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Natural Resources and Money Laundering

Commodity and precious metals deals from the perspective of Swiss money laundering law

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Abstract: Two thirds of the world's metal and energy resources are located in developing countries. This wealth could contribute greatly to the alleviation of poverty. However, it is no secret that poor governmental management and corruption continue to disallow citizens in affected countries to benefit from these natural riches. In the meantime, journalists and whistle-blowers continue to expose suspicious business and tax practices, human rights violations and – in extreme cases – even war crimes in the context of natural resource exploitation.

Turning to the other side of the globe, Switzerland has emerged as a premier trading hub for a plethora of commodities; an exposure that is highly lucrative, but at the same time fraught with risks. While – at least on paper – numerous commodities continue to pass through Switzerland, it is therefore somewhat surprising that no commodity trader has been brought to trial in Swiss courts for money laundering to date. In addition, the Swiss government has not been willing to take progressive steps to adequately supervise and regulate the natural resource trade.

We argue for (a) law enforcement to be more proactive and pursue cases in court where the evidence is sufficient; (b) Swiss government institutions to require commodity traders to comply with anti-money laundering regulation; (c) Switzerland to recognize its responsibility as a market leader and to advocate for transparency and accountability initiatives in international fora.

Key words: money laundering, commodity trade, corruption, regulation, Switzerland

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1. Introduction

Examples of the effect our insatiable hunger for cheap natural resources has in countries whose natural resource governance is deplorable are plenty. Just recently, the 'Paradise Papers' revealed additional proof of how commodity corporations acquired prime mining assets in unstable yet resource rich regions at prices hundreds of millions of dollars below expert evaluations (Guardian 5.Nov.2017; Süddeutsche Zeitung 5.Nov.2017).

A common *modus operando* in such deals is for a public official or rebel militia to corruptly or forcefully acquire control over a mining project (Wall Street Journal 13.Feb.2018; Heimann/Pieth 2018; Franchini et al. 2016). Then, either the mining asset itself or the commodity it produces – both of which are now proceeds of crime – are sold to middlemen or investors and the earnings are misappropriated. Such deals contribute majorly to illicit financial outflows, empty state coffers and ever-increasing debt burdens in developing countries. They help keep kleptocrats in office and are a key reason why populations in the global South face a bleak future and are continuously starved of the benefits of their natural riches.

While extractive industries are among the business sectors most exposed to corruption and other serious offenses (cf. Heimann/Pieth 2018; cf. CGMF 2015; OECD 2016), no Swiss commodity trader has been brought to trial in Swiss courts for money laundering to date. This raises question, particularly because several corporations domiciled in Switzerland have been alleged to have purchased assets in the types of deals mentioned above. At least from what is publicly known, it appears that public prosecutors have opened criminal investigations only after criminal complaints from the public (Public Eye 2017; Public Eye 2018).

This paper advocates for an increased focused on these issues, both in the national and international context. First, general remarks on the commodity trade in Switzerland (2.) and the conception of money laundering are provided (3.). Second, the paper discusses the Swiss anti-money laundering instruments, with special regard to problems that may occur in the context of natural resource trading (4.). Finally, the authors conclude the paper with recommendations to the Swiss legislator and policy makers (5.).

The facts and analysis recited in this paper are based on publicly available information found in (NGO) reports, press articles and legal literature. No primary information has been gathered. None of the statements made are intended or should be interpreted as accusations of criminal conduct. The presumption of innocence is always preserved for every person or entity mentioned.

2. Overview of commodity trading in Switzerland

The commodity trade has a long-standing tradition in Switzerland, and over the last half-century, it became one of its most important sectors. Section 2.1. will provide an overview over the main mechanisms of commodity trading. Section 2.2. will summarize the debate in the Swiss political sphere and the official position of the government vice versa the commodity sector and its challenges.

2.1 The essentials of the Swiss commodity trade

Despite its scarcity of natural resources, many ‘global players’ in the commodity sector are located in Switzerland, making it one of the premier trading hubs for commodities worldwide: In raw oil, for example, 35% of trades are done in Switzerland and it is also the largest trading platform for metals, grains, coffee and sugar (Swiss academies 2016; Betz/Pieth 2016; IPC 2013). The commodity trade is an important contributor to Switzerland’s GDP, as 7 of the 10 largest corporations of Switzerland are involved in commodity trading and/or extraction (Handelszeitung, 24.June.2015).

Commodity trade in Switzerland dates back to the 18th century (Public Eye 2012; IPC 2013). It has, however, undergone major transitions and only few of the traditional trading houses have survived. Instead, a large number of new players joined; either foreign companies who settled in Switzerland or newly incorporated Swiss companies (IPC 2013).

On a fundamental level, a commodity trader’s core business model is the so called ‘transit trade’ or ‘physical trade’, where a commodity is produced or bought at place A and shipped to place B, where it is sold at a higher price (IPC 2013). The commodity itself seldom ever reaches Switzerland physically, except in the case of gold (on average, Switzerland refines 50-70% of the world’s gold annually, Swissinfo 12.Oct.2012). The traders oftentimes administer large portions of the delivery chain from the mine to the buyer; including transport, but also insurances and storage (IPC 2012).

Looking at the commodity trade in more detail reveals its complexity. Many trades are done within the same group of companies, e.g. Shell Nigeria selling oil to Shell Switzerland. Another noteworthy sector are inter-governmental trades (Public Eye 2012). The most important field of business of commodity traders, however, is the so called “free commodity trade”, where commodities are either sold via **direct sales** or via **derivatives**. Direct sales, i.e. trades between the trader and the buyer, are either carried out under long-term supply agreements or on the ‘spot market’, where prices fluctuate heavily and payment and delivery are performed ‘on the spot’ or with a short lag. Spot-market transactions are the exception, however, as long-term supply agreements account for approximately 90% of direct sales (Public Eye 2012).

The ‘financial derivatives markets’ are key to modern commodity trade. Here, trades are often made at a high frequency, based on sets of agreed standards and without visual inspection. The term

‘derivatives’ encompasses a broad group of financial instruments such as swaps, forward contracts, futures contracts etc.

Especially forward contracts – also referred to as ‘forwards’ – are an indispensable tool for a commodity trader. Therein, the parties stipulate date, price and quantity of a future sale of commodities. The fixed price offers the trader protection against the risk of falling prices. The counterparty, e.g. an industrial manufacturer, on the other hand, obtains protection from rising prices (IPC 2013). Forward contracts are also sought after investment tools for financial investors (IPC 2013). Derivatives can either be traded at an **exchange**, or **‘over the counter’**, the latter involving non-exchange based contracts which may be kept secret. At commodity exchanges, speculators, investors, bulk producers and consumers trade commodities either directly or through banks (Public Eye 2012).

The commodity trade is capital-intense, wherefore close ties to the financial industry are essential (IPC 2013). Roughly 70-80% of the financing for commodity trading is provided by banks (IPC 2013). NGO reports such as “Gunvor in Congo” by Public Eye have shown, however, how large commodity traders can slip into the role of banks themselves; a fact that will be relevant later in the discussion (vide infra 4.2.2.).

Gunvor

In 2010, Gunvor, a Geneva-based oil trader, entered into a commercial relation with SNPC, the state oil producer of the Republic of Congo. Apart from buying oil, Gunvor also arranged loans to Congo totalling at $750 mio. In order to mobilize the funds, Gunvor used its good credit rating to obtain cheap capital from a bank. It, however, also injected $150-180 mio of its own assets. For its service, Gunvor received “arrangement fees” of $14.7mio – all without being subjected to banking regulations (Public Eye 2017).

2.2 Commodity trading in Swiss politics

Many outsiders wonder what precipitated Switzerland’s rise to the top of the global commodity trade. And in fact, the question why, for instance, such a large number of oil traders has chosen Geneva as their place of business is a fair one.

The official account on why Switzerland has become the main hub for trades in a number of commodities can be summarized in three points (cf. IPC 2013):

1. Commodity trading’s long tradition in Switzerland,
2. a neutral political framework, security, predictability and stability,
3. a sophisticated and stable financial system, well-trained workers and a high standard of living.

Despite these purported locational advantages, the Swiss government sees itself in constant competition with other countries (IPC 2013, listing Singapore, Dubai, the US and the UK). In order to defend its positioning vice versa its competitors, the Swiss government remains committed to

providing a business-friendly framework, which translates to weak or inexistent regulation, low taxation and minimal oversight.

Meanwhile, several NGOs, journalists and academics continue to expose scandals involving the Swiss commodity and precious metals industry (e.g. Public Eye 2017; Telegraph 27.May.2014; Heimann/Pieth 2018, HRW 2005). Furthermore, international organizations have documented the risks in the natural resource sector, including corruption, gold smuggling, tax fraud and evasion, drug money laundering and oil theft (OECD 2016, FATF 2012). The Swiss administration's response, however, remains underwhelming: A report commissioned by the Swiss Federal Council even concludes that "[w]hile there does exist, in theory, a limited risk of such [commodity] transactions being used for money-laundering, there is no evidence that this actually occurs in practice." (IPC 2013).

3. The origins of money laundering

Money laundering was first criminalized in the United States of the 1980's, after the country faced an ever escalating 'war on drugs' against increasingly militarized cartels (Pieth 2016). In 1984, a US Commission to the President defined money laundering as the "*process by which one conceals the existence, illegal source or illegal application of income, and then disguises that income to make it appear legitimate"* (cf. Pieth 2018b). In 1989, the US-Customs distinguished three phases of money laundering: first '**placement**' of the illicit cash in the money circulation, secondly deliberate confusion through so called '**layering**' and thirdly '**integration**' of the laundered funds into the legal economy (Report of the US-Customs to the Subgroup "Statistics and Methods" of the FATF 1989; Pieth 2016).

Not least with the creation of the Financial Action Task Force (FATF), the criminalization of money laundering gained international prowess. The FATF pursues a prevention-focused agenda building on the so called 'gatekeeper theory', pursuant to which professions that are 'at the gates' of the legal financial economy should identify illicit funds. Accordingly, not only banking institutions but also lawyers and notaries carry anti-money laundering duties (Trechsel/Pieth 2018).

Thus far, this international push has left commodity traders untouched: The FATF only considers "commodity futures trading" to fall within the scope of its recommendations (FATF 2017). This despite the fact that a 2015 FATF Report identified several money laundering risks, at least related to gold trading, e.g. the laundering of proceeds from narcotic sales in Colombia through gold transactions (FATF 2015). This essay will showcase the need for more action in this regard (vide infra 4.2.).

4. The Swiss anti-money laundering regulation

Swiss law on money laundering can primarily be found in Art. 305bis Swiss Criminal Code (Section 4.1.) and in the Swiss Anti-Money Laundering Act (Section 4.2), which is an administrative law.

4.1 Criminal law – Swiss Criminal Code

The following section provides an overview of the criminal offense of money laundering in the Swiss Criminal Code (SCC) in the natural resource context. The starting point is Article 305bis SCC which stipulates the objective and subjective elements of the offence of money laundering. The provision aims to remove the monetary incentive of crime (cf. Pieth 2016).

Art. 305bis Money laundering

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

[…]

2. […]

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

a. acts as a member of a criminal organisation;

b. acts as a member of a group that has been formed for the purpose of the continued conduct of money laundering activities; or

c.achieves a large turnover or substantial profit through commercial money laundering.

3. The offender is also liable to the foregoing penalties where the main offence was committed abroad, provided such an offence is also liable to prosecution at the place of commission.

4.1.1 Offender

Any person can qualify as **offender** and be held liable for money laundering. According to the corporate criminal liability provision, Article 102 (2) SCC, **corporations** may be found guilty of money laundering where they intentionally omitted to take all necessary reasonable organisational measures to prevent the offence (Pieth 2016).

The question of whether the perpetrator of the predicate offence can be his or her own money launderer is disputed (cf. Pieth 2016). For the commodity trade, this question is highly relevant, however, as the following example showcases:

Glencore

The Paradise Papers have exposed new evidence that the Swiss commodity trader Glencore, or one of its subsidiaries, have transmitted loans, cash and shares into offshore companies owned by Dan Gertler, a dubious middleman with excellent connections up to the highest levels of government in the Democratic Republic of Congo (DRC) (Tagesanzeiger, 26.Jan.2018; Guardian, 5.Nov.2017; Süddeutsche Zeitung, 5.Nov.2017). Court documents in the US indicate that Gertler has

paid millions of bribes to top DRC officials in return for cheap mining licences (US v. Och-Ziff, DPA, Cr. No 16-516 (NGG))
Glencore, inter alia, supplied Gertler with a $45 mio. “incentivisation” package, contingent on him resolving licensing and royalty disputes with the DRC government. Gertler delivered and, in the following, Glencore obtained the requested licenses at a premium of several hundred million dollars. (Guardian 5.Nov.2017; Süddeutsche Zeitung 5.Nov.2017, Global Witness Blog 10.Nov.2017).

The matter is currently under investigation. Glencore denies any wrong-doing and states that the loan was “made on commercial terms” (see Glencore’s full statement: http://www.glencore.com/media/news/p/statement-by-glencore-to-the-international-consortium-of-investigative-journalists). Assuming but not alleging that Glencore, or its subsidiary, – through Gertler – have enabled the acquisition of mining rights in the DRC by bribery, does Glencore’s subsequent sale of the proceeds of the Congolese mine amount to money laundering? Two prominent responses exist in Swiss doctrine and case law:

On the one hand, the Swiss Federal Supreme Court – following the view of the FATF – insists on the criminal liability of self-money laundering: The Court argues that money laundering is an independent offense, wherefore self-laundering is sanctioned in addition to the predicate offence (BGE 124 IV 274; 122 IV 211; 120 IV 323; Ackermann 2013). Several commentators, on the other hand, see self-money laundering as the offender’s attempt at evading his or her own prosecution wherefore they find the ‘privilege of non-punishment’ to be applicable (Arzt 1995; Trechsel/Pieth 2018).

According to the second opinion the perpetrator of the predicate offense would not be convictable for money laundering. Pursuant to the decisions by the Federal Court, however, a conviction would be possible.

4.1.2 Predicate offence

Money laundering requires a **felony** as a **predicate offence**. Whether an act amounts to a felony or not is determined exclusively pursuant to Swiss (criminal) law. Most internationally recognized white-collar crimes are felonies under the SCC and are therefore qualified predicate offences. Since 2014 – after pressure by the FATF – Switzerland declared aggravated tax misdemeanour as a predicate offence to money laundering.

As a leading international financial centre, Switzerland is exposed to illegally gained foreign assets (Pieth 2018a). In order to fight international crime, the third paragraph of Article 305bis SCC clarifies that the offender is equally liable where funds of an offence committed abroad are laundered in Switzerland (Pieth 2017). The law however insists on the principle of dual criminality (Trechsel/Pieth 2018). But it is not required that the foreign state itself recognizes the offence as a predicate offence to money laundering (Pieth 2016).

The predicate offence can be established by way of a court judgment. If, however, no such judgement exists, Swiss judges may apply domestic rules of evidence to the determination of whether an asset is of criminal origin (Trechsel/Pieth 2018). Though, where the predicate offence was committed abroad, proofing it will frequently be difficult. Therefore, Swiss courts have applied a low standard of proof for establishing the link between crime and asset (BGE 120 IV 323).

4.1.3 Asset

Despite its name, money laundering is not only applicable to monetary transactions, but encompasses any **asset** with economic value (Ackermann 2013; Pieth 2018a). Apart from all forms of money and currencies, it also includes precious metals, real estate property and rights thereto (Dispatch 1998; Trechsel/Pieth 2018). Accordingly, a mine, a mining concession or the proceeds of mining qualify as 'assets' pursuant to Art. 305bis SCC.

In the context of a commodity deal tainted by bribery, the profits from the underlying contract will often far exceed the bribe. To make sure that crime does not pay, law enforcement must thus also target all proceeds of corrupt mining operations. Though, the question arises as to what extent profits and other returns are tainted. Here, the Swiss Federal Supreme Court ruled that assets resulting from a contract that has been facilitated by corruption, in principle, are forfeitable and can therefore be subject to money laundering (BGE 137 IV 79; Trechsel/Pieth 2018, Pieth 2016).

One may further ask whether dirty profits that have already been reinvested, e.g. in the purchase of another concession, are still within the reach of a money laundering action.

A solution approach can be found by re-reading the wording of Article 305bis SCC which states that only acts "aimed at frustrating […] the forfeiture of assets" are considered money laundering (the variations of frustrating the "tracing and forfeiture" do not have any self-standing meaning, [cf. BGE 129 IV 244, 126 IV 255]). Accordingly, money laundering requires an asset to be **forfeitable**. Art. 70 SCC sets out several prerequisites for forfeiture relevant to the present discussion. The asset must:

- have been acquired through the commission of an offence during the last seven years, unless a longer limitation period applies to the offence,
- not have been acquired by a third party who was in good faith, paid a consideration of equal value or to whom forfeiture would cause disproportionate hardship.

Applying Art. 70 SCC to our example manifests that the seller of the new concession does not have to fear losing the received asset, as long as he acted in good faith and the amount he received was of equal value to the concession.

However, regarding the **surrogate** which Glencore obtained, i.e. the concession, the situation is the following: Where an illicit asset is replaced by a clean one and the paper trail remains intact, the surrogate remains forfeitable (Ackermann 2013; Trechsel/Jean-Richard 2018). Where, however, it is

no longer possible to identify neither the original nor the surrogate, the offender will have to pay an "equivalent claim" pursuant to Art. 71 SCC (Pieth 2016).

Lastly, a further problem scenario that may arise is, where proceeds from a corrupt deal are mixed with legally earned assets, so called **partial contamination**. Let's assume a joint-venture is set-up between two corporations. Each corporation supplies 50% of the joint-venture's assets. However, one corporation's assets were dirty. Again, we must ask whether the profits from this joint-venture are tainted. Radical solutions would be to declare everything coming out of the joint-venture to be either clean or dirty. Neither approach would lead to particularly practical outcomes (Trechsel/Pieth 2018). Alternatively, one could argue that the dirty assets remains within the joint-venture until all the clean assets are used up (Trechsel/Pieth 2018).

4.1.4 Frustration of the identification of the origin

Art. 305bis SCC requires the **frustration of the identification of the origin**, also referred to as 'layering' (cf. above 3). The obfuscation of the illicit origin may, for example, happen by transferring the asset to a different jurisdiction, by changing the legal ownership, or by conversion of the tainted asset into other value formats (Ackermann 2013; Pieth 2018a). All of these elements are inherent in the modern commodity trade. In particular, the complex corporate structures involving complex corporate structures make it difficult to trace and identify true beneficial ownership and to detect the illegal provenance of tainted assets (Stiglitz/Pieth 2016; OECD 2016).

4.1.5 Intent

Subjectively, Article 305bis SCC requires that the perpetrator "knows or must assume" that an asset originates from a felony and underlines that *dolus eventualis* is sufficient (Trechsel/Pieth 2018). The money launderer does not need to be aware of all details of the predicate offence. At least in theory, it suffices to have reckoned the possibility of an asset stemming from criminal origins and to have accepted that the predicate offence is more severe than a petty offence (Dispatch 1989; BGE 138 IV 1; Trechsel/Pieth 2018). In a case involving a gold refiner the finding of intent appeared to follow a different logic, however:

Argor Heraeus

In 2013 Argor-Heraeus, a gold refiner situated in southern Switzerland, was alleged to have bought 3 tons of plundered gold ore originating from an eastern-DRC gold mine, controlled by a rebel militia. The gold was declared to have been dug in Uganda. However, several indicators should have raised serious doubts as to the truthfulness of the declaration. For instance, Uganda had no documented gold production of that scale at that time. Furthermore, publicly available reports by the UN clearly stated that DRC gold was being smuggled through Uganda to finance warring rebel militias (Franchini et al., 2016).

An NGO filed a criminal complaint with the Office of the Swiss Attorney General (OAG) which opened an investigation for complicity in the war crime of pillaging and money laundering. The OAG found that the gold in question was indeed dug

illegally in the DRC with a probability next to certainty. However, it denied that Argor-Heraeus acted with criminal intention. Accordingly, the OAG abandoned the proceedings and the matter was never heard by a Swiss court. (Ruling abandoning proceedings, SV 13.1374-MUA)

Civil Society and academics have sharply criticised the prosecutor's decision (cf. Pieth 2016). An NGO spokesperson was quoted saying: "This is one of the biggest refineries in Switzerland. Did nobody read the newspapers or UN reports to know anything about the context in which it was working?" (swissinfo 2.June.2015).

Indeed, whereas it is common in cases of blue-collar crime to infer intent where the accused knew and was aware of the circumstances of his actions, the approach is much more reluctant for certain white-collar crime investigations (cf. Pieth 2016): In the Argor-Heraeus case, the OAG declined intent i.a. because the internal compliance had failed. Accordingly, it found that the refiner did not intentionally ignore circumstances that should have made clear that the gold had an illicit background. The NGOs considered this line of argument to be "an official invitation to refiners and other companies subject to the money laundering act to ignore information that could lead to the discovery of problematic cases, or to pretend that they were not aware". (Swissinfo, 2.June.2015).

Turning back to the wording of Art. 305bis SCC, it is true that the definition of intent ("knows or must assume") focuses more on the knowledge element than the general definition of intent found in Art. 12 SCC (cf. Pieth 2016). However, as stated above, the money launderer does not need to know every detail of the predicate offence. It is sufficient to have expected and accepted the asset to be of criminal origin.

4.2 Administrative law – Anti-Money Laundering Act

Preventive measures against money laundering are primarily found in the 1998 Federal Act on Combating Money Laundering and Terrorist Financing (AMLA), which is an administrative law. Among other things, it imposes due diligence duties on financial intermediaries (Articles 3-8 AMLA). AMLA is complemented by the Federal Council's Ordinance on Combating Money Laundering and Terrorist Financing (OMLTF).

4.2.1 Scope of application

The core of AMLA consists of five basic duties. The most prominent one is the **identification of customers (know your customer)**: the obliged intermediary must identify the direct customer and all beneficial owners (BO) (Pieth 2016). Intermediaries must also identify all persons or groups of persons who hold voting shares or capital shares of at least 25 % (Art. 2a(3) AMLA; Pieth 2016). Insufficient diligence in the identification of the BO is penalized under Article 305ter SCC.

The thoroughness of the due diligence examination must be determined based on a **risk-based approach**. Here, the financial intermediary must ascertain the “nature and purpose” of the services requested by the customer in order to qualify the risk. Where these are unclear, the intermediary must request further information (Article 6 AMLA). Intermediaries are further obliged to keep due diligence records in storage for 10 years (Article 7 AMLA) and train, instruct and supervise their staff properly (Article 8 AMLA).

Lastly, according to Article 9(1)(a) AMLA, a **duty to report** arises where the intermediary “knows or has reasonable grounds to suspect” that assets involved in a business relationship are connected to money laundering or are proceeds of a felony. Letter b. obliges the intermediary to report if it terminates negotiations because of a reasonable suspicion as defined in letter a. In the case of commodity traders, a report would have to be filed in case their own compliance failed and tainted goods were traded, where a buyer’s funds appear suspicious or where a supplier offers them suspicious goods.

4.2.2 Are commodity traders subject to AMLA? – An influential lobby hits back

Article 2(1)(a) AMLA puts forth that the Act applies to ‘financial intermediaries’. While the act does not contain a legal definition of the term, it is generally understood to stand for the management and storage of assets belonging to others (Pieth 2018b). It must be noted, however, that Article (2)(3)(c) AMLA contains a non-conclusive list of designated activities that are considered financial intermediation and thus must fall within the scope of AMLA:

Art. 2 Anti-Money Laundering Act:
Para. 3
“Financial intermediaries are also persons who on a professional basis accept or hold on deposit assets belonging to others or who assist in the investment or transfer of such assets; they include in particular persons who:” […]
lit. c:
“trade for their own account or for the account of others in banknotes and coins, money market instruments, foreign exchange, precious metals, commodities and securities (stocks and shares and value rights) as well as their derivatives”

The *raison d’être* of the catalogue in litera c. must be that the legislator understood certain activities to be particularly money laundering prone and, therefore, subjected them to AMLA, even where they are not undertaken on the account of a third party (Pieth 2018b).

Up until 2002, the Controlling Authority of AMLA (AMLCA) did subject commodity traders to AMLA duties, regardless of whether the trade was conducted for the traders own account or for the account of others (AMLCA 2003). Then, however, the AMLCA changed its reading of Art. 2(3)(c) AMLA and added far-reaching restrictions. Henceforth, only commodity traders acting for the account of others were subjected (AMLCA 2003). The changed approach came against the backdrop

of aggressive lobbying by the industry (Pieth 2018b). As a result of the change, a trader doing business in its own interest, with its own funds and at its own risk, was no longer subjected to the AMLA rules (AMLCA 2008). As the large majority of Swiss commodity traders act on their own account, AMLCA's reinterpretation led to the commodity industry being virtually freed from AMLA duties. This practice has been confirmed by the Swiss Federal Council in Article 5 OMLTF (formerly Article 5 Ordinance on the Professional Practice of Financial Intermediation). Strangely enough, traders who trade banknotes or foreign exchanges for their own account were not exempt.

Going even further, the AMCLA stated that it only considered trades at an exchange market to be subjectable to AMLA. It argued that non-exchange based trades lacked the necessary liquidity and standardization to be considered financial intermediation (AMLCA 2008). This restriction has also found its way into Article 5 OMLTF. This restrictive view is particularly counter-productive to the goal of detecting money laundering: Commodity traders primarily turn to commodity exchanges for their hedging operations (vide supra 2.1.). The predominant money laundering risk, however, arises out of the underlying purchase or delivery agreement between the trader and the supplier/buyer, which – in most cases – will not be concluded at a commodity exchange.

In any case, the restrained interpretation Swiss authorities have applied to Article 2(3)(c) AMLA stand in contradiction to the law which unequivocally states that traders who trade "for their own account" must be considered financial intermediaries for the purposes of AMLA. The lawfulness of AMLCA's practice and of Article 5 OMLTF must thus be questioned.

4.2.3 The need for a different approach

Turning to the Government's arguments against the subjection of commodity traders to AMLA, a 2015 report commissioned by the Federal Council stated:

> "Subjecting proprietary trading activities to the AMLA would not make any sense because it would be the responsibility of the traders, as the counterparties and BOs of the goods, to impose the due diligence obligations established by the AMLA on themselves and to examine the background of their own transactions. The adoption of a rule like this is not very convincing at the conceptual level […]." (CGMF 2015)

As explained in the previous sections, a primary money laundering risk in natural resource transactions is that of illicit commodities being laundered through the global markets. Another risk is that of illicit funds being laundered by buying legal commodities. Accordingly, the task of a responsible trader is not to do due diligence on itself, but to examine thoroughly the selling or purchasing party. In the view put forward here, commodity traders are uniquely positioned to identify suspicious sellers/buyers. It is therefore not convincing when the report goes on to argue that the AMLA duties should only be triggered once "illicitly gained funds are placed in circulation by the conduct of transactions through a bank" (IPC 2013). Furthermore, this reasoning cannot explain why,

for example, lawyers are subjected to AMLA, even though the funds they receive will be placed in a bank as well.

Furthermore, the Report noted that Swiss commodity traders would face competitive disadvantages if Switzerland were to subject them to the due diligence duties of financial intermediaries because "no other legal system foresaw doing so, either" (IPC 2013; FDC 2005, cf. supra 2). In our opinion, the view that effective measures can only be undertaken once the competition countries have done so already is a dangerous one. Rather, a leader in the field like Switzerland could make use of its significant influence and make the first move towards cleaner commodity markets. The illustrative example of the US Dodd Frank Act Section 1504 could alleviate some of the fears of the Swiss government: In Section 1504, the US legislator unilaterally required "resource extraction issuers" to declare payments to foreign governments above a certain threshold. At the time, none of the US' competitors foresaw such a duty. The reaction of the affected entities was not to leave the US. To the contrary, they stayed and the largest competitor, the EU, adopted a similar transparency requirement (Heimann/Pieth 2018).

5. Conclusion

Switzerland should take up the initiative and assume the responsibility that comes along with being a mayor natural resource trading hub. An adequate supervision of all players involved would favour scrupulous traders which in turn benefits citizens in exporting countries. To improve towards a fairer and more sustainable trading place, we advocate for (a) law enforcement to be more proactive and pursue cases in court where the evidence is sufficient; (b) Swiss government institutions to require commodity traders to comply with anti-money laundering regulation; (c) Switzerland to recognize its responsibility as a market leader and to advocate for transparency and accountability initiatives in international fora.

Turning a blind eye is not a valid option. For Switzerland, a progressive approach with effective measures and actions would signify a big step up the latter for the country's reputation and show true commitment towards global equal opportunities. As long as illicitly gained commodities flow through the global trade networks unfettered, this potential is unlikely to materialise, however.

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