingly handling quantities of drug related money. He insinuated that the amounts of money handled were such that a legal source could be excluded. At p. 145 Mr. Powis regrets that during a large scale operation against money launderers, only 1 out of 10 banks notified the authorities that suspicious transactions involving huge quantities of currencies were being conducted by businesses not prone to generating that much cash. At p. 169, a banker from a well established family is referred to having told his client: "ship me all you've got". Although the banker duly declared all transactions, he must have been aware of the fact that a store selling gold chains and cheap jewellry could not generated U.S.$ 12 million (in cash) within two months. The attitude of a corrupt and greedy banker is exemplified with what a B.C.C.I. employee told a D.E.A. undercover agent when comparing his clients with the C.E.O. of General Motors, Mr. Lee Iaccocca: "You know, it's just that they are in a different kind of business. One sells cars and one sells coke. That's the way it goes." The same official was later concerned about finding an explanation for business conducted through a Geneva bank, calling their director "a little straight down the line."; see: Powis R.E., above FN 94, at p. 212.

[95] Raith W., Die ehrenwerte Firma, Berlin 1993, at p. 137 describing how a Sicilian bank came to belong to a local mafia family.

[96] Krachmer C.L., International Money Laundering: Analysis of Information on Successful Cases, Police Executive Research Forum, Washington D.C.1988, at p. 25.See case U.S. v. Fernadez (indictment, M.D. Fla December 11, 1984, Cr. No. 84-853-CR-JWK) documenting the take-over of both the Sunshine State Bank in Florida and the Hamilton Bank and Trust in the Bahamas by Messrs. Fernadez and Cuevara, two well known money launderers, in order to conduct a vast money laundering operation. Mr. Corona, the director of the Sunshine Bank in person, eager to please his new employers, travelled to Central America to find people willing to pretend to be shareholders for the two banks. For another example, see U.S. Senate Hearings, Drug, Law Enforcement and Foreign Policy, Part 3: The Cartel, Haiti and Central America: Hearings before the Subcommittee on Terrorism, Narcotics and Intl. Communications of the Committee on Foreign Relations, 100 Congress, 2nd Session (1988), Washington D.C. 1988, at p. 3 and 15. According to information made public during the Senate Hearings, it became public that 51% of the stock of Inter-America Bank in Panama was controlled by a member of the Colombia Cali Cartel.

they began to structure their transactions by using cashier's or bearer checks. Large amounts were broken down into amounts below U.S.$ 10,000,-- to facilitate transactions at banks and other financial institutions[97] . This concept was not really new; money launderers had practiced it since the Bank Secrecy Act[98] was enacted in 1970[99] , but it became a major trend among drug dealers in late 1981 and lasted for years[100] . This concept is simple: a large amount , U.S.$ 20,000,-- for example is broken down into three different amounts of about U.S.$ 7,000,-- - in other words the initial amount to be deposited with a bank is structured into smaller deposits in order to evade the Bank Secrecy Act's requirement to declare the transactions[101] . It was the Colombia drug dealers laundering money who developed this kind of structuring into an art form which became known as "smurfing"[102] .

In order to smurf, the money launderers need a professional organisation large enough to accommodate all transactions without being noticed[103] : "In a given large city, a drug organization might have 20 couriers each purchasing two cashier's checks daily from different banks in the amount of $ 7,000,--. The 40 cashier's (checks), for a total amount of $ 280,000,--, are then forwarded to a bank in Florida where they are deposited to the account of the money launderer. If this operation is replicated in 10 cities on a given day, some $ 2,8 million in cashier's checks would be deposited in the

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97 Powis R.E., above p. 26, FN 94, at p. 91

98 Pub. L. No. 91-508, 84 Stat. 114 (1970)

99 Powis R.E., above p. 26, FN 94, at p. 91

100 Powis R.E., above p. 26, FN 94, at p. 91

101 Arzt G., Das Schweizerische Geldwäschereiverbot im Lichte amerikanischer Erfahrungen, Schweizerische Zeitschrift für Strafrecht SZStR, Bern 1989, vol. 106, p. 160 - 201, at p. 174:The old B.S.A. was reformulated in the years 1982, 1984, 1986 and 1988, 12 U.S.C. 1829(b) and 31 U.S.C. 5311-536. All business-people, inclusively banks, accepting cash for goods and services, all private people bringing cash or bearer shares or bonds into the U.S. and all people having a foreign account are required to report all transactions from U.S.$ 10,000,00 on. For certain regions, lower limits are provided for.

102 Powis, R.E., above p. 26, FN 94, at p. 92

103 Mr. Powis estimates the minimum number of smurfers in one organisation to be about 15 people. See Powis R.E., above p. 26, FN 94, at p. 92.

money launderer's account . And if it were continued every day for a week, approximately $ 14 million could be laundered"[104] . Mr. Powis states that D.E.A. agents had identified about 20 groups operating in Miami in the middle of 1982[105] . Because of the uncontrollable dimensions[106] smurfing had reached in certain regions, the duty to declare transaction for these regions was lowered from transactions of U.S.$ 10,000,-- to transactions of U.S.$ 3'000,-- [107] . In order to be able to control the situation. In addition to the amendments of the B.S.A. mentioned above[108] , record-keeping regulations, in 1990, which require financial institutions to obtain identification and maintain records of all purchases with currency of monetary instruments in amounts between U.S.$ 3,000,-- and U.S.$ 10,000,-- followed. The monetary instruments covered include cashier's checks[109] , bank checks and drafts, traveller's checks and money orders. Many banks operating in regions especially touched by smurfing have begun a policy of refusing to issue or cash checks[110] .

4.3.5. Structuring

Smurfing is a form of placement which developed from structuring. Nowadays, structuring, that is the multiple depositing of assets just below the limit of declaration, is complementary to smurfing. Due to new amendments to the B.S.A.[111] which obliges private persons as well to

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104 Powis R.E., "Bank Secrecy Act Compliance", Rolling Meadow 1989, 3rd edition, at p. 106

105 Powis R.E., above p. 26, FN 94, at p. 92

106 For example U.S. v. Botero,quoted in Ackerman J.-B., above p. 7, FN 38, at p. 21, FN 3: Mr. Botero employed 700 couriers.

107 NZZ, Zurich November 25/26 1989, at p. 33

108 Above, p. 25, FN 97

109 Citicorp Bank has adopted the policy not to issue cashier's checks over U.S.$ 10,000,-- to non-clients (source: Mr. A. Hölzl, Citicorp Bank Zurich; confirmed by Ackerman J.-B. , above p. 7, FN 38, at p. 26: the Subcommittee on Narcotics, Terrorism of the Commission on Foreign Relations asked Citicorp 1990 not to hand out checks over U.S.$ 10,000,-- to non-clients .

110 Ackerman J.-B., above p. 7, FN 38, at p. 26

111 Above, p. 27, FN 101

declare certain transactions[112] , it is almost impossible to structure financial transactions without help from within banks[113] .

4.3.6. The Currency Exchange Business

A variation of structuring is the organised and multiple exchange of small bills into larger ones, or the exchange of one currency into another. Each transaction is structured in a way so as to avoid the duty to declare it and without using a bank account. Like structuring and especially smurfing , this method requires many participants and accessories within the currency exchange company. There is no doubt that the lack of proper state supervision[114] makes check cashing places[115] and currency exchange offices very attractive for money launderers[116] .

4.3.7. Exempt Transactions

All rules and obligations to report certain transactions provide for exemptions in order to prevent a breakdown of normal business

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112 Above, p. 27, FN 101. Further see Plombeck T., above p. 11, FN 49, at p. 85: Prior to the the B.S.A., federal courts were split on whether to sanction an individual structuring currency transactions in order to avoid reporting thereof on the ground that these duties were placed solely on financial institutions.

113 Money Laundering Alert, Miami , December 1990, p. 1 - 3: A case where a bank acting as an accessory to money laundering, offered its services for structuring, is the case of the National Mortgage Bank of Greece in the United States. The bank was dubbed 'Structuring Inc.' by the prosecution. It openly advertised its services in Greek newspapers published in the U.S. , offering the "depositors' anonymity and a quick return of their money after a quick roundtrip to Greece".

114 For the U.S., see House of Representatives, Current Problems of Money Laundering; Hearings, above p. 23, FN 87, at. p. 146; for Switzerland see Graber Ch. K. , above p. 2, FN 10, at p. 67.

115 Ackerman J.-B., above p. 7, FN 38, at p. 25, FN 4: In 1990, about 67 cash checking places were investigated for money laundering.

116 Preston J. E. International and Domestic Money Laundering, Statement and Memorandum before the Committee on Banking, Finance and Urban Affairs, U.S. House of Representatives, Washington D.C., 7 November 1989 at p. 83. These businesses play an important role in money laundering in the southern U.S. (author also cited by Ackerman J.-B., above p. 7, FN 38, at p. 26, FN 2.

activities[117] . Mr. Powis[118] determines that next to the automatically exempted U.S. banks and insurance companies doing business in the U.S. and U.S. commercial banks exempted under the condition of keeping internal records, four categories of businesses exempted from reporting transactions below a certain limit exist[119] :

1.) Retail stores owned by U.S. citizens having a established bank account. Retailers of cars, ships and aeroplanes are explicitly not exempted;
2.) Banks have the authority not to declare the transactions of the following types of businesses, if they fall under the categories in 1.), above: sport stadiums, race tracks, bars, restaurants, hotels, amusement parks, theatres, licensed check cashing places, companies operating vending machines, transportation companies and public utilities companies;
3.) State owned companies;
4.) Regular salary renumerations by employers above U.S.$ 10,000,-- if the account of a U.S. citizen is used.

After what has been said above about deception and corruption[120] , it is obvious that money launderers will try to control or infiltrate companies that benefit the exempt status. Businesses in trouble are especially targeted, since the owner may be interested in selling his company, or be corruptible in order to save it.

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[117] Plombeck Ch. T., above p. 11, FN 49, at p. 86".. section 5318 of the bank Secrecy Act authorises the Secretary of Treasury to delegate compliance authority, regulate compliance procedure, and prescribe exemptions from the requirements of the Bank Secrecy Act. The exemption authority granted by this section was designed to reduce unnecessary reports from retail enterprises, such as grocery stores, that deal directly with the customers and normally generate large volumes of cash."

[118] Powis R.E., A Guide to bank Secrecy Act Compliance, Rolling Meadows 1989, 2nd edition, see chapter "Exemptions".

[119] For the legal base, see below, p. 52, at 6.1.2.1.

[120] Above p. 25

4.4. Forms of Layering

4.4.1. Definition

Layering is "separating illicit proceeds from their source by creating complex layers of financial transactions designed to disguise the audit trail and provide anonymity"[121] .

4.4.2. Domestic Money Laundering

Domestic[122] money laundering is primarily conducted as a step prior to international money laundering. It does not require a perfect degree of laundering, since the money is not yet intended to be injected into international financial markets. Any business generating a high amount of cash and having relatively steady operating costs is suitable to launder money. This is even more true, since most of these businesses have an exempt status[123] . What makes these businesses so attractive is the fact that since most of the revenue is in cash, its origin is not determinable. Further, there are no limits to the money launderers' imagination, as the following examples demonstrate. Mr. Bernasconi[124] cites a case in which money launderers owned and operated a cinema, falsifying the numbers of paying moviegoers. Messrs. Clarke and Tigue[125] refer to a case in which

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[121] Bank of England, above p. 12, FN 54, at p. 2. The same definition is used in the Memorandum of the Montreal (Stock) Exchange (circular no. 104-93 dated 11 May 1993, at p. 1) to its members explaining the Canadian Proceeds of Crime (Money Laundering) Act, Canada Gazette Part II, vol. 127, no. 4 , 24 February 1993, which came in force on 26 March 1993, to chief financial officers and external auditors.

[122] Differentiation between domestic and foreign money laundering according to Messrs. Doherty V.P. and Smith M.E., above p. 16, FN 67, at p. 8. Domestic money laundering corresponds to money laundering of a first degree according to Mr. Bernasconi, above at p. 15.

[123] Above, p. 29, 4.3.7. Exempt Transactions

[124] Bernasconi P., Schweizerische Erfahrungen bei der Untersuchung und strafrechtlichen Erfassung der Geldwäscherei, Macht sich Kriminalität bezahlt? , Arbeitstagung des Bundeskriminalamtes Wiesbaden vom 10. -13. November 1986, BKA-Vortragsreihe Band 32, Wiesbaden 1987, p. 165 - 214, at p. 173

[125] Clarke T. and Tigue J., Dirty Money, Swiss Banks - The Money Laundering, London 1976, at p. 134

money launderers operated a car wash. The operation was successful, yet the launderers declared washing 120 cars on a day on which a snow storm paralysed the city's traffic. In Marseille, France, private clinics were bought by money launderers and lavishly restored. It was found later that most patients existed only on paper[126]. The existing patients were rich Italian visiting the clinic for organ transplants. It is believed that the owner of the clinic not only laundered money but was also implicated in the traffic of organs. That the duty to declare certain transactions is not always a hindrance for launderers is demonstrated in a money laundering case in the U.S. involving dealers in gold and jewels. Each transaction was correctly reported Since most of this business is done in cash, the transactions went unnoticed. What triggered an investigation was the unbelievable turnover of U.S.$ 12 million[127] within the two months the launderers had created[128] it. Mr. Ackerman[129] cited a case in which a more refined dealer in old coins ordered a large amount of coins and paid in advance - cash. He then cancelled his order, asking for the refund in the form of a banker's check in the name of another company he controlled. In Colombia, buying a soccer club, in order to sponsor the acquisition, is considered a very elegant method to launder money [130] .

One must wonder why these forms of money laundering are no longer sufficient. The obvious reason is that the prosecution has become as inventive as the criminals themselves. The famous Chicago gangster Al

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[126] NZZ, Zurich February 2 1990, at p. 11.

[127] Above p. 26, FN 94

[128] Powis R.E., above p. 26, FN 94 at p. 145 and p. 153.: It was discovered that this organisation had laundered U.S.$ 1,2 billion in the period between 1986 and 1989. The first information that any federal law enforcement agency received did not come from the banks doing business with the launderers but from the armoured car service. The informant could not believe, due to his experience, that the sums his company transported was the result of legal business activities only.

[129] Ackerman J.-B., above p. 7, FN 38, at p. 28, FN 2: U.S. v. Huppert, F 2d, In re Grand Jury Proceedings. U.S. v. Bank of Nova Scotia, 691 F.2d 1384 (11th Cir. 1982), cert. denied, 103 S, St. 3086 (1982).

[130] Der Spiegel, Hamburg July 22 1991, at p. 148

Capone was not convicted for his many murders, but for tax evasion[131] and when a certain Mr. Klein appeared to be too clever, the Klein-Conspiracy-Doctrine[132] made all activities impairing state duties punishable and brought him behind bars. What must not be underestimated in this catch-as-catch-can game is the international dimension of it. This international dimension, national sovereignty and the frustration of prosecutors confronted with international cases demanding subsequently greater investigating powers, will be thoroughly discussed below[133] .

4.4.3 International Money Transfer

Apart from domestic money laundering, all transactions which are not intended to repatriate assets into the country of origin but meant to conceal or park the funds[134] are a form of layering. Such transactions are usually recognisable by the lack of economic sense. The following practical example might shed some light onto the type of offers money launderers operate on: a few years ago, many independent asset managers were offered credits of huge sums (the currency changed, the amount was always the same: 100 million) for 10 year-credits at an interest rate below the market. Why would somebody in his right mind offer a deal in which he is losing money? The reason is obvious: a premium is paid by the money

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[131] Capone v. U.S., 56 F.2d 927 (1932). Mr. De Feo believes that this and other much publicised cases "were exceptions to the general rule of unsophisticated financial enforcement"; see DeFeo M.A., Depriving International Narcotic Traffickers and Other Organized Criminals of Illegal Proceeds and Combating Money Laundering, Denver Journal of International Law and Policy, Denver 1990, vol. 18, no. 2, Winter 1990, p. 405 - 415, p. 405.

[132] Mr. Klein was in the alcohol wholesale business. He produced whiskey with his Canadian company. The Canadian company delivered the whiskey directly to Klein's New York customers.; but according to his book-keeping, the shipment came from a Cuban shell-corporation controlled by Klein. With the many other companies Klein controlled,he was able to create a web of deliveries and bills impossible to sort through, hence the "documentary evidence was impossible to secure and reconstruct in order to prove how much income was unreported and which tax returns should have technically been reported". See DeFeo, above , FN 131, at p. 407.

[133] Below, p. 70 - 74

[134] Money is literally parked in an account, waiting for the next phase of the laundering process.

launderers in order to make sure that the credit paid back is of an ususpected source.

4.5. Integration

4.5.1. Definition

Integration is "the provision of apparent legitimacy to criminally derived wealth. If the layering process has succeeded, integration schemes place the proceeds back into the economy in such a way that they re-enter the financial system, appearing to be normal business funds"[135] . The intention of all forms of integration is to make all traces leading from the funds to the initial offence disappear in order to be able to recreate a legitimate but fictive new paper-trail. Integration of criminally derived funds can draw from the vast experience and methods used by specialists in tax evasion[136] . How this fact not only impedes both the tracking down of money laundering but also the collaboration of the many people working in the financial business will be discussed below .

4.5.2. Under-, Over- , and Fictive Valuation of Assets

Undervaluation occurs when property assets are bought at an official price which is below its actual market value. Later, the assets are sold at their real value. A classic example of this technique is the following real estate transaction: a house is bought by a person seeking to launder money for a real price of U.S.$ 2 million. U.S.$ 1 million is the official price paid by transfer of check, U.S.$ 1 million is paid 'under the table', cash. The new owner increases the value of the object by renovating it for U.S.$ 1 million. He then sells it for U.S.$ 3 million. The net - official - profit equals the amount of the laundered money previously not declared: U.S.$ 1 million. Such profits help criminals to explain the source of their wealth.

In countries with strict controls on imports and exports [137] , fictive-, under-,

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[135] Bank of England, above p. 12, FN 54, at p. 2, Montreal Exchange, above p. 31, FN 121, at p. 1

[136] Ackerman J.-B., above p. 7, FN 38, at 37 and Bernasconi P., above p. 2, FN 4, at p. 33

[137] The U.S. is such a country. See Ackerman J.-B., above p. 7, FN 38, at p. 44.

and overvaluation are constantly utilised in order to evade taxation[138] and are a common practice in international business[139]. Since these mechanisms can be used both to evade taxation and to launder money, it is factually very difficult if not impossible to determine[140] the intention behind it. Incorrect valuation of assets always follows the scheme used in the following example[141] : a resident company importing goods will ask his foreign supplier to overvalue the goods in order to overbill him. The difference between the market value and the billed value will be credited by the supplier, minus his commission, on a foreign account of the importer. In the opposite case, the resident exporter will ask that the goods be billed below their real value and the difference credited to his foreign account.

Another method is the billing of fictitious consulting fees for services never rendered[142]. Since a fictitious file can be created in no time, it is almost

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138 Financial Times, London & Frankfurt, May 16 1994, p. 1, col. 3: "Foreign companies angered by Japanese tax increases: ...the national tax agency has alleged that many western companies have been under-reporting profits earned in Japan in order to minimise their tax bills. They accuse western companies of levying excessive royalty payments on their Japanese subsidiaries and associates. It is also alleged that the Japanese off-shots are being charged too much in transfer prices for materials imported from their parent companies in the west. ...Executives of the affected companies say privately that they believe the tax increases are a reprisal for substantial tax increases imposed on Japanese companies by the U.S. Internal Revenue Service. The I.R.S. alleged that Japanese companies have inflated the transfer prices at which they ship goods to their U.S. subsidiaries".

139 Höhn E., Handbuch des internationalen Steuerrechts der Schweiz, Bern & Stuttgart 1988, 6th ed., at p. 382

140 Ackerman J.B., above p. 7, FN 38, at p. 44. See also NZZ, Zurich July 27 1991, at p. 35: Steuerliche Aspekte konzerninterner Verrechnungspreise. The difficulties to control such transactions has led to the requirement that corporations in the U.S. must arrange an "Advanced Pricing Agreement" with the I.R.S. before concluding the wanted transactions.

141 See also above, p. 35, FN 139. Furthermore, p. 33, at FN 132.

142 NZZ, Zurich, September 27 1989, at p. 5: Die Capos als neuen Wirtschaftsmacht Kolumbiens. During the search of the company in charge of the many farms and companies of Rodriguez Gacha, a former boss of the Medelin Drug Cartel, investigators found only bills for services, but no traces of a any economic activity.

impossible to prove the contrary[143] .

4.5.3. Back-to-Back Loans

This method is easy to apply and therefore largely used[144] . The method works the following way: A launderer deposits money with a bank or a financial corporation. This legal entity will grant a credit to the launderer on the basis of the money deposited. Back-to-back loans are used mainly to repatriate money into its country of origin. As demonstrated by the two examples below, its advantages are not to be neglected: The criminal can transfer money legally into his country; the interest must be paid outside the country; the criminal has the possibility to re-export the money legally; since the launderer officially contracted a debt, both debt and interests are tax deductible.

Two types of back-to-back loans can be differentiated: one in which the money is abroad and used to secure what is declared officially to be an unsecured credit and one in which the money is still within the country of origin. In that case, the credit is granted on the basis of a fictitious deposit abroad.

An example of the first type of back-to-back loan is the case of the B.C.C.I. - scandal[145] . Illicit U.S. income was invested with the many subsidiaries of the B.C.C.I. in France, Luxembourg, the Netherlands, Panama, the Bahamas and different Latin America countries in certificates of deposits (CD's, short term, fixed income instruments). At the same time, the bank granted the money launderers credits whenever a CD came to maturity and

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[143] It is almost impossible to proove that fictious services were never rendered., See U.S. v. Browning, 1548; U.S. v. Bucey I, 1080 and U.S. v. Bucey II, 1299. All cases cited by Ackerman J.B., above p. 7, FN 38, at 44. U.S. v. Bucey is most entertaining to read for its theme is worthy of a movie: The money laundering organisation instructed its clients to buy works of art. Since the organisation was incorporated as a church (!), the works of art had to be donated to that church. The donation was 100% tax deductible. The clients received 80% of the price which they had bought the work of art for.

[144] Concurring, Ackerman J.-B., above p. 7, FN 38, at p. 45.

[145] Above p. 26, FN 96

was paid back[146] . This case exemplifies the difficulties of uncovering such transactions. Notwithstanding the difficultly of proving that a credit is fictitious, the legal entity has the ability to grant a credit officially on a personal basis. In fact, the credit is guaranteed by an irrevocable bank guarantee of the bank's own foreign subsidiary on the basis of an account with the subsidiary controlled by the creditor.

The perfect example for the second, fictitious back-to-back loan is the case U.S. v. Montalvo[147]. Montalvo met his client Morgan in the U.S. and submitted to him the foundation document of Montmor Internacional S.A.. Further, Montalvo showed his client different loan-agreements between Montmor and Morgan. Among them, "a joint venture agreement signed by Montalvo on behalf of Montmor purporting to show a $ 500,000 - loan by Montmor to Morgan, a letter to a third party stating that Montmor had loaned Morgan $ 50,000 and another letter purporting to evidence a $ 100,000 - loan from Montmor to Morgan". In fact, Montmor was a shell-corporation granting fictitious credits. The construction was intended to help Morgan explain the source of his (illicit) funds kept within U.S. banks. Once the provenance was explained by foreign credits, Morgan was able to legally invest the money, which had in fact, never left the country.

4.5.4. The Gambling Industry

Perhaps the oldest method of laundering money is through casinos and lotteries, subsequently controlled by organised crime[148] . Money launderers will buy chips from gamblers or the winning lottery ticket and cash them. Mr. Ackermann[149] cites the cases of "The Corporation", a Cuban criminal organisation specialised in money laundering with lottery tickets from Puerto Rico. Since the organisation controls the selling of the tickets, it always knows the person with the winning ticket. The winner is contacted; after a quick explanation on how much money he would loose if declaring

[146] For more information see Walther I., The Secret Money Market, New York 1990, at p. 15.

[147] U.S. v. Montalvo, 820 F.2d 686 (5th Circ. 1987)

[148] Blau Ch. W., The Right to Financial Privacy and the Criminal Referral Process: A Conflict in the Terms and Purpose of the Money Laundering Statute, Consumer Finance Law Quarterly Report, September 1990, vol. 44, at p. 15

[149] Ackerman J.-B., above p. 7, FN 38, at p. 16

the gain to tax authorities, he will most probably agree to sell his ticket for cash.

4.5.5 The Abuse of Off-Shore Corporations

In this chapter describing the different techniques of money laundering, off-shore companies are mentioned in different contexts. The utility of off-shore corporations for money laundering has been noticed by the prosecution[150]. Off-shore corporations are domiciled in so-called tax havens[151]. Tax havens are countries which try to attract international transactions by granting legal and tax advantages. In opposition to the general belief, these financial centres are fully legal and recognised by the international business community. The (tax-) privileges of the Channel Islands and the Isle of Man for example were recognised on a separate protocol when the United Kingdom joined the European Community. Thus, European Community legislation concerning capital transfer and tax harmonisation do not apply in these territories[152]. Legal entities and private persons domicile their assets in these tax havens for reasons of stability, bank secrecy and low taxes[153]. The many advantages are granted because the activities of the shell or off-shore corporations do not concern the countries domestic market. The choice to acquire a off-shore corporation is made easier by the following advantages:

-The shell-corporation offers the advantage of anonymity of its beneficial owner[154] since most tax havens allow local people to be nominee shareholders.

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150 Financial Action Task Force, Report 6 February 1990, at p. 6

151 Albisetti E., Bömle M., Ehrsam P., Gsell M., Nyffeler P., Rutschi E., Handbuch des Geld-, bank- und Börsenwesens der Schweiz, Thun 1987, 4th ed., at p. 520. See also p. 268.

152 NZZ, Zurich May 125/26 1991, at p. 34

153 U.S. Senate , Crime and Secrecy: The Use of Off-Shore Banks and Companies, Report 99-130 made by the Permanent Subcommittee on Investigations of the Committee on Governmental Affairs, U.S. Senate, 99th Congress, 2nd Session (1986) at p. 143

154 Graber Ch.K., above p. 2, FN 10, at p. 63

-It is cheap [155] and unbureaucratic[156] to acquire such a corporation.
-Since most countries allowing off-shore corporations are poor, the regulations will be few and the supervising authority, if existing, understaffed and badly trained[157] ,[158] .
-Off-shore corporations are usually of limited liability[159] .
-In order to attract as many clients as possible, tax havens have strict

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[155] The International Trust Group, a company belonging to Ansbacher (Switzerland) Ltd. offered on May 11 1994 shell-companies to the following prices: Bahamas: buying price U.S.$ 1.050,00; buying taxes: U.S.$ 100,00 and annual costs: U.S.$ 575,00, Cayman Islands: buying price: U.S.$ 2.580,00; buying taxes U.S.$ 702,00 and annual costs U.S.$ 1.150,00. Guernsey and Ireland are the two only tax havens requiring a annual tax.

[156] Graber Ch. K., above p. 2, FN 10, at p. 64: A Swiss television team called for a documentary report on off-shore corporations the consulate of Panama in order to find out how long the incorporation of a company might take. The consulate's response: the take-over of an existing corporation lasts one day, the creation of a new corporation a few days only.

[157] Ackerman J.-B., above p. 7, FN 38, at p. 59.

[158] See: The Report of the Caribbean Drug Money Laundering Conference in Orajestad on the Island of Aruba, 8 - 10 June 1990. The participants, nota bene all countries offering off-shore services, agreed to follow the recommendation of the Financial Action Task Force, stated in resolution 19, that "each country should endeavour to ensure that its laws and other measures regarding drug trafficking and money laundering, and bank regulation as it pertains to money laundering, are to the greatest extend possible as effective as the laws and other measures of all other countries in the region", before concluding that "the Conference acknowledged that the implementation of some of the recommendations might entail for countries with small economies the employment of human and financial resources beyond their actual financial capabilities" and that a survey should be conducted in order to determine the size of the investments in order to consider what appropriate of programme of action can be suggested. The resolution indicates that these countries do not intend to fight money laundering wholeheartedly, since they live off of these shell-corporations. In order to understand the dilemma of tax havens, see Graber Ch. K., above p. 2, FN 10, at 64 stating the case of the Principality of Liechtenstein. Before the Great War, the owner of 10 cows was considered a rich man in this poverty-stricken country between Austria and Switzerland. All changed when a new corporate law implemented in 1926 permitted the establishment off-shore-companies (Briefkastenfirmen). By the 1970ies, Liechtenstein then 24.000 inhabitants) had 30.000 off-shore corporations registered - which brought prosperity to the country.

[159] Müller R., Wabnitz H.B., Wirtschaftskriminalität, Munich 1982, at p. 106. The authors call the Liechtenstein Anstalt "ein Nichts mit beschränkter Haftung" (a nothing with limited liability).

banking secrecy laws[160] .

-Since the transactions of shell-corporations do not concern national territory in any way, tax havens have, if at all, few restrictions concerning currency exchange and the transfer of funds [161] .

-Tax havens are usually not party to agreements to mutual judicial assistance[162] .

The popularity of tax havens and shell-corporations is such that every major bank offers at least one financial product taking advantage of either the anonymity factor or less tax[163] . Official estimaties by the International Monetary Fund (I.M.F.) stated in the early 1980's that the world was running an annual balance-of-payments deficit of U.S.$ 100 billion or 10% of the world market trade. The I.M.F. explained these 'asymmetries' by the existence of non-declared funds hidden mostly in tax havens[164] .

The arguments above shed not only some light on the importance of off-shore corporations and tax havens in the process of money laundering, but also indicate that their use requires a certain knowledge of the existing and ever changing laws.

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[160] Ackerman J.-B., above p. 7, FN 38, at p. 60

[161] Scot H.S.,Where are the Dollars? - Off-shore Funds Transfers,Banking & Finance Law Review, Toronto 1988-89, at p. 243- 286. The author argues that claims to dollar deposits held outside the U.S. can be transferred abroad by in-house or correspondent transfers without any involvement of the U.S. payment system. Thus the U.S. cannot effectively freeze U.S. dollar deposits abroad through its control of dollar transfers in the U.S..

[162] Graber, Ch. K,.above p. 2, FN 10, at p. 62: The adaptation of national laws of tax havens to international standards is believed to bring some solutions in the future. Mr. Bernasconi, above Bernasconi P, p. 31, FN 124, at 177 draws attention to the successful bilateral agreement between the U.S. and the Cayman Islands.

[163] The book on tax havens of Mr. Edouard Chambost demonstrates that the general public shows some interest in the question as well: Chambost E., Le nouveau guide des paradis fiscaux, Paris 1982, compares the different tax havens. For a more thorough explanation of the use of tax havens, see Workmann D.J., The Use of Off-Shore Tax Havens for the Purpose of Criminally Evading Income Taxes, The Journal of Criminal Law and Criminology, vol. 74, No. 1, Northwestern University School of Law, Chicago 1983

[164] Naylor R.T., Hot Money and the Politics of Debt, Toronto 1987, at p. 11

V. Money Laundering and Organised Crime

The explanation of both the procedure [165] and the different techniques of money laundering[166] makes it clear that only professional people can arrange the laundering of the huge amounts of illicit money[167] existing worldwide. Money laundering not only requires specialists of a high level of sophistication, but it also presupposes a well staffed organisation [168].

Due to the scope of its criminal activities and the necessity to conceal and control its illicit income, organised crime has gone international[169] and has

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[165] Above p. 14

[166] Above p. 20

[167] Above p. 3, at FN 12 and FN 13, p. 7, at FN 35 and FN 36 and p. 16, at FN 69. The latest estimation of so called "black money" worldwide by the Statistical Department of the International Monetary Fund: between U.S. $ 700 and U.S.$ 1'000 billion (!), with a annual increase of U.S.$ 100 billion, cited from L'Express, p. 9, FN 41, at p. 25.

[168] President's Report on Organized Crime, above p. 10, FN 42, at p. 8: "Ultimately, the degree of sophistication and complexity in a laundering scheme is virtually infinite, and is limited only by the creative imagination and expertise of the criminal entrepreneurs who devise such schemes ... in recent years ...criminals have mastered the details of modern technology, international finance, and foreign secrecy laws to create a select fraternity of money laundering professionals. As a result, organized crime today uses banks and other financial institutions as routinely, if not as frequently, as legitimate businesses."

[169] Beare M.E., Tracing of Illicit Funds: Money Laundering in Canada, Minister of the Solicitor General of Canada, Ottawa 1990, at p. 304; In general: "The laundering of proceeds of crime is truly an international phenomenon. No longer are operations limited to the country in which the illicit money is generated. On the contrary, the transborder movement of money is now a prominent feature of laundering operations; For Canada: A recent official analysis of Canadian money laundering police files revealed that over 80% of the cases examined had an international dimension. See also, above p. 15: Money Laundering Explained through its Different Phases and p. 31: Forms of Layering.

reached a frightening level of power[170]. Most of its income is from the sale of illicit drugs: in 1990, the United Nations estimated the turnover in sales of illicit drugs worldwide to be U.S.$ 500 billion (!)[171] .

The ability to make money available from illegal activities as quickly as possible[172] is the decisive element for the survival[173] of all criminal organisations[174]. Under this aspect, it makes sense to fight money laundering in order to combat organised crime. It is no coincidence that many authors discuss money laundering from this point of view[175] . Swiss legislators explicitly implemented Art. 305bis and Art. 305ter StGB with the intention of combating organised crime[176, 177]. Before discussing the effectiveness of the approach above, the term "organised crime" must be specified.

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170 Tages Anzeiger, Zurich August 22 1989: The Colombian Medelin Cartel is said to employ over 6'000 people: from peasant planting cocaine to specialists in finance and computing. It is believed to have even considered buying a satellite (Tages Anzeiger, Zurich August 21 1989 at p. 5) and tried to buy 120 Stinger-rockets (Neue Zurcher Zeitung, May 9 1990 at p. 1).

171 Neue Zurcher Zeitung, Zurich February 22 1990, at p. 4, according to which the estimations were only U.S.$ 122 billion the year before. See: International Efforts to Combat Money Laundering, Cambridge International Documents Series, Cambridge 1992, vol. 4, at p. ix: On the Paris Economic Summit in July 1989, it was said that the "sales of cocaine, heroin and cannabis amount to approximately $ 122 billion per year in the United States and Europe; of which 50 to 70% or as much as $ 85 billion per year could be available for laundering and investment".

172 See above p. 12: Concealment, control and change of the money.

173 Above p. 12, FN 52: Mr. Irving R. Kaufmann called laundered money the "life-blood" of organised crime.

174 Graber, Ch. K., above p. 2, FN 10, at p. 54

175 Among many, Bernasconi P, above p. 2, FN 4 , at p .26 and Pieth M., above p. 3, FN 15 at p. 24, and DeFeo M.A., p. 33, FN 131 at p. 405.

176 See, above , Botschaft über die Aenderung des Schweizerischen Strafgesetzbuches, p. 5, FN 25, at p. 1064 and Bernasconi P., above p. 2, FN 4, at p.26.

177 Concurring opinion by Professor Niklaus Schmid, Aktuelle Probleme im Bankrecht, Berner Tage für die Juristische Praxis 1993, Bern 1994, Insiderdeliket und Geldwäscherei - neuere und künftige Aspekte aus der Sicht der Banken, pp. 189 - 215, at p. 199

5.1. The Definition of Organised Crime

The first difficulty when discussing the phenomena of organised crime is its definition. In France, for example, there is no word translating organised crime. The French vocabulary is limited to words like "mafia", "la pègre", "organisation criminelle/mafieuse" or "parrain" (godfather)[178] . The German language is more explicit about the term, yet not precise: "organisiertes Verbrechen" (organised crime) is used; organised written in small letters. The adjectival use of the word organised is intended to underline the importance of the fact that criminals are organised. Furthermore, German terminology uses "Organisierte Kriminalität" (organised criminality), while Swiss authors speak rather of "kriminelle Organisationen" (criminal organisations)[179] . The Swiss terminology is obviously influenced by the American approach[180]. The American terminology ("organised crime") embraces all kinds of crimes and offences committed by syndicates from drug dealers, to cartels of corporation agreeing on understandings as to prices[181] .

In order to develop the argument of this study, "organised crime" is used as defined in article 6, paragraph 3 of the Treaty concerning Mutual Judicial Assistance in Criminal Cases dated May 25 1973[182] (in German, Rechtshilfeabkommen in Strafsachen zwichen den Vereinigten Staaten von Amerika und der Schweiz, or short RVUS) [183] between the U.S. and Switzerland. According to this treaty, "organised criminals" are:

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[178] In two recent articles in the French press, a word expressing "organised crime" could not be found. Above, p. 9, FN 41 and p. 25, FN 92.

[179] Arzt G., Beweiserleichterung bei der Einziehung, recht - Zeitschrift für juristiche Ausbildung und Praxis, Bern 1993, vol. 4, p. 77 - 83, at p. 78

[180] See below, p. 59, FN 264 and 265 and p. 60, FN 270

[181] Kaiser G. , Kriminologie, Heidelberg 1988, 2dn editon., at 371

[182] Treaty on Mutual Assistance in Criminal Matter, May 25, 1973, United States - Switzerland, 27 U.S.T. 2019, T.I.A.S: No. 8302.

[183] Staatsvertrag mit den Vereinigten Staaten von Amerika über gegenseitige Rechtshilfe in Strafsachen vom 25.5.1973 (SR 0.351.933.6), Bern 1973

People associated for a long or indefinite lapse of time. Their aim is to earn, by completely or partially illicit means, money or other property assets, or economic advantages for themselves or other people. Another aim is to conceal and protect their illegal activities against criminal prosecution. In order to achieve these aims, organised criminals must, in a methodical and systematical manner (a) use or threaten to use acts of violence or ways of intimidation that are liable of prosecution both in Switzerland and the U.S., and (b) either (1) aspire to influence in economy and politics, especially the police, public administration, justice, business, employers' associations, trade unions or similar associations; or (2) associate formally or informally with one or more associations or groups carrying on activities as described in (1.).

This definition comprises the essential characteristics of organised crime. These accentuate the potential dangers of such associations:

- the criminals intend to work over a longer, not determined period of time;
- they aim to maximise their earnings (including legal means);
- the working tool of organised crime is terror within and outside the organisation;
- they aim to gain influence in politics and economy;
- and last but not least, organised crime is not restricted to borders. It operates on a international level. For example, different activities can be performed in different countries but still be part of on operation.

In 1990, a German research team[184] tried to define organised crime under criminological aspects. Their findings were identical to the definition according to the RVUS.

The definition above sheds some light onto the American use of the term "organised crime"; considering everything said about organised crime and leaving aside the common interpretation e.g. (mafia) , the definition as used in the U.S. could apply to totalitarian states, large corporations,

[184] Dörrmann U., Koch K.-F., Risch H., Vahlenkampf W., Organisierte Kriminalität - Wie gross ist die Gefahr?, BKA-Forschungsreihe, Sonderband, Wiesbaden 1990, at p. 6

political parties and similar organisations[185] .

Organised crime is an abstract form of behaviour. It has a dynamic of its own and is able to react rapidly to a changing environment. In order to be able to combat organised crime, the prosecution must be able to recognise actions, behaviour and structures indicating its presence. Mr. Butz[186] suggests that instead of working with a definition, the prosecution would be better off working with a list of indicators implying the presence of organised crime. These indicators are: the way an offence was planned and executed; the way the profit was disposed of; whether the criminals behaved in a conspirating manner; whether they work with or within a structured group; whether relatives of members are supported when in need; and whether corruption is used in order to conceal the existence of the group.

5.2. Why Fight Organised Crime?

"Unfortunately, in this century, crime has ceased to be largely local in origin and effect. Crime is now established on an international scale and the common law must face this new reality"[187] . This statement by Lord Griffiths and the concurring opinion of all authors cited so far[188] are reason enough to think about ways to fight organised crime. Another reason to fight organised crime are its political implications [189]: any democracy is at risk . These negative effects are expected to continue and accentuate in the near

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[185] Lindau D., Der Mob, Munich 1989, at p. 64. The author exemplifies this point by investigating the facts about recent political scandals such as Irangate in the U.S. (sending of weapons paid by deals with Iran by the U.S. secret service) and the German Flick-scandal (German billionaire who donated large amounts to both political parties and politicians).

[186] Butz P., Die Absahner, Reinbek bei Hamburg 1990, at p. 4

[187] Liangsiriprsert v. U.S. Government (1990) 2 All ER 866, at 878

[188] Above p. 41, FN 168 and FN 169

[189] Neue Zurcher Zeitung, NZZ September 8 1989, at p. 5: In Latin America, organised crime finances terrorist groups such as the Sendero Luminoso in Peru and the M-16 in Colombia in order to be able to put some military pressure on the government and to guard the plantations of coca and marijuana.

future. Experts in fighting organised crime predict a further professionalisation and internationalisation of it. In a more remote future, organised crime will be able to merge with legal business, making it a decisive force in the economy[190]. Considering that organised crime "is the most explosive force to emerge from the wreckage of Soviet communism...(and) has undermined reform, spawned extraordinary levels of violence in major cities, and helped fuel a growing ultranationalist backlash"[191] , such that the Russian crime syndicate has become "a serious threat to post-Soviet democracy"[192] , one must wonder how deep organised crime has infiltrated our western democracies to date[193] .

In the light of what has been said so far, one must concur with Mr. Nadelmann, who pointed out in a U.S. context that a number of rationales support the view that "going after the money" is the best way to tackle organised criminal activities: "The most basic of these is that insofar as criminals ... act as they do for the money, the best deterrent and punishment is to confiscate their incentive. A second rationale is that while the higher level and more powerful criminals rarely come into contact with the illicit goods, such as drugs, from which they derive their profits, they do come into contact with the proceeds from the sale of those goods. That contact often provides a "paper trail" or other evidence, which constitutes the only connection with a violation of the law. A third rationale is that confiscating the process of criminal activities is a good way to make law enforcement pay for itself"[194] .

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190 Dörrmann U. et al., above p. 44, FN 184, at p. 98 and 100.

191 Handelmann S., The Russian Mafyia - Politics by other Means, Foreign Affairs, March/April 1994, vol. 73, no. 2, New York 1994, p. 83 - 96, at p. 83

192 Handelmann S., above , FN 191, at p. 83

193 Neue Zurcher Zeitung, Zurich July 1 1989, at p. 34 and January 8 1992, at p. 1: The German secret service for example has noticed that drug dealers seem to buy government bonds from industrialised nations with a disbalanced budget such as Italy, with the intention to bring these countries into a certain dependency.

194 Nadelmann E., Unlaundering Dirty Money Abroad: U.S. Foreign Policy and Financial Secrecy Jurisdictions, American Law Review, vol. 18, 1986, at p. 34.

One can affirm, that the methods intend to fight illicit drug production and consumption directly have failed [195] . Therefore, of all methods applied so far, the remaining option is to try to follow the money as suggested by Mr. Nadelmann [196] .

The following chapter will explain,discuss and compare the laws in effect in the U.S. and Switzerland.

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[195] On the attempt and failure to destroy drug plantations and replace the crop, see Financial Times, May 7/8 1994, 2nd Section, at p. I. On different operations instigated by the U.S. in Latin America, see Del Olmo R., above p. 2, FN 8, at p. 33. On why the failure of the so-called "war of drugs" may not be evident, see O'Malley P. and Mugford S., The Demand for Intoxicating Commodities: Implications for the "War on Drugs", Social Justice, San Francisco 1991, vol. 18, no. 4, issue 46, Winter 1991, p. 49 - 75, at p. 49. Furthermore, the latest number of consumers of illicit drugs is estimated to be of 11 million. A growing number of young people are dependent on drugs; see Neue Zurcher Zeitung , Mai 13 1994, at p. 13, col. 3.

[196] Above, p. 46, FN 194

VI. A Comparative Summary of U.S. and Swiss Law on Money Laundering

6.1. Summary of the Legislation in the U.S.

U.S. legislation is not organized in a systematic manner[197] . Therefore, an explanation must be based on the intentions of the legislative body. The following summary is based on Mr. Arzt's[198] comparative study of U.S. and Swiss law against money laundering. For the U.S., Mr. Arzt differentiates three generations of laws which forbid money laundering. The first two generations still prevail, while the third complements the two previous generations.

6.1.1. The First Generation of Laws Fighting Money Laundering

The first generation of laws prohibiting money laundering is aimed at all agreements passed between two or more people to commit an offence or fraud against the U.S., defined as conspiracy in 18 U.S.C. 371. The prosecution must bring evidence of an agreement or at least of an overt act. The proof of money laundering is not necessary[199]. Conspiracy law was successfully applied in money laundering cases[200]. The rationale of 18 U.S.C. 371 is to cover all acts during the preliminary approach of the

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197 Ackermann J.-B., above p. 7, FN 38, at p. 86: The legal basis concerning duties of identification, notification, and registration is the Banking Secrecy Act (B.S.A.), title 12 and 31 of the United States Code (U.S.C.). Other provisions can be found in the Internal Revenue Code (I.R.C.). The Treasury Department implemented under title 31 of the Code of Federal Regulations Part 103 regulations thereof. Further, all federal departments supervising the B.S.A. have issued Administrative Rules and B.S.A.- Guidelines.

198 Arzt G., above p. 27, FN 101, at p. 172 - 177

199 Nevertheless, this conspiracy-law was applied in money laundering cases; see Arzt G, above p. 27, FN 101, at p. 172. Concerning the definition of "agreement" and "overt act", see LaFave W.R., Modern Criminal Law, St. Paul 1988, 2nd ed., at p. 598 and p. 645. and Black's Law Dictionary, St. Paul 1990, 6th ed., at p. 67 and p. 1104.

200 Arzt G., above p. 27, FN 101, at p. 172

offence, and to find legal grounds to fight organised crime[201] . This fraud doctrine is the base of different conspiracy theories such as the Klein Conspiracy Doctrine[202] in cases of tax evasion or the Chain Conspiracy Theory, according to which a person taking part in a conspiracy is not required to know all of the details. Only a sufficient link, the proof of intent or dolus directus, is necessary[203] . An attempt to widen the Klein Conspiracy Doctrine in order to punish the money launderer for integration of illicit funds[204] was not successful. Conspiracy theories used to be the only legal instruments to prosecute money launderers before money laundering was a crime. In U.S. v. Jerkins[205] , the court stated that albeit money laundering was (at that time) not a crime, the defendant had defrauded the U.S. by not declaring to the I.R.S. the illicit assets concerned[206]. Another example of the impact of conspiracy theories is the case of Oliver North, the main defendant in the Irangate case. The prosecution tried to apply an extended version of the Klein Conspiracy Doctrine: North was accused of obstructing the activities of the U.S. Congress. The U.S. Department of Justice, hereafter D.O.J., was forced to limit[207] such an extensive interpretation of both the Klein Conspiracy Doctrine and the Conspiracy Theory in 18 U.S.C. 371 to its present interpretation[208] . Conspiracy theories are a useful tool in the hands of justice, yet their negative effects must be underlined: it is a doubtful practice to penalise behaviour of avoidance by including it in a definition of conspiracy whenever other legal means are limited.

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201 Ackermann J.-B., above p. 7, FN 38, at p. 180, FN 6; citing Kadish S.H. & Schulhofer S.J., Criminal Law and Process, Cases and Materials, Boston, Toronto, London 1989, 5th ed. at p. 765: "Conspiracy as sanction against group activity".

202 Above, p. 33, FN 132

203 U.S. v. Barnes, 604 F.2d 121 (2d Cir. 1979), at p. 154: "Importers, wholesalers, purchasers of cutting materials, and persons who 'wash' money are all necessary to the success of a drug venture as is the trafficker. They can all be held to have agreed with one another

204 Above, at p. 34, 4.5. Integration

205 U.S. v. Jerkins, 871 F.2d. 598 (6th Circ. 1989)

206 Above , FN 205, at p. 603

207 Ackermann J.-B., above p. 7, FN 38, at p. 182

208 In this specific case, an Amicus Curiae had to be used.

In addition to all conspiracy theories, the Racketeer Influenced and Corrupt Organizations Statute, or RICO[209] , is part of the first generation of laws fighting money laundering. The statute targets primarily organised crime, but it is of the highest[210] importance for the confiscation of property acquired from the proceeds of crime[211]. The statue is intended to fight the integration of proceeds from racketeering activities into the legal economy, the takeover of legal businesses by racketeering activities and the running of businesses in order to commit racketeering activities. Racketeering activities are defined in different federal and nine state laws[212] . Money laundering as defined in 18 U.S.C. 1956[213] and 1957[214,215] is a racketeering activity. According to the RICO statute, anybody having taken part in at least two racketeering activities within 10 years is prohibited to invest funds thereof into a legal business[216] . "RICO's most significant advantage is that it allows the government to reach legitimate businesses which have been infiltrated, taken over, or used for such activities as laundering money or fronting merchandise obtains from illicit activities. (...) organized crime operation of a legitimate business may take many forms; moreover, the original legitimate purpose may be continued or perverted while the enterprise becomes a front for an unrelated criminal activity. RICO permits the government to prosecute these corrupted enterprises no matter

209 Organized Crime Control Act of 1970, Publ. L. No. 91-452, Title IX, 84 Stat. 1970, codified as 18 U.S.C. 1961 - 1968.

210 Ackermann J.-B., above p. 7, FN 38, at p. 171, judges RICO to be the most important law against organised crime in the U.S..

211 Black's Law Dictionary, above p. 48, FN 199, at p. 650. See also 18 U.S.C 981, 982 (criminal and civil forfeiture) and 21 U.S.C. 853 (forfeiture in drug cases).

212 Ackermann J.-B., above p. 7, FN 38, at p. 171

213 The Money Laundering Crime, for further explanation, see Plombeck Ch. T., above p. 11, FN 49, at p. 71

214 Monetary Transaction Crimes, for further explanation, see Plombeck Ch. T., above p. 11, FN 49, at p. 79

215 Money Laundering Control Act of 1986, see Plombeck Ch. T., above p. 11, FN 49, at p. 71.

216 Ackermann J.-B., above p. 7, FN 38, at p. 172: A money launderer took advantage of the exempt status credited his account with several hundred thousand dollars. Because of the exempt status, he could not be convicted according to the B.S.A., but for violation of the RICO statute.

what form they take."[217] The importance of RICO lies in the fact that it is often practically impossible to prove conspiracy among a group of people[218] . The RICO statute does not require association with a criminal organisation or conspiracy. It applies in the case of a perpetration of at least two offences typical of organised crime.

6.1.2. The Second Generation of Laws Fighting Money Laundering

The second generation of laws prohibiting money laundering embraces all compulsory reporting of certain transactions specified by banking-, tax- and custom-regulations. The initial compulsory reporting in the world of banking was enacted in 1970 (Bank Records and Foreign Transaction Act, or shortly, Banking Secrecy Act)[219] . It was ignored altogether by both the prosecution and the banking community[220] and was therefore long forgotten. The Act was amended in 1982 and both its content and its penalties strengthened[221] .

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217 Ackermann J.B., above p. 7, FN 38, at p. 172, quoting Friedman J.M., Fighting Organized Crime: Special Response to a Special Problem, 16 Rudgers Law Journal, 1985, at p. 454.

218 LaFave, W.R., above p. 48, FN 199, at p. 683: Beyond Conspiracy: RICO.

219 Pub.L. No. 91-508, ç401 (a), 84 Stat. 1114 (1970). The first part of the Act is codified in 12 U.S.C. 1730d, 1829b and 1951 - 1959. The second part was re-codified in 1982 with the Money and Finance Act, Pub.L. 97-258, 96 Stat. 995 in 31 U.S.C. 5311 - 5322 and supplemented to the Money Laundering Control Act of 1986, Pub. L. 99-570, 100 Stat. 3207 (1986) with 31 U.S.C. 5323 - 5325.

220 Ackermann J.-B., above p. 7, FN 38, at p. 83. The author cites long pending appeals to the Supreme Court concerning the constitutionality of the act, loopholes in the law and lacking coordination among the agencies concerned.

221 Ackermann J.-B., above p. 7, FN 38, at p. 83: The records of all since 1980 compulsory Currency Transactions Reports, (CTR) had to be kept and introduced into the Treasury Enforcement Communications System (TECS). The TECS was run by the Treasury Law Enforcement Centre (TFLEC) under the supervision of the IRS.

Additional definitions followed in the years 1984[222], 1986[223] and 1988[224]. They aimed at reinforcing its contents even more. To date, the B.S.A., codified in titles 12 and 31 of the United States Code (U.S.C.) is the general legal base for all duties to identify, notify, and register transactions. Scattered provisions can be found in the Internal Revenue Code, to which the Secretary of Treasury issued in title 31 of the Code of Federal Regulations, part 103, the implementing regulations[225]. The initial idea of the B.S.A. is both simple and original. Because funds of illicit origin can be traced from their source to another property asset by their "paper-trail", it must be possible to go the reverse way from the money back to its source. In order to achieve this, the state must make sure that every citizen is allowed a see-through purse only[226]. All business-people, including banks, accepting cash for goods and services, all private people bringing cash or bearer shares or bonds into the U.S. and all people having a foreign account are required by different legal provisions to report all transactions from US$ 10,000,00 or over[227]. The most important regulations requiring a report on transactions are 31 U.S.C. 5313 and 26. U.S.C. 6050I.

6.1.2.1. 31 U.S.C. 5313

31 U.S.C. 5313 stipulates that all financial institutions must register all transactions specified by the Secretary of Treasury and notify the latter by using a special form, the I.R.S. Form 4789 or Currency Transaction Report

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222 The BSA is supplemented with the Comprehensive Crime Control Act (CCCA), Pub.L. No. 98-473, 98 Stat. 1837 (Oct. 12 1984): Search warrants became easier to obtain, stiffer penalties and a system of gratification were enacted.

223 The Money Laundering Control Act (MLCA) supplemented the BSA in order to clarify questions such as who was liable under the BSA.: Pub.L. 99-570, 100 Stat. 3207(1986).

224 Above, Plombeck Ch. T., p. 11, FN 49, and Arzt G., above p. 27, FN 101. Since this revision, 31 U.S.C. 5321, the court can decide on civil penalties up to U.S.$ 10'000,-- for non-compliance with the requirements of 12 U.S.C. 1829b, 1730d and 1951-1959 concerning the reporting and keeping the records. For further information, see: Zagaris B., The Bank Secrecy Act, Money Laundering and Law of Enforcement; International Symposium on Money Laundering, Miami 1991, at p. 10.

225 Ackermann J.-B., above p. 7, FN 38, at p. 86

226 Arzt G., above p. 27, FN 101, at p. 166

227 Above p. 27, FN 101

(CTR). The same applies to casinos. These have to fill out the I.R.S. Form 4789. In order to prevent a breakdown of normal business due to a flood of red tape, exemptions[228] are provided for. The law distinguishes two types of exemptions[229] :

-First, there are transactions which are not required to be reported at all. According to the Code of Federal Regulations (C.F.R.), transactions between all domestic banks and transactions between the Federal Reserve Banks or the Federal Home Loan Banks and domestic banks are fully exempt of notification[230].

-Second, the C.F.R. provides for so-called unilateral exemptions[231]. A customer can apply for a exemption with his bank or certain financial institutions by submitting a detailed report about his activities and a sound argument why he should be exempted to report his transactions[232]. The exemption is not of general nature. The bank or financial institution has only the possibility of granting a specific limit for the amounts paid into or withdrawn from the account. In case this limit is exceeded, a C.T.R. Form must be completed. Three different types of businesses who may apply for an exemption can be differentiated: First, there are the retail stores with an established U.S. bank account and special businesses such as restaurants, sport stadiums, hotels, theatres and so on. The second group embraces all local (county or municipal) state or federal agencies and offices. The last group comprises all cash transactions of employers for salaries to be paid to their employees.

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228 Above p. 29, 4.3.7. Exempt Transactions

229 Internal Revenue Service (I.R.S:), Currency and Foreign Transactions Reporting Act, Exemption Handbook, Publication 1387 (8-88), Washington D.C., 1988

230 31 C.F.R. 103.22 (b)(1)(i) and (ii); See also I.R.S., Currency and Foreign Transaction Reporting Act, Exemption Handbook, above p. 52, FN 224, at p. 3 and p. 19.

231 31 C.F.R. 103.22(b)(2); Currency and Foreign Transactions Reporting Act, Exemption Handbook, above FN 228, at p. 3 and p. 20

232 12 U.S.C. 1953 (1730d, 1829b); details in 31 C.F.R. 103.33-38: Financial institutions granting credits that are not secured by real property have to register any transaction above Us$ 10,000 (31 C.F.R. 103.22(a)(1). Further, every query, every advise or instruction concerning a transfer of funds of more than US$ 10,000 abroad must be recorded.

6.1.2.2. 26. U.S.C. 6050I

26 U.S.C. 6050I requires that anybody "who is engaged in trade or business, and who, in the course of such trade or business, receives" cash in excess of US$ 10,000,-- notifies the transaction on I.R.S. Form 8300. With this provision, all business-people are obliged to report transactions above US$ 10,000,--.

6.1.2.3. Compliance with the Requirement to Report Transactions

A study conducted by the Money Laundering Alert Magazine in 1991[233] shows an increasing numbers of I.R.S. Forms being filed:

Form	1988	1989	1990
Form 4789[234]	5,506,000	6,502,000	7,324,000
Form 8300[235]	19,250	21,323	30,443
Form 8362[236]	48,101	53,142	63,002

The increasing number of forms being filed cannot rule out the fact that many reports are voluntarily falsified [237] or not filed at all. A cross-check [238] of the forms filed by 5 car dealers in Manhattan with the forms their banks filed brought to light the following result : the dealers filed six 8300 reports for a total sum of US$ 212,383 only, whilst their banks filed 1,144 form 4789 reports for a total amount of US$ 18,820,316 for all the cash payments made by the dealers customers over the same period of time.

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[233] Number of Federal Cash Reports Filed 1987 - 1990, in: Money Laundering Alert, Miami February 1991, at p. 5

[234] Currency Transaction Report

[235] Report of Cash Payments Over US$ 10,000 Received in Trade or Business

[236] Currency Transaction Report by Casinos

[237] An investigation brought to light, that of 79 business controlled, 76 were prepared not to file a report, to falsify a report or instructed the person whom they believed to be a potential client on how to structure payments in order to avoid declaration of the transaction: GAO probe finds extensive business laundering, in: Money Laundering Alert, Miami, October 1990, at p. 1.

[238] Five N.Y. car dealers charged, in Money Laundering Alert, Miami, November 1990, p. 1 and 3.

"The speed and relative anonymity of electronic and wire transfers have made the trail of illegally-generated cash nearly impossible for law enforcement authorities to trace."[239] In order to fight money laundering more effectively, national and international money transfers became the focus of further penal provisions. The aim of legislation against money laundering was formulated as broadly as possible[240]. The Money Laundering Control Act of 1988[241] made money laundering a substantive crime. It was aimed at the promoting of "specified unlawful activity", designing transactions or the transportation of monetary instruments to conceal or disguise the nature, the location, the source, the ownership or the control of the proceeds of specified unlawful activity and any action intended to avoid transaction reporting requirements under state or federal law. To achieve all these aims, 18 U.S.C. 1956 created a federal money laundering crime. Certain specific financial transactions and certain transportation activities are prohibited. 18 U.S.C. 1957 forbids any monetary transaction in criminally derived property. Other than the B.S.A.-regulations[242] , 18 U.S.C. 1956 and 18 U.S.C. 1957 punish certain transactions with illicit funds per se. 18 U.S.C. 1956 penalizes severely failure to notify the concerned agency if the illicit source of the funds is

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239 Marlody, Laura M.L., Recordkeeping and Reporting in an Attempt to Stop the Money Laundering Cycle: Why Blanket Recording and Reporting of Wire and Electronic Funds Transfers is not the Answer; in : Notre Dame Law Review, vol. 66, number 3, 1991, pp. 863 - 892, at p. 864

240 Ackermann J.-B., above p. 7, FN 38, at p. 198, citing Burnett Arthur L., Money Laundering - Recent Judicial Decisions and Legislative Developments, Federal Bar News & Journal, vol. 33, 1986, at p. 372: to create a Federal offence against money laundering; to authorise forfeiture of the profits earned by launderers; to encourage financial institutions to come forward with information about money laundering without fear of civil liability; to provide Federal law enforcement agencies with additional tools to investigate money laundering; and to enhance the penalties under existing law in order to deter the growth of money laundering.

241 Above p. 52, FN 223

242 Ackermann J.-B., above p. 7, FN 38, at p. 120: The Money Laundering Control Act introduced a civil penalty for violations of BSA-rules. The penalty would not be applied "in the case of an occasional clerical error".

actually known. Further, the creation of these new federal offences is crucial[243] in the fight against money laundering because, on the one hand, the subjective knowledge of a prior offence is added to the formal requirements of the B.S.A.. On the other hand, any failure to identify or notify will strengthen the suspicion of the judge of the knowledge of such prior offence[244] . Therefore, the focus of most money laundering cases is not so much on the prohibited act itself[245] , but on scienter. Although Mr. Plombeck states that "scienter standards under the Money Laundering Crime require a high degree of proof of the defendant's specific knowledge or intent of the underlying activity"[246] , thus excluding from prosecution for example "a grocer for his produce by the proceeds of a crime"[247], he acknowledges that there are no explicitly incorporated limitations to the extent of application of this crime in the statute and that "any limitations on the scope of this crime must be evolved judicially"[248] . While prior legislation - as in all Conspiracy and Aid and Abetting laws - required intention, the Money Laundering Control Act requires a mere dolus eventualis[249]. Therefore, the courts of law must determine whether a defendant has crossed the line separating a mere suspicion and punishable wilful blindness. It must be kept in mind that in the U.S. the terminology concerning intention is not uniform, both in the different states, and also in federal law[250] . The fact that courts have demonstrated incomprehension on many occasions complex financial transaction schemes[251] , and that the judge will suspect knowledge of a prior offence if

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243 Ackermann J.-B., above p. 7, FN 38, at p. 198

244 Ackermann J.-B., above p. 7, FN 38, at p. 198

245 Plombeck Ch. T., above p. 11, FN 49, at p. 71

246 Plombeck Ch. T., above p. 11, FN 49, at p. 71

247 Plombeck Ch. T., above p. 11, FN 49, at p. 80

248 Plombeck Ch. T., above p. 11, FN 49, p. 80

249 Ackermann J.-B., above p. 7, FN 38, at p. 282. In casu, dolus eventualis being the the state of mind in which a person considers and accepts that the assets have an illicit source and that he would be contribute to launder them.

250 Ackermann J.-B., above p. 7, FN 38, at p. 282

251 Scott, H.S., Where Are the Dollars - Off-Shore Funds Transfers, in Banking and Finance Law Review 1988 - 1989, p. 243 - 286

a transaction was not duly notified[252] must lead to the assumption that the longer courts will be faced with money laundering crimes, the lower the standards of whether a defendant acted with wilful blindness or not will fall[253] . The correctness of this assumption is sustained by the call of the ABA and the NACDL for revision of 18 U.S.C. 1957[254] , because "the potential impact of 18 U.S.C. 1957 on the adversary system and on the quality of representation makes its application to an attorney a legitimate subject of debate. .. Empirical and anecdotal evidence indicates that prosecutorial practices involving attorney's fee forfeiture have changed the way some defence attorneys accept cases and handle their clients. These practices include subpoenaing attornies to testify about their fees, .. attempting to gain forfeiture of attorneys' fees, and trying to disqualify an attorney who is representing a particular client"[255] .

The international dimension of 18 U.S.C. 1956 (a)(2)[256] is in line with the recommendations of the 1988 U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances[257] : in article 7, all parties to the Convention were asked to grant "the widest of mutual legal assistance in investigations, prosecutions and judicial proceedings". Since 18 U.S.C. 1957(f)(2) prosecutes monetary transactions with criminally derived

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252 Above, p. 56, see FN 240. Further, on the discussion about the difference on "Avoidance" and "Evasion", see Ackermann J.-B., above p. 7, FN 38, at p. 107 quoting different judgments with the same bottom line: avoiding taxes by the use of legal loopholes is lawful, money laundering not .

253 On the development of the requirement for patdown searches , see Abramovsky A., Money Laundering and Narcotics Prosecution, Fordham Law Review 1985 - 1986, vol. LIV, New York 1985 and 1986, p. 471 - 483, at p. 484: "a mere or minimal suspicion" is enough.

254 Wolfteich Paul G., Making Criminal Defence a Crime Under 18 U.S.C. Section 1957, Vanderbilt Law Review, New York 1988, p. 843 - 869

255 Wolfteich Paul G., above p. 57, FN 254, at p. 861

256 Transportation Money Laundering or in different terms International Money Laundering

257 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotic Substances, Adopted in Vienna , 19 December 1988 and in on the nature and extend in general: Gilmore William C., Combating International Drug Trafficking: the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, London 1991.

property by financial institutions[258] and 18 U.S.C. 1956(a)(2)(A) does not demand accessoriness of the monetary instruments or the funds with the prior offence, the territorial jurisdiction is extended beyond the borders of the U.S.. Because of this extension of territorial jurisdiction the law was only applied very restrictively when foreigners were imposed. This was so because of international sensitivities[259] . This susceptibility is taken into account in article 2, paragraph 3 of the Vienna Convention[260] : "A Party shall not undertake in the territory of another Party the exercise of jurisdiction and performance of functions which are exclusively reserved for the authorities of that other Party by its domestic law".

6.2. A Summary of the Legislation in Switzerland

As indicated in the introduction[261], both the Swiss legislative body and the general public were stunned when they learned that money laundering was going on in Switzerland and that legal precautionary measures were non-existent. This does not imply that there were no provisions against money laundering at all. Since 1977 the member-banks of the Swiss Bankers Association are contractually forced to honour a code of behaviour, the "Vereinbarung über die Standesregeln der Banken" or VSB[262] . This code is constantly adapted to the latest developments in the banking profession. Its aim is the defence of the good reputation of Switzerland as a financial

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[258] 18 U.S.C. 1957 . Financial institutions are as defined in 31 U.S.C. 5312(a)(2) as commercial banks and banks having their assets insured by the FDIC (12 U.S.C. 1813 (h)) .

[259] Arzt G., above p. 27, FN 101, at p. 176

[260] Above, p. 57, FN 257

[261] Above p. 1

[262] Mabillard M., de Weck R., Scandale au Crédit Suisse, Geneva 1977: The code of honour was introduced by the Swiss Bankers Association in order to prevent governmental regulation of the profession after a scandal about flight capital brought some dubious practices in banks to light.

centre[263] by identifying the client and the beneficial owner and to refrain from active help of capital flight and tax evasion. There is a certain conceptual similarity between the VSB with the rules established in the BSA[264,265]. The main difference is that in Switzerland, the private sector monitors the transactions with its own controlling instances without the involvement of a governmental office and without any duty to notify transactions to anybody. An example of how effective the rules established by the VSB can be is the case of Mr. Denis Levine. Mr. Levine, was a New York City broker involved in inside trading. He instructed his Swiss banker to buy or sell stocks based on confidential information he had received by corrupting fellow employees. His Geneva banker noticed the accuracy in stock-picking of his client. It was such that it was obviously beyond the possibilities of any professional analyst. Subsequently, Mr. Levine was asked to close his account with the bank[266]. The major weakness of the rules established by the VSB is that not all the financial sector can be forced to join the agreement[267] and not all banks apply the same standards of diligence, the latter being demonstrated by the cases[268] that prompted the Swiss money laundering legislation. Unlike the legislation in the U.S., the Swiss legislation was put into force within a short notice and with no practical national experience to build upon[269]. Since the Swiss legislators had to draw from somebody's experience, the developments in the U.S.

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263 Aubert M., Kernen J.-P., Schönle H., Das Schweizerische Bankgeheimnis, Bern 1978, at p. 167: Vereinbarung über die Standesregeln zur Sorgfaltspflicht der Banken (VSB) zwischen der Schweizerischen Bankiervereinigung einerseits und den unterzeichnenden Banken andererseits vom 1. Juli 1992, Art. 1, Präambel; and Schürmann, R., Zum zehnjährigen Bestehen der Sorgfaltspflichtvereinbarung, in Der Schweizer Treuhänder, vol. 10, Bern 1987, pp. 378 - 381.

264 Above p. 51, FN 219

265 Ackermann J.-B., above p. 7, FN 38, at p. 199

266 Steward J., Den of Thieves, New York 1991, at p. 72: This attitude - in line with Swiss laws and regulations - was not appreciated by the U.S. prosecution.

267 The term bank implies a licence granted by the Federal Banking Commission. Foreign exchange dealers, portfolio managers and financial advisers do not need to apply for a banking licence and would not meet the required standards.

268 Above p. 1

269 Above, p. 1

were taken into consideration. Mr. Arzt[270] underlines how influential the legislative effort around the Money Laundering Control Act of 1988[271] became. This fact is, according to the same author, the reason that the new Swiss legislation is similar to the third generation of laws fighting money laundering in the U.S.. The following discussion of both StGB Art. 305bis and Art. 305ter will bring to light that in essence, both the U.S. and the Swiss approach try to tackle the very same legal problems surrounding the struggle against money laundering.

6.2.1. StGB Art. 305bis - Money Laundering

StGB Art. 305bis prohibits money laundering. According to of StGB Art. 305bis paragraph 1, the offender must:
- commit an act which inherently impedes the identification of the source, the discovery or the confiscation of assets,
- of which the offender knew or should have known the criminal source.

Certain situations are qualified as serious and the legal sanctions are more severe. Paragraph 2 of Art. 305bis gives three examples of such situations:
- the offender acts as a member of a criminal organisation;
- the offender acts as a member of a group formed to systematically engage in money laundering;
- the offender launders money professionally and makes a relevant profit or a significant turnover.

The intention of the law being to fight organised crime by preventing it from laundering or concealing its money in Switzerland[272] and realising that

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[270] Arzt G, above p. 27, FN 101, at p. 172. Contradictory opinion in Bernasconi P., Finanzunterwelt, above p. 2, FN 4, at p. 39 stating that a chronological comparison of the U.S. and the Swiss laws does not allow the conclusion that the Swiss law is reduced to a typical Lex Americana.

[271] Above, p. 53, FN 2220

[272] Botschaft über die Aenderung des Schweizerischen Strafgesetzbuches (Gesetzgebung über Geldwäscherei und mangelnde Sorgfalt bei Geldgeschäften) vom 12. Juni 1989 (BBl 1989 II 1061), at p. 1064

organised crime is not limited by national borders[273], StGB Art. 305bis paragraph 3 provides that the perpetrator will also be punished when the principal offence,dealing with illicit drugs for example, (which is also punishable in the country it was perpetrated) has been committed outside of Switzerland.

In order to fight organised crime, the legislator had two possibilities: money laundering can be interpreted as a special form of support to a criminal organisation or as obstruction of the criminal prosecution. The Swiss legislators opted for the second possibility. This choice leads to some ambivalence within the Swiss legal system and practical problems almost impossible to solve[274] .

6.2.1.1. Money Laundering as a Crime against the Administration of Justice

Any Criminal Code applies to its jurisdiction only. The Swiss Criminal Code is no exception. In the case of Switzerland, it is assumed that (most) property assets to be laundered originate from offences committed abroad[275]. These initial offences are prosecuted by the foreign authority in charge of the case. Therefore, impeding the identification of the source, the discovery or the confiscation of such assets in Switzerland means obstructing the foreign prosecution. Thus, this is in contradiction with the intention of the Swiss Criminal Code and with the much more specific StGB Art. 305 against abetting[276] - systematically superior to StGB Art. 305bis - which explicitly protects the Swiss jurisdiction only. This systematic problem is enhanced by the fact that according to StGB Art. 305bis paragraph 3, the initial offence must be punishable in both the country it was committed and in Switzerland, whereas StGB 305bis does not require money laundering to be prohibited in the prosecuting country. In addition, StGB Art. 305bis

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[273] Ackermann J.-B., above p. 7, FN 38, at p. 84. Mr. Ackermann underlines the fact that this statement cannot be substantiated with statistical material.

[274] Stratenwerth, G.,Schweizerisches Strafrecht, Besonderer Teil I und II, Teilrevisionen 1987 bis 1990, Bern 1990, at p. 71

[275] above FN 273

[276] StGB 305: Impeding prosecution of a specific crimes listed in the StGB, whether committed on Swiss territory or abroad, is prohibited.

protects a non specified "interest in the prosecution as such"[277], whereas the systematically superior StGB Art. 305 enumerates all possible crimes which can impede the prosecution. This unspecified interest of prosecution as such must be limited to property assets that possibly originate from a crime or are connected to a crime. There is no requirement that the property assets be connected to the organised crime[278]. This fact is not only contrary to the ratio legis of StGB Art. 305bis but contributes to make it unclear, which legal interest is protected by StGB Art. 305bis[279] .

6.2.1.2. Assets According to StGB Art. 305bis

According to the commentary of the bill by the Federal Executive[280], the meaning of "assets" in StGB Art. 305bis includes all forms of economic transaction and pecuniary advantage imaginable. This notion of assets which includes cash as well as securities, metals, precious stones, rights and obligations, other movable and immovable goods and the rights attached thereto, gives rise to the question of how extensive the term assets can possibly be interpreted. StGB 305bis clearly targets assets that are the product or the result of a crime, crime being defined by Swiss criminal law[281] as imprisonment in a "Zuchthaus" or jail from 1 to 20 years. However, the drafting of the criminal provision leaves open the question of whether and to what extend funds, in themselves clean but having been at some stage connected to an offence, are targeted by StGB Art. 305bis[282]. According to Mr. Graber, the "vitium rei inhaerens" sticks to the asset in

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277 Geldwäschereibotschaft, above p. 61, FN 272, at p. 1081

278 Stratenwerth G., above p. 61, FN 274, at p. 72

279 Stratenwerth G., above p. 61, FN 274, at p. 72

280 Geldwäschereibotschaft, above p. 61, FN 272, at 1089

281 StGB 9, paragraph 1 and StGB Art. 35, paragraph 1: A crime is an offence punishable by imprisonment in a "Zuchthaus" from one to three years. Swiss criminal law differentiates between "Zuchthaus" or penitentiary (StGB 9, paragraph 1) and "Gefängnis" or jail (StGB 9, paragraph 2; StGB Art. 36: imprisonment from three days to three years; or specification in the text of law)) . Both "Zuchthaus" and "Gefängnis" are the same institution. The difference is made by the law by determining the term to be served according to the gravity of the offence.

282 Graber Ch. K., above p 2, FN 10, at p. 118

question as long as the prosecution has beenprevented from seizing it[283]. This evaluation is in line with most of the legal opinions[284]. Unfortunately, the line of argumentation of the Federal Executive is not clear: on the one hand, assets are interpreted in an extensive manner[285]. On the other hand, in the same report, the Federal Executive warns that the extensive interpretation of the term "asset" must result in the conclusion that most parts of the economy are contaminated with laundered money and that an extensive interpretation might conflict with the constitutionally guaranteed right to ownership[286] . It must be noted that, to date, the reception of stolen goods and their confiscation is oriented to objects. StGB Art. 58 paragraph 4 takes this fact into account and recognises a claim for compensation in those cases in which the object is not recuperable; still, the concept of following the value of an object (contre-valeur) and punishing the passing on of this value is new to Swiss Criminal law[287]. The solution suggested by the parliament is to consider only "assets that can be seized"[288]. The parliament did not clarify what it meant by this wording[289] . The above demonstrates how little parliament thought about legal technicalities and terms when discussing StGB Art. 305bis and Art. 305ter. First, the law of seizure does not define what a substitute asset is[290]. Second, the suggestion that the law of seizure should be applied is contradictory to the concerns about the constitutionality of the seizure of substitutes which the

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283 Graber Ch. K., above p. 2, FN 10, at p. 118: Dirty money looses its vice only when seized. Theoretically, this means that the money launderer can only achieve the fiction of clean money; make its fault as little visible as possible.

284 Schultz H. , Die Einziehung, der Verfall von Geschenken und andere Zuwendungen sowie die Verwendung zugunsten des Geschädigten gemäss StGB rev. Art. 58, Zeitschirft des Bernischen Juristenvereins, ZJBV, Bern 1978, vol. 114, at p. 307, Rehberg J., Strafrecht II, Zurich 1984, at p. 84. Only adversary opinion in Stratenwerth G., Schweizerisches Strafrecht,- Strafen und Massnahmen, Bern 1989, at p. 496.

285 Above p. 62, 6.2.1.2. Assets According to StGB Art. 305bis.

286 Geldwäschereibotschaft, above p. 61, FN 272, at p. 1083

287 Pieth M., above p. 3, FN 15, at p. 25

288 Geldwäschereibotschaft, above p. 61, FN 272, at p. 1083

289 Graber Ch. K. , above p. 2, FN 10, at p. 119 and Stratenwerth G., above p. 61, FN 274, at p. 74.

290 Ackermann J.-B., above p. 7, FN 38, at p. 245

same parliament expressed[291]. Third, the Federal Executive did not take into account that many authors are uneasy with the seizure of substitutes[292] because the onus of prove which must be with the prosecution[293] is reversed. It is the defendant that would be required to prove that whatever was seized is not a substitute.

Taking the legislators' initial intention into account[294], one can give the parliament's suggestion the following interpretation: since it is the intention to fight organised crime, all assets that are controlled by a criminal organisation can be seized by the prosecution. Under such circumstances, even contaminated assets including substitutes can be seized[295]. Unfortunately, such an interpretation is not compatible with the formulation of the StGB Art. 305bis paragraph 1 specifying that only assets directly connected to a crime[296] can be seized. This conclusion brings us back to one of the most fundamental challenges to any law against money laundering: the proof that a certain asset has an illicit source. It is determined that the money launderer will change the form of the illicit funds as fast and as many times as he deems necessary to make the tracing of the source impossible[297]. What makes the tracing even more difficult is the fact that on the one hand the country in which the crime is committed is usually not identical with the country in which the assets are invested[298] and on the other hand that the assets might have been transferred to a tax haven[299] first before being wired to their final destination.

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291 Geldwäschereibotschaft, above p. 61, FN 272, at p. p. 1083

292 Ackermann J.-B., above p. 7, FN 38, at 244

293 Schmid N., Strafprozessrecht, Zurich 1989, at p. 77

294 Above p. 61, FN 272

295 Stratenwerth G, above p. 61, FN 274, at p. 74.

296 Stratenwerth G., above p. 61, FN 274, at p. 74

297 Above p. 14 and p. 34: The paper-trail must disappear.

298 Above, p. 16, 3.1.2. Countries of Dealing and Countries of Money Laundering

299 Above, p. 38, 4.5. 4.The Abuse of Off-Shore Corporations

6.2.2. StGB Art. 305ter - Lack of Vigilance in the Field of Financial Transactions

The new StGB Art. 305ter punishes the fact that professionals accept, keep on deposit, help place or transfer assets of, a third party without verifying the identity of the beneficial owner in conformity with the vigilance required under the circumstances.

Different from StGB Art. 305bis, the source of the assets the professional is dealing with is not relevant. The law sanctions the omission to identify the beneficial owner only[300]. The circle of possible offenders is limited to professionals who accept, keep on deposits, help to place or transfer assets. According to the commentary of the bill by the Federal Executive[301], professionals are all people working in the financial sector: banks (including parabanks), financial corporations, trustees, assets managers, money changers, dealers in precious metals and business lawyers. In casu, serious problems of delimitation can occur. First, every businessman selling goods or services is paid. In other words he accepts assets. Obviously, this view is too far-reaching[302]. Aware of this problem, the Federal Executive tried to elude this difficulty in its commentary of the bill[303]. In the commentary, it assumed that professionals dealing in liquid assets or assets that can be liquidated easily are a group usually abused. Mr. Stratenwerth[304] sees in that statement the admission that the legislator was not able to precisely imitate the type of offender. "What occurs when a commodity dealer signs a contract with a stock corporation? Must he, in every case, try to find out who the shareholders are? This would be not very positive for his business. On the other hand, if the answer depends upon the time in which a certain business is considered to be exposed to abuse,

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[300] Graber Ch. K., above p. 2, FN 10, at p. 185

[301] Geldwäschereibotschaft, above p. 61, FN 272, at p. 1088

[302] Graber Ch. K., above p. 2. FN 10, at p. 181

[303] Geldwäschereibotschaft, above, p. 61, FN 272, at p. 1088

[304] Stratenwerth G., above p. 61, FN 274, at p. 80

the court could only judge by empirical assumption - an unacceptable solution."[305] Second, the term professional is open to different interpretations. The reason for this is the lack of a clear definition of what a professional is in legal practice[306]. The Federal Executive is not clear in its comment. It states in the commentary to the bill[307], that a "professional" is not necessarily somebody living exclusively from the revenues of his activities. Still, these revenues must be of a certain importance. An example might underline the problem of limitation of the term "professional": In Switzerland, lawyers often invest money on behalf of their clients as trustees, acting, de facto, as an asset manager. How important must the income of this activity be in order to require that he controls whether his client is the real beneficial owner? To date, the question about who must be considered a professional is not answered to the full satisfaction of both legislation and practice[308].

The description of the actus reus of StGB Art. 305ter is ambiguous[309]. The article is conceived as an offence of abstract strict liability[310].This presupposes an active behaviour of the offender[311]. StGB Art. 305ter requires that anybody accepting, keeping on deposit, helping place or transferring - in other words: acting - but omitting to verify the identity of his partner and not determining who the beneficial owner is - in other words: not acting - will be punished. Swiss legal theory differentiates between offences where the defendant committed an act and offences where the

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305 Stratenwerth G., above p. 61, FN 274, at p. 80. Translated from German by the author.

306 BGE 100 IV 30: It is not excluded, that a professional asset manager has some other, time-consuming business activity.

307 Geldwäschereibotschaft, above p. 61, FN 272, at p. 1088

308 Stratenwerth G., above p. 61, FN 274, at p. 80

309 Stratenwerth G., above p. 61, FN 274, at p. 80

310 Hauser R., Rehberg J., Strafrecht I - Verbrechenslehre, Zurich, 1983 at p. 61: An offence of strict liability punish actions endangering the object of legal protections. Swiss legal theory differentiates between abstract and concrete strict liability. A offence is abstract, if the probability of infraction is created and concrete, if the object of legal protection is actually violated.

311 Hauser R., Rehberg J., above FN 310, at p. 59

defendant is prosecuted for omitting to act[312] . Offences of strict liability are offences where the defendant is supposed to have committed a unlawful act. The formulation of the text of law and the commentary of the bill by the Federal Executive[313] suggest on the other hand, that it is the omission to act (in casu verify the identity and true beneficial ownership) that is condemned. This confusing approach becomes important when looking into the meaning of "in conformity with the vigilance required under given circumstances[314] ."

The first problem of the interpretation of the expression "vigilance required under given circumstances" relates to the interpretation of the term "professional"[315] . The consensus among legal authors is that only professionals working in the financial sector are meant to be submitted under the rules of StGB Art. 305ter[316]. If the view that all people working in finances are supposed to verify the identity of the beneficial owner if they have any reson to doubt that they deal with the true beneficial owner is adopted, the following question arises: under which circumstances is a verification of the is required. What has been said so far makes it clear, that

312 Hauser R., Rehberg J., above FN 310, at p. 54

313 Geldwäschereibotschaft, above p. 61, FN 272, at p. 1089

314 Above p. 65

315 Above p. 65 - p.66

316 Though with different arguments. Mr. Stratenwerth, above p. 61, FN 274 at p. 80, and Mr. Graber, above p. 2, FN 10, at p. 181, argue that an extensive interpretation including every person doing business would make no sense and unnecessarily impede on the due course of business. Mr. Schmid, Schmid N., Anwendungsfragen der Strafttatbestände gegen die Geldwäscherei, vor allem StGB 305bis, in Geldwäscherei und Sorgfaltspflicht, Publikation des Schweizerischen Anwaltsverbandes SAV, Zurich 1991, vol. 8, p. 111 - 135, at p. 125, suggests to exclude all professionals acting according a synallagmatic or bilateral/reciprocal contracts, and Mr. Ackermann, above p. 7, FN 38, at p. 98, bases his opinion on the ratio legis. Mr. de Capitani, De Capitani W., Zum Identifkiationsverfahren bei Kontoeröffnung aus dem Ausland, in Schweizerische Juristen Zeitung, Bern 1993, vol. 89, p. 21 - 26, at p. 22, calls StGB Art. 305ter hypocritical. Is is clear that the legislator meant financial corporations. Since a legal entity is - unless the law makes an exception - not subject to the Swiss Criminal Code ("societas delinquere non potest", Hauser R., Rehberg J., above p. 66, FN 306, at p. 53) , the creation of a law punishing financial corporations is more time consuming and technical: e.g. strict definition of the imputed act, setting of a minimal standard for the controlling instances of the corporations .

the professional must not act, specifically verify the identity of his partner, whenever he accepts funds, keeps assets on deposit, or places and transfers assets since all these transactions are unsuspicious in any free market economy. This fact conflicts with the definition of Art. StGB 305ter as an offence of abstract strict liability[317], since the professional is only required to act in circumstances not specified by the law. VSB[318] Art. 3 suggest that a duty to verify the identity of the beneficial owner arises if serious reasons to doubt the veracity of the client's statements (e.g. the client pretends to have earned his money in commodity trading but does not seem to be able to explain this transaction proficiently) exist or if an uncommon transaction justifies the apprehension that the client is not the beneficial owner (e.g. a transaction that leaves the client with an unusually high commission, whilst the initial amount is transferred abroad). The sense of the verification of the identity is to conclude about the source of the assets[319]. The decisive factor is the trustworthiness of the assumed beneficial owner. Where there is no reason to doubt about the trustworthiness of a client, there can be no motive to verify the latter[320] . Trustworthiness can be assumed if the activities of the client are known or a serious bank or a respected lawyer guarantees for his integrity[321] .

Once it is determined who is required to verify the identity of the beneficial owner and under which circumstances this verification must occur, the question of the standard of the verification arises.

The only duty of the professional is the verification of the identity of the beneficial owner of the assets. In case the standard is reduced to a simple formal control[322], the new law must be qualified as useless[323]. Thorough

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317 Above p. 66, FN 310

318 Above, p. 58, FN 262 and p. 59 , FN 263

319 Stratenwerth G., above p. 61, FN 274, at p. 81

320 Arzt Ch.. , Zur Rechtsnatur des Art . 305ter StGB, Schweizerische Juristen Zeitung, Bern 1990, p. 189 - 198, at p. 191

321 Stratenwerth G., Above p. 61, FN 274, at p. 81

322 VSB Art. 3 and Art. 4: self-declaration by the person in control of the assets.

323 Graber Ch. K., above p. 2, FN 10, at p. 191

control in every case, however, would lead to the impracticability of most financial professions[324] . The commentary of the bill makes only a reference to the principle of reasonableness[325] which should outline the limits of verification[326]. It further refers to the VSB[327] which is not more than a contractual agreement considered by the Federal Banking Commission[328] and the Swiss Supreme Court [329] to be a minimal standard - and a canon of professional etiquette for the financial sector not regulated by the banking laws that has not yet been established[330]. This ambiguous description is certainly not of great help to the category of people the law aims at [331]. The question whether the principle "nulla poena sine lege stricta" is violated is not answered by some authors[332] , denied by Mr. Kleiner [333] and answered in the affirmative by Mr. Zulauf [334, 335] .

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[324] Graber Ch. K., above p. 2, FN 10, at p. 191,

[325] Geldwäschereibotschaft, above p. 61, FN 272, at p. 1089

[326] Geldwäschereibotschaft, above p. 61, FN 272, at p. 1089

[327] Above p. 59, FN 263

[328] Jahresbericht der Eidgenössichen Bankenkommission, Bern 1982 , at p. 28: referring to the VSB guidelines as useful tool to judge the behaviour of a bank. Same conclusion in further annual reports:1985, at p. 22; 1986 at p. 22, 1987 at p. 28; 1988 at p. 24

[329] BGE 109 Ib 153 and BGE 111 Ib 128

[330] Geldwäschereibotschaft, above p. 61, FN 272. at p. 1089

[331] Stratenwerth G. , above p. 61, FN 274, at p. 82

[332] Deliberately by Graber Ch. K., above p. 2, FN 10, at p. 198 and in general by Stratenwerth G., above p. 61, FN 272, at p. 82.

[333] Kleiner B., Sonderzug für einen Geldwäschereiartikel, Schweizerische Arbeitgeberzeitung, Zurich 1989, vol 38, at p. 733

[334] Zulauf U., Die Schweizerische Bankenkommission und Geldwäscherei, Recht, Bern 1989, vol. 3, p. 79 - 90, at p. 89

[335] It must be noted that Mr. Zuberbühler, bank supervisor with the Federal Banking Commission, underlines the fact that large banks have never liked strict legal guidances and shown preferences for a large scope of discretion. He points out that a publicised list of guidances which behaviour he must avoid. See: Zuberbühler D., Banken als Hilfspolizisten zur Verhinderung der Geldwäscherei? Sicht eines Bankaufsehers, in Pieth M., above p. 3, FN 15, p. 31 - 66, at 40.

6.3. Summation

A comparison of the U.S. and the Swiss approach to fight money laundering brings the different nature of the interest involved to light. the U.S. is scourged by organised crime on its own national territory, whilst Switzerland is mainly used as a money laundering place[336]. Yet both countries have the perhaps the strictest regulations worldwide to fight money laundering[337].

Sticking to the theory that money is the life blood of organised crime[338], U.S. legislation goes after the money: financial transactions and transportation of financial instruments with assets derived from an illicit source are a substantive crime[339]. The interpretation of what a criminally derived asset is, is rather broad[340]. Complementary to these rules, the U.S. has established duties of a formal nature[341] to register and notify certain transactions[342].

In Switzerland on the contrary, it is not the dirty money directly, but the obstruction of the prosecution and the lack of vigilance in financial transactions that is punished[343].

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336 Dietzi H.-P., Der Bankangestellte als eidgenössisch konzessionierter Sherlock Holmes? - Der Kampf gegen die Geldwäscherei aus der Optik des Ersten Rechtskonsultenten einer Grossbank; in: Pieth M. , above p. 3, FN 15, p. 69 - 96, at p. 95, concurring opinion in by Mr. Pieth, in: Pieth M., above p. 3, FN 15 at p. 16 and Ackermann J.-B., above p. 7, FN 38, at p. 163.

337 Ullrich P., Harte Zeiten für Geldwäscher?, in: Schrift des Schweizerischen Anwaltsverbandes, Zürich 1991, at p. 28 and p. 40.

338 Above p. 12, FN 52

339 Above p. 55 -58, 6.1.3. The Third Generation of Laws Fighting Money Laundering

340 Ackermann J.-B., above p. 7, FN 38, at p. 317, citing the revised M.L.C.A. of 1988: "(A)ny property, real or personal, involved in a transaction in violation of (31 U.S.C. 5313, 5324) or of (18 U.S.C. 1956,1957) or any property traceable to such property" can be seized.

341 Dietzi H.P., above FN 336, at p. 95

342 Above p. 51-55, 6.1.2. The Second Generation of Laws Fighting Money Laundering

343 Above p. 65 - 69, 6.2.2. Lack of Vigilance in the Field of Financial Transactions

Both approaches appear to have failed: For Switzerland, Mr. Stratenwerth[344] speaks of a missed chance to rethink the concept of fighting money laundering. In the U.S., the BSA rules "on routine reporting has proven ineffective in the currency transaction context"[345,346] . It appears that the cases of money laundering uncovered that drew national attention are the result of fluke hits[347,348]. The example of the case of the detection of a gang of smurfers as reported by Mr. Powis[349] is typical: the bank teller did not check with the bank's records, but found it suspicious that a man of Hispanic[350] origin purchased two cashier's checks of US$ 5,000,-- each within two days. He watched the man leave the bank, took down the license number of his car and reported the incident to the Police Department. Statistical research seems to endorse the above opinions. It is a fact that convictions for money laundering are scarce: 90% of the cases, most of which are not published, were settled with a guilty plea in a plea bargaining agreement[351]. Further, many cases never came to trial due to prosecutorial discretion of the United States Attorney and the Assistant United States Attorney[352] . This fact suggests that the legal provisions in place are not suitable to overcome the ingenuity and adaptation money

344 Stratenwerth G., Geldwäscherei - ein Lehrstück der Gesetzgebung, in Pieth M., above p. 3, FN 15, p. 97 - 121, at p. 119

345 Marlody L.M.L., above p. 55, FN 239, at p. 865. The author even suggests, that "the government should limit mandatory recordkeeping of wire and electronic funds transfers, so that banks do not have to maintain records that will be of little or no use to law enforcement.

346 Ackermann J.-B., above p. 7, FN 38, at p. 124: Same result as Mrs. Marlody. Further, the author draws attention to the fact that no analyses of the relationship between costs and benefit has ever been made.

347 Arzt G., Normen gegen die Geldwäscherei - ein feines Netz und keine Fische; NZZ 19th July 1993, at p. 164

348 Ackermann J.-B., above p. 7, FN 38, at p. 125

349 Powis R.E., above p.26, FN.94, at p. 93 and p. 94

350 The racial fact in random checks as in this case must be taken into account. See: Johns Ch., The War on Drugs: Why the Administration Continues to Pursue a Policy of Criminalization and Enforcement, Social Justice, San Francisco 1991, vol. 18, No. 4, p. 147 - 165., at p. 155: the author looks at the aspect of racial and social discrimination with the creation of an 'enemy'.

351 Ackermann J.-B., above p. 7, FN 38, at p. 204

352 Ackermann J.-B., above, p. 7, FN 38, at p. 204

launderers have demonstrated to achieve their goal[353]. The options of the U.S. prosecution to choose arguments such as conspiracy[354] and to utilise the much broader[355] civil forfeiture[356] when going after the defendant (in which case the demonstration of a probable cause that a property asset is the result of drug trafficking[357] is proof enough) gives the prosecution enough leverage in order that the defendant accused of money laundering agrees to a guilty plea in a plea bargaining agreement. This procedure relieves the prosecution from the burden of proof, a fact that makes the institution of plea bargaining[358] suspicious in the eyes of many European authors[359] .

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353 Above, p. 20 - 40, IV Techniques of Money Laundering

354 Above, p. 48, 6.1.1. The First Generation Fighting Money Laundering

355 Ackermann J.-B., above p. 7, FN 38, at p. 321 and Kaiser G., Gewinnabschöpfung als kriminologisches Problem und kriminalpolitische Aufgabe, Festschrift für Herbert Tröndle, Berlin & New York 1989, p. 685 - 711, at p. 698: In civil forfeiture, the assumption is, that the all income of the defendant, every bestowal to relatives or friends, originates from dealing in illicit drugs. Therefore, based on the net worth approach as used in tax law is applied, every property asset can be seized. The burden of proof is with the defendant.

356 Smith D.B., Prosecution and Defence of Forfeiture Cases, New York 1989, at subparagraph 2.03 and Kaiser G., above FN 351, at p. 669: Civil forfeiture is a procedure in rem (against the property asset of criminal origin), whereas the criminal forfeiture is a procedure in personam (the defendant is to be proven guilty before going after his property assets).

357 Ackermann J.-B., above p. 7, FN 38, at p. 321

358 Rietmann M., Gesetzes-Mahnfinger oder "Task force police"?, Handels-Zeitung, Zürich 1994, No. 16, April 21st 1994, at p. p. 3; citing Christian Weber, expert in white-collar-crimes, woh points out that such agreements are contrary to Swiss legal tradition.

359 Keller G.A., Das Schweizerische Vorverfahren zum Rechtshilfeabkommen in Strafsachen zwischen den Vereinigten Staten von Amerika und der Schweiz, Zürich 1981, at p. 27: One of the many points at issue during the discussions for the Treaty concerning Mutual Judicial Assistance in Criminal Cases, dated May 25 1973 - above p. 43, FN 178 - was the guilty plea in a plea bargaining. The institution was considered to be not acceptable according to constitutional guarantees embedded in Swiss Criminal Law. Mr. Arzt considers plea bargaining irreconcilable with the Swiss and the German understanding of the Rule of Law: Arzt G.: Der Ruf nach Recht und Ordnung, Ursachen und Folgen der Kriminalitätsfurcht, Tübigen 1976, at p. 98, p. 123 and p. 149, and in Beweiserleichterung bei der Einziehung, recht. Bern 1993, p. 77 - 83, at p. 78.

The attempt to stop money laundering by the laws implemented to date is disenchanting: now as before, people are addicted to illicit drugs[360] and their number does not appear to decline[361]. The failure of the strategy of supply reduction through de facto military interventions abroad[362] which initiated the reinforcement of internal laws[363] permits the assumtion of a conceptual error in approaching the problem. This even more, since prosecutors[364] frustrated with the complexity of money laundering transactions and the difficulties of gathering proof against the defendants and politicians[365], looking for a simple solution to the problem of drug abuse advocate a see-through-wallet policy, including penalisation of

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360 NZZ, Zurich 13th May1994, at p. 13: Ueber elf Millionen in den USA konsumieren Drogen: over 11 million U.S. citizen consume illicit drugs on a regular base.

361 NZZ, Zurich 26th April 1994, at p. 9: Die Drogenbekämpfung stösst auf Hindernisse: The two important statements of the article are, that the cocaine business is still a growth-market and that a growing number of people are addicted to drugs in the producing countries.

362 Del Olmo R., above p. 2, FN 8, at p. 23: Operations to intervene in producing countries date back as far as 1972: the attempts to destroy Turkish poppies and Mexican marijuana simply lead to a dislocation of the production to other countries. On the more recent failures of such a programme, see Financial Times, London 7/8th May 1994: The Traffickers, Section II, Weekend Edition. The author points out the link between poverty in the producing countries and the need for these people to produce coca-base. Still "a 13£bn annual budget notwithstanding, America's drug war is likely to continue for some time".

363 Herman E.S., Drug "Wars": Appearance and Reality, Social Justice, San Francisco 1991 . 18, No. 4, p. 76 - 84, at p. 76.

364 Stratenwerth G., above p. 61, FN 274, at p. 72 and District Judge Gasser P., Von der vermuteten Unschuld des Geldes - Die Einziehung von Vermögenswerten krimineller Herkunft, in Pieth M., above p. 3, FN 15, at p. 159 - 173, at p. 172: The author advocates the reverse of the onus of proof - at p. 171 he understands the frustration of prosecution when confronted with clever dealers and launderers - and points out, that Switzerland would be in good company. The reversed onus of proof is standard in the U.S. (e.g. 21 USC 881, 18 USC 981 and 982), in Great Britain (Drug Trafficking Offenses Act, 1986, Section 2, Canada (The Narcotics Control Act (Proceeds of Crime) Section 420.17); finally, the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic substances, Adopted in Vienna, 19 December 1988 permits the member states in Art. 5 Paragraph 7 to reverse the onus of proof whenever it is within the constitutional possibilities of the state.

365 Powis R.E., above p. 26, FN 94, at p. 276: Mr. Powis advocates reinforcing the numbers of agents of the Criminal Investigation Division of the IRS and centralising all information collected in order to be make it ready for access.

cash [366] and the reverse of the onus of proof[367] with all its consequences for a democratic society.

[366] Pieth M., above p. 3, FN 15, p. 3 - 27, at p. 27. See also FATF-recommendation No. 25, Financial Action Task Force Report of February 7th, 1990: "Furthermore, given the crucial importance of cash in drug trafficking and drug money laundering, and despite the fact that no clear correlation could be established between the cash intensiveness of a country's economy, and the role of this economy in international money laundering, countries should further encourage in general the development of modern and secure techniques of money management, including increased use of checks, payment card, direct deposit of salary checks, and book entry recording of securities, as a means to encourage the replacement of cash transfers".

[367] See Gasser P., above p. 73, FN 364 at p. 172, citing the regulations in place in different states and a UN document.

VII. The Need for a New Approach to Fight Money Laundering

7.1. Fighting Money Laundering de lege lata

The debate about the formulation and the extension of the laws fighting money laundering in Switzerland and the United States reveals the tendency of legislators in general to get tough on money launderers[368]. Skepticism towards this new approach arises when consideration is given to the threats it poses to substantial liberties such as the right to privacy, notably the obligation of bankers and other financial institutions to confidentiality or secrecy[369] .

This question is new for Swiss legislators and courts. Furthermore it is limited to the subject of the reversed onus of proof[370]. For nations like the United States, the reversed onus appears to be standard[371]. There, the discussion is about how far the "government's interest in curbing narcotics trafficking, coupled with the attendant enforcement problems, outweighs the

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[368] See for example above p. 73, FN 364

[369] For the United States see , Plombeck Ch. T., above p. 11, FN 49, Blau Ch. W. , above at p. 37, FN 148 and Ackermann J.-B., above p. 7, FN 38; at p. 329: 2.1.2.1. Bank Secrecy Act and Subpoenas. For Switzerland Aubert M. et al, above p. 59 FN 263 . For Canada see Marshall J.D., the Relationship Between Banker and Customer: Fiduciary Duties and Confidentiality. For Great Britain see Harpum Ch., Equitable Liability For Money Laundering, The Cambridge Law Journal, vol. 50, part 3, November 1991, p. 409 - 411.

[370] Above Stratenwerth G. and Gasser P., at p. 73, FN 364. Note that the discussion of the question is about criminal law and criminal procedure and not (yet?) about the constitutionality of the reverse of the onus of proof and its dogmatic basis.

[371] Above p. 73, FN 364

minimal intrusion on an individual's protected interests"[372] protected by the fourth amendment[373]. Analyses of cases of which some were brought before the Supreme Court[374] indicate that the government's interest in curbing narcotics trafficking is deemed to be more vital than the protection of individual interests against undue intrusion. The rationale is that the narcotics problem generates much social unrest in the United States, penetrates all social strata and takes its toll in increased crime rates, lost wages and extra demand for social services[375]. Both Ms. Moore[376] and Ms. Sickman[377] who each analysed different cases mentioned above[378] agreed with the Justices' findings outlined above.

The predominance of the states' interests over individual constitutionally guaranteed rights is in line with the utilitarian approach to law advocated by

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372 Texas v. Brown, 103 S. Ct. 1535, 1546, quoted in Sickmann L.M., Fourth Amendment - Limited Luggage Seizures Valid on Reasonable Suspicion, in: The Journal of Criminal Law & Criminology, Northwestern University School of Law, vol. 74, no. 4, 1983, p. 1225 - 1260, at p. 1225. The following epitomises the above opinion: "The public has a compelling interest in detecting those who would traffic in deadly drugs for personal profit. Few problems affecting the health and welfare of our population, particularly our young, cause greater concern than the escalating use of controlled substances. Much of the drug traffic is highly organized and conducted by sophisticated criminal syndicates. the profits are enormous... As a result, the obstacles to detection of illegal conduct may be unmatched in any other area of law enforcement", in: United States v. Mendenhall, 446 U.S.. 544, at 561-62 (1980)

373 Black's Law Dictionary, above p. 48, FN 199 at p. 657: The fourth amendment of the U.S. constitution guarantees people the right to be secure in their homes and property against unreasonable searches and seizures providing that no warrant shall issue except upon probable cause and then only as to specific places to be searched and persons and things to be seized., U.S. Constitution, amm. IV.

374 United States v. Place, 103 Ct. 2637 (1983) analysed by Sickmann L.M., above p. 75, FN 372 and Illinois v. Gates, 103 Ct. 2317 (1983) analysed on the bases of Aguila v. Texas (378 U.S. 108 (1964) and Spinelli v. United States (393 U.S. 410 (1969)) by Moore C.E., Fourth Amendment - Totality of the Circumstances Approach To Probable Cause Based On Informant's tip, in: The Journal of Criminal Law & Criminology, Northwestern University School of Law, vol 74, no. 4, 1983.

375 Sickmann L.M., above p. 75, FN 372 at p. 1239

376 Above, FN 374

377 Above, p. 75, FN 372

378 Above, FN 374

Mr. Posner[379]. In his opinion, "the fact that searches and seizures (including arrests) impose social costs is not, of course, an argument for banning them. But it is an argument for regulating them, so that the police do not conduct searches when the social costs exceed the social benefits. We can use the Hand Formula to frame the inquiry. A search (or seizure) is reasonable if the costs of the search in impaired privacy (B) is less than the probability (P) that without the search the target of the search cannot be convicted, multiplied by the social loss (L) of not convicting him. P has two components: the probability that the search will turn up something of value to the police (probable cause); and the probability that something is essential to conviction. The value is of the search is therefore less if the same evidence could be obtained without a search (so presumably at a lower B). the more intrusive the search, the more essential the evidence sought must be (P) or the graver the crime investigated must be (L) in order to justify the higher B imposed." Mr. Posner suggests that the courts are not always aware of the fact that a higher L will justify a lower P. "The more serious the crime, the less probable cause the police should be required to demonstrate in order to justify a search of a given intrusiveness (B)."[380] The consideration of the seriousness of the crime (trafficking narcotics) and the social costs resulting from it is exactly what the Supreme Court has taken into account when it ruled in favour of prosecution and against the rights of the defendant guaranteed by the fourth amendment[381].

Few authors have reviewed the development above under the aspect of broad discretionary power granted to government authorities. Assuming that each person has inviolable rights founded on justice[382] and protected by the constitution, and that these rights cannot be subject to bargaining or to the calculus of social interests, the question how far the state can go in impairing substantial liberties - such as the right to privacy and notably the obligation of bankers and other financial institutions to confidentiality or secrecy - acquires a dimension that goes beyond the mere utilitarian

379 Posner R.A., Economic Analysis of Law, 3rd Edition, Boston and Toronto 1986

380 Posner R.A., above, FN 379, at p. 640

381 Above p. 76, FN 374 and FN 375

382 Rawls J., A Theory of Justice, Cambridge, 1971, at p. 3 - 4

approach.

In an article about the regulation of money laundering in the United Kingdom which analyses the development of U.K. law in relation to bank secrecy since the implementation of the Police and Criminal Evidence Act of 1984, Mr. Michael Levi[383] concludes that "where major crimes are alleged, customer confidentiality is now almost dead in Britain"[384]. One asserted reason is the possible combination of the Prevention of Terrorism (Temporary Provisions) Act 1989[385] and the Drug Trafficking Offences Act 1986. The latter provides for a maximum imprisonment for 14 years[386] for assisting in the retention or control of illicit funds - such as terrorists' funds. The wording of the Drug Trafficking Offences Act 1986[387] generates problems in how to deal with an account of someone thus suspected. The risk for the bankers is that at the time they handled the funds, they might not have considered certain transactions suspicious, whereas in retrospect perhaps they should have thought more about them[388],[389]. In the light of the draconian measures of the two acts mentioned above[390], and the intra-organisational communication within the police and the banks[391], Mr. Levi deduces that "it appears from the foregoing analysis as if the foundations for the international finance-police state are being laid. In six years, the UK has moved from a legal position in which bank account details could be revealed only after the account holder had been charged, to one in which

383 Levi M., Regulating Money Laundering - The Death of Bank Secrecy in the UK, in: The British Journal of Criminology, Vol 31., No. 2, Spring 1991, p. 109 - 125

384 Levi M., above, FN 383, at p. 113

385 Levi M., above, FN 383, at p. 115

386 Levi M., above , FN 383, at p. 116

387 Levi M., above, FN 383, at p. 115

388 Levi M., above , FN 383, at p. 116

389 It must be noted that after the implementation of StGB Art. 305bis (above p. 62) and StGB Art. 305ter (above p. 65), Swiss Bankers are confronted with an identical problem: How to treat old accounts - correctly opened according to the old rules, that would not be deemed receivable under the new provisions; in: Neue Zürcher Zeitung, April 18 1994, p. 11, col. 3 and col. 4.

390 Above p. 77, FN 385, and FN 387

391 Levi M., above, p. 77, FN 383, at p. 118

routine interchanges - court-authorized or not - take place between banks and a plethora of police and regulatory agencies"[392] .

A similar alarming conclusion is reached by Mr. Abraham Abramovsky[393] in his analysis of money laundering and narcotics prosecution in the U.S.. He argues that provisions of the Currency and Foreign Transactions Reporting Act[394], in particular 31 U.S.C. 5313[395], 5316[396] and 5317[397], and the Fraudulent Statements Statute[398] , "when applied together[399] in money-laundering prosecutions provide law enforcement officers with a powerful

[392] Levi M., above p. 77, FN 383, at p. 123

[393] Above p. 57, FN 253

[394] Above p. 51, FN 219

[395] Above p. 52, at 6.1.2.1. 31 U.S.C. 5313

[396] 31 U.S.C. 5316 (West 1982 & Supp. 1985)

[397] 31 U.S.C. 5317 (West 1982 & Supp. 1985) states that: "(a) The Secretary of the Treasury may apply to a court of competent jurisdiction for a search warrant when the Secretary reasonably believes a monetary instrument is being transported and a report on the instrument under section 5316 of this title has not been filed or contains a material of omission or misstatement. the secretary shall include a statement of information in support of the warrant. On a showing of probable cause the court may issue a search warrant for a designated person or a described place or physical object. This subsection does not affect the authority of the Secretary under another law. (b) A customs officer may stop and search, without a search warrant, a vehicle, vessel. aircraft, or other conveyance, envelope, or other container, or person entering or departing from the United States with respect to which or whom the officer has reasonable cause to believe there is a monetary instrument being transported in violation of section 5316 of this title."

[398] 18 U.S.C. 1001 (1982). The statute provides the "whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and wilfully falsifies, conceals or covers up by any trick, scheme or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $ 10.000 or imprisoned not more than five years or both"

[399] See Collora & Tillotson, Defense Perspective of Prosecuting Criminal Cases Under Secrecy Act, National Law Journal, Feb. 17, 1986, at p. 30, col. 1: The Supreme Court removed one possible obstacle to the joint application of the statues in United States v. Woodward, 105 S. Ct. 611 (1985) (per curiam). At p. 613, the Court held that an individual could be convicted under the fraudulent statements statutes and the currency reporting statute for the same conduct. Quoted in A. Abramovsky, above p. 57, FN 253, at p. 474, FN 10.

investigative tool" which may severely conflict with individual freedoms, especially those guaranteed by the fourth and fifth amendments"[400] . It is 31 U.S.C. 5316 that authorises custom officials to stop and search travellers without a warrant if there is only "reasonable cause to believe that section 5316 is being violated[401] ". Congress amended the statute less than one month after the Supreme Court's *Chemaly* decision[402] which was contrary to the statute, thereby emasculating the warrant requirement[403]. The concept of "searching in a reasonable manner" underwent some extension over the years. Originally, the Supreme Court limited the warrantless search to the notion that an officer should be allowed to protect himself

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[400] A. Abramovsky, above, p. 57, FN 253, at p. 474

[401] Above p. 79, FN 397

[402] United States v. Chemaly, 741 F. 2d 1346, 1352 (11th Circ.), quoted by A. Abramovsky, above p. 57, FN 253, at p. 488, FN 141. The court held that the border search exceptions would not relieve the government of the obligation to obtain a search warrant based on probable cause. "The border search exception is actually an exception to the fourth amendment itself and not the the amendment's probable cause or warrant requirements. Created by the First Congress when it gave the government the right to stop and search anyone or anything entering the country, the exception is based on the United State's right as a sovereign state to protect itself. One conducting the search, however, must proceed in reasonable manner"; in A. Abramovsky, above p. 57, FN 253, at p. 483. The reverse border search exception - the right to stop and search anyone or anything leaving the United States - was judicially created and upheld as a variation of the border search. It originates from the Supreme Court's decision in California Banker's Association v. Shultz (416 U.S. 21 (1974)) where the constitutionality of the Bank Secrecy Act (above p. 51, FN 219 and FN 220) was examined. The Court underlined the government's strong interest in commercial transactions "across national boundaries" (at p. 63) and saw no reason to invalidate the regulations at issue "if those entering and leaving the country may be examined as to their belongings and effects, all without violation of the Fourth Amendment" (at p. 63). this dictum has been quoted in support of the reverse border search - "sometimes as a direct statement, without the hypothetical 'if' " (A. Abramovsky, above p. 57, FN 253, at p. 486). For a thorough analysis of search and seizure under the Fourth Amendment, see also Sickman L., above p. 76, FN 377 and Moore C.E., above p. 76, FN 376.

[403] A. Abramovsky, above p. 57, FN 253, at p. 488

during an investigative stop[404] and thereby "conduct a carefully limited search of the suspect's outer clothing in order to discover a weapon[405] " in its landmark decision[406] Terry v. Ohio[407]. Fifteen years later, the Supreme Court extended the scope of the Terry-search in United States v. Place[408]: although the court found a ninety-minute seizure to exceed the permissible bounds[409], it concluded that "some brief, warrantless detentions of luggage based on reasonable suspicion do not violate the fourth amendment because the government interest in curbing narcotics trafficking, coupled with the attendant enforcement problems, outweighs the minimal intrusion on an individual's protected interest[410]." Furthermore, a "canine sniff" for investigation purposes - although a search for drugs is clearly a warrantless search for evidence - was said not to constitute a search under the fourth amendment[411] .

31 U.S.C. 3516 allows a search for money if the custom official has reasonable cause to believe that section 5316 is being violated. "Reasonable cause" could for example originate from an informant's tip. The Supreme Court abandoned in 1983 in Illinois v. Gates[412] the two-

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404 Terry v. Ohio, above p. 80, FN 405, at p. 30: "If, after identifying themselves as police officers and making reasonable inquires, nothing in the initial encounter dispels their reasonable fear for their own or others' safety, they are entitled to conduct a carefully limited search of the suspect's outer clothing in an attempt to discover weapons that might be used to assault them or others in the area."

405 Above, FN 406

406 Moore C.E., above p. 76, FN 376, at p. 1225

407 Terry v. Ohio, 392 U.S. 1 (1968)

408 United States v. Place, 103 S. Ct. 2637 (1983)

409 Above, FN 408, at p. 2639

410 Moore C.E., above , p. 76, FN 376, at p. 1225

411 Above, FN 408, at p. 2645

412 Illinois v. Gates, 103 S. Ct. 2317 (1983)

pronged Aguillar-Spinelly test[413] to determine whether an informant's tip contains sufficient probable cause in order to support the issuance of a warrant under the fourth amendment, in favour of a totality of the circumstances approach[414], without providing any practical guidelines to the magistrates and courts[415] . On such a base, reasonable cause becomes a hollow concept.

Both Mr. Abramovsky's and Mr. Levi's findings concur in the following point: the fight against drug traffickers and money launderers must be balanced with the constitutional rights of the public. The overruling of the latter by stating the state's interest in fighting the business with and around illicit drugs is very attractive in specific cases in which the obvious cannot be proven, but wipes aside all objections in favour of constitutional rights.

7.2. Fighting Money Laundering Efficiently in the Future

Despite a proliferation of international treaties and legislation fighting money laundering[416], money laundering seems to go on as ever[417]. This fact and considerations of constitutional law as mentioned above[418] leaves any honest observer with only one possibility: to rethink the approach to fight money laundering effectively.

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[413] Aguillar v. Texas, 378 U.S. 108 (1964) and Spinelli v. Unites States, 393 U.S. 410 (1969):The first prong of the test required the police to inform a magistrate of the circumstances supporting the informant's allegations of criminal activity. The second prong of the test requires the police to demonstrate that the informant is credible or his information reliable.

[414] Illinois v. Gates, above p. 82, FN 412, at p. 2332

[415] Moore C.E., above p. 76, FN 376, at p. 1264

[416] For examples see: International Efforts to Combat Money Laundering, Cambridge International Documents Series, Volume 4, Cambridge 1992, above p. 42, FN 171.

[417] Above p. 70 and p. 71, FN 344 and FN 345

[418] See M Levi , above p. 77, FN 383 at p. 79, FN 392A. Abramovsky, above p. 57, FN 253 at p. 79, FN 393

States should restrain themselves from establishing a complex legal framework and put in place some basic principles such as those established in the "Recommendations of the Intergovernment Expert Group to Study the Economic & Social Consequences of Illicit Traffic in Drugs."[419] For example: money laundering must become a criminal offence, identification, tracing and freezing of illicit funds must be possible, criminal investigation into money laundering should not be inhibited beyond standards such as banking secrecy and customer confidentiality. Once these basic principles are acquired, the financial community and especially banks should regulate the problem themselves. Here again, the quoted document indicates in substance rules to go by:

"13. Banks and other entities providing financial services, institutions and professional groups:
(a) Should make certain that they have knowledge of the identity of their customers and clients when entering into business relations or conducting major business transactions on their behalf. If there is any doubt whether customers or clients are acting on their own behalf, reasonable measures should be taken to identify the persons on whose behalf they are acting;
(b) Should scrutinize any unusual transaction or instruction concerning financial transfers without apparent economic rationality or legitimate purpose."

Point (c) of the recommendations is much disputed:
"(c) Should be required to report any suspicious transaction to the competent supervisory law enforcement authorities. The disclosure in good faith of such transactions should not constitute a breach of any restriction to disclose information and should not entail penal or civil liability for the individual or institution concerned."

This last point is controversial, because it is the fear of disclosure that has many people fleeing with their - legally earned but undeclared income - into

419 UN Document E/CN.7/1991/25.21 December 1990

the underground of off-shore corporations and tax havens[420] adding further confusion when determining the possible source of funds[421] . In addition, every banker or lawyer taking his privilege of confidentiality seriously will oppose any attempt to force him to denounce one of his clients, at least on the grounds of an ill defined 'suspicion'.[422] Who would entrust his assets to an individual or institution which is known to disclose transactions he or it deems to qualify as suspicious[423] ?

The above recommendations, especially points (a) and (b), have been adopted by many regulatory institutions world-wide. In Switzerland, the much cited "Geldwäscherei-Richtlinien"[424] (money laundering regulations) follow the very same schemata. Furthermore, banks ask independent money managers to sign an agreement to enforce these rules of

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[420] It is a fact that money launderers utilise the means invented by bankers, lawyers and accountants advising people evading taxes. All techniques of integration as described in 4.5., p. 34 - 40, with the exception of 4.5.3. The Gambling Industry, p. 37, have their origins in the exploitation of existing (legal) possibilities to reduce taxes.

[421] Ackermann J.-B., above p. 7, FN 38, at p. 71-72. The author underlines the criminological difficultly to make the difference between funds originating from capital flight, tax evasion, and the camouflage of funds belonging to secret state organisations such as secret services, terrorist groups or funds that are intended to finance corruption of private or institutional people or entities.

[422] Ackermann J.B., above p. 7, FN 38, at p. 136: No official guidelines determining what a substantial basis for a reasonable belief in a suspected violation exist. The professional is de facto left alone.

[423] Ackermann J.B., above p. 7, FN 38, at. p. 138, FN 1, quoting Harmon J.D., United States Money Laundering Laws: International Implications, New York Law School Journal of International and Comparative Law, vol. 9., New York 1988, at p. 15: "For financial institutions, there exists an uncertain connection between the idea of 'avoidance of knowledge' and their enhanced ability to communicate with enforcement authorities (..) Disclosure, however, is permissive, not mandatory. Thus the dilemma posed for financial institutions is evident: Where illegal activity is only suspected, can a financial institution ever avoid a charge of wilful blindness by not disclosing the suspected illegal activity to enforcement authorities? The quandary for financial institutions is how to avoid crossing the line between unreported suspicion and passive complicity. Liberal, but standardized, disclosure practices and extreme caution should be the watchword here.". See also above, FN 421.

[424] Beschluss Eidg. Bankenkommission vom 18. Dezember 1991, in Kraft seit 1. Mai 1992

diligence[425] . Other examples are the rules established in "Circular no 104-93" of the Montreal Exchange to its members, Chief Financial Officers and External Auditors requiring the identification of clients and record-keeping. The purpose is "to provide members with some guidance on the federal Government Money Laundering Regulation." The guidelines evolve around the identification of the customer[426] , the use of a "Declaration of Funds" form for cash transactions of C$ 10.000 or more[427] and record-keeping[428] .

Once the basic rules as stated above are generally recognised, the argument in favour of self-regulation of the image-conscious banking industry is, that nobody working in the banking industry wants to be associated with money-laundering and the drug trafficking that is often behind it[429] .

From both the definition[430] and the procedure of money laundering[431] it becomes obvious that the possibility of conducting a large cash transaction without questions asked is the conditio sine qua non of money laundering. Therefore, it is the prevention of illicit funds entering the international monetary system that is the crucial task. From the work above it becomes clear that money laundering is as complex as it is diverse. Legislators will never achieve a concise legal definition[432] . Anybody required to act according to existing money laundering laws will, when confronted with the

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425 Vereinbarung über die Standesregeln zur Sorgfaltspflicht der Banken zwischen der Schweizerischen Bankiervereinigung einerseits und bankähnlichen Finanzgesellschaften andererseits.

426 Circular no. 104-93, at 6.

427 Circular no. 104-93, at 4.

428 Circular no. 104-93, at 7.

429 In general: Malrody M.L., above p. 55, FN 239, at p. 892. For the situation in Switzerland: Pieth M., p. 3, FN 15, at p. 27. For a specific example of a bank refusing to be involved in what it believed to be inside trading, see Steward X., above p. 59, FN 266 at p. 00: applying self-regulatory rules, the bank asked their client to end their relationship.

430 Above p. 9-13

431 Above p. 14-19

432 For example, see: "vigilance required under given circumstances", above p. 67.

diversity of requirements, rules and uncertain interpretations[433] of the latter, act strictly according to the word of the legal text without thinking twice about the ratio legis. The inevitable result is that institutions and employees of the financial services industry will develop an attitude acking any personal personal responsibility, because the formal requirements of their task are met. Such a disposition is contra-productive for fighting money laundering because any institution in the financial services industry taking its task for diligence concerning possible money laundering seriously must inevitably rely on vigilant employees who are alert enough to detect suspicious transfers or structures of accounts and transfers[434] .

8. Conclusion

In order to fight money laundering effectively, not more regulations and blanket reporting and recording requirements are needed. Instead, a few precise rules defining clearly any conduct that will be penalised are more likely to be successful[435] .

Such an approach would give the financial industry the deserved stimulus to have a more candid and professional approach regarding policies such as "know your customer", the key to success being a well trained and responsible staff.

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[433] For many, see above, p. 84, FN 421 and 422. See also Ackermann J.-B., above p. 7 , FN 38, at p. 79 quoting Villa J.K., Critical View of Bank Secrecy Act Enforcement and the Money Laundering Statutes, Catholic University Law Review, vol. 37, 1988, at p. 504:"Congress has simply dropped the problem in the lap of the financial services industry and walked away."

[434] Zuberbühler D.,p. 69, FN 335, at p. 38

[435] The idea to refrain from trying to define the undefinable and to work with indicators instead is not new. Mr. Butz suggests the very same approach when attempting to determine whether one is confronted with a criminal organisation or not. See, above p. 45, FN 183, at p.4

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