

# Working Paper 31

## Applying the Swiss Anti-Money Laundering Act to gold refineries

Stefan Mbiyavanga | December 2019

# Table of contents

1 Introduction	2
2 Forms of "gold laundering"	2
2.1 Drug trafficking and organised crime	2
2.2 Conflict gold	4
2.3 Kleptocrats	4
3 Preventive measures	5
3.1 Self-regulation	5
3.2 Anti-Money Laundering Act (AMLA)	7
3.3 Current developments	8
3.3.1 Control mechanism for the purchase of scrap precious metals	8
3.3.2 Central Office for Precious Metals Control as new money laundering supervisory authority	9
3.4 Interim conclusion	10
4 What next?	10
4.1 Counterargument 1: De-risking	11
4.2 Counterargument 2: Competitive disadvantages	11
5 Conclusion	12

## About the author

Stefan Mbiyavanga

Legal Specialist for Latin America

Stefan Mbiyavanga is a Legal Specialist for Latin America at the International Centre for Asset Recovery (ICAR) of the Basel Institute on Governance. In his function he supports criminal justice authorities in Peru and Ecuador in mutual legal assistance cases in criminal matters and develops scientific research projects in the field of economic criminal law.

Stefan studied international business law at the Faculty of Law of the University of Basel and is currently writing his doctoral thesis. For three years he worked at the Chair of Criminal Law and Criminal Procedure of Prof. Mark Pieth, where he was involved in the research for the recent book publication *Gold Laundering*.

stefan.mbiyavanga@baselgovernance.org

## Abbreviations

AMLA	Federal Act on Combating Money Laundering and Terrorist Financing of 10 October 1997
AMLO	Ordinance on Combating Money Laundering and Terrorist Financing of 11 November 2015
FATF	Financial Action Task Force
FINMA	Swiss Financial Market Supervisory Authority
MROS	Money Laundering Reporting Office Switzerland
OECD	Organisation for Economic Co-operation and Development
PMCA	Federal Act on the Control of the Trade in Precious Metals and Precious Metals Articles of 20 June 1933
PMCO	Ordinance on the Control of Trade in Precious Metals and Articles of Precious Metals of 8 May 1934

# 1 Introduction

Switzerland is the world leader in gold refining. Of the roughly 2,200–3,100 tonnes of raw gold imported into the country each year,<sup>1</sup> the majority is destined for Swiss gold refineries. Together these companies are estimated to refine 50–70 percent of the world's gold production, transforming it into gold bars, semi-finished products and other goods.

The imported gold loses all traces of its origin during the refining process. Due to the high-quality manufacturing standards of Swiss refineries, and the fact that they possess all of the pertinent accreditations, the gold can afterwards be traded as "Swiss" gold on international financial markets without restrictions.

At the same time, the international gold trade is enormously vulnerable to money laundering operations by drug cartels and other forms of organised crime networks, terrorist organisations, and kleptocrats.<sup>2</sup> As the world centre of gold refining, Switzerland is highly exposed to these money laundering risks.

This Working Paper first analyses money laundering risks in the gold trade, supported by examples. This is followed by an overview of the gold refineries' due diligence obligations under existing self-regulation and the Swiss Anti-Money Laundering Act (AMLA). It is shown that the self-regulation models have, at best, mixed success and that the core business of the refineries is not subject to the AMLA. Finally, the paper sets out the pros and cons of applying the AMLA obligations to the core business of Swiss refineries.

## 2 Forms of "gold laundering"

### 2.1 Drug trafficking and organised crime

Money laundering activities aim to conceal the criminal origin of assets.<sup>3</sup> Criminal organisations often rely on gold for this – a fact demonstrated by law enforcement operations in several European countries.<sup>4</sup> The BBC has revealed how a drug syndicate operating in Europe bought several tonnes of gold and sold it to a gold refinery in Dubai, which has close business relations with at least one Swiss gold refinery.<sup>5</sup>

Mafia organisations in Mexico, Venezuela and Colombia also launder proceeds of violent crimes and drug trafficking by buying and selling gold.<sup>6</sup> Investigating these crimes and recovering the proceeds from them is an extremely complex undertaking that only succeeds in a small number of cases.

---

<sup>1</sup> Swiss Federal Council 2018, Goldhandel und Verletzung der Menschenrechte, 3.

<sup>2</sup> FATF 2015, Money laundering/terrorist financing risks and vulnerabilities associated with gold.

<sup>3</sup> Cassani, U. 2008, L'internationalisation du droit pénal économique et la politique criminelle de la Suisse: la lutte contre le blanchiment d'argent, *Revue de droit suisse*, 227 et seqq., 233 et seqq.; Pieth, M. 2015, *Wirtschaftsstrafrecht*, 154 et seq.

<sup>4</sup> See for example: OCCRP, 13 December 2018, Italy hits multi-million dollar gold smuggling operation.

<sup>5</sup> BBC, 28 October 2019, Gold, drug money and a major auditor's 'cover up'; Pieth, M. 2019, *Gold Laundering*, 179.

<sup>6</sup> InSight Crime, 2 September 2019, *Traficantes de oro innovan a lo largo de la ruta Colombia-Panamá*; Infobae, 5 November 2019, *El sofisticado método del "Chapo" Guzmán para lavar dinero con lingotes de oro*.

Switzerland's exposure to this illicit gold is not just theoretical: in June 2019, UK authorities confiscated around 104 kilograms of raw gold on board a private aircraft that could be traced back to a South American drug cartel. The plane was on its way to Switzerland.<sup>7</sup>

Drug traffickers in northern and central Africa are also reported to be laundering the profits of their smuggling activities in the gold markets of Dubai.<sup>8</sup> As the Dubai refineries lack international accreditation, they depend on refineries in other countries to resell the illicit gold on the world market. Again, Switzerland's potential exposure to this is high. According to Swiss foreign trade statistics, considerable quantities of gold are imported into Switzerland from Dubai every year.

**7108.1200 - Gold, incl. gold plated with platinum, in unwrought forms, for non-monetary purposes (excl. gold in powder form) [included in the special trade since 1.1.2012]**

Period 1,2	Commercial partner	Import			Export		
		Quantity (kg)	Value (CHF)	Value +/- %	Quantity (kg)	Value (CHF)	Value +/- %
2012	Emirates, Arab	303,657	15,333,260,235	*	37,946	1,907,751,448	*
2013		52,127	2,317,504,119	-84.9	127,554	5,281,743,850	176.9
2014		63,996	2,396,303,563	3.4	66,277	2,459,441,594	-53.4
2015		76,996	2,822,877,308	17.8	42,653	1,493,330,670	-39.3
2016		373,112	15,025,507,253	432.3	22,833	894,685,896	-40.1
2017		162,685	6,551,959,731	-56.4	25,058	997,650,134	11.5
2018		83,987	3,397,953,161	-48.1	39,829	1,601,749,925	60.6

Request achieved in 3.842 seconds  
Request date/time: 06.11.2019 12:45:45

Source: Federal Customs Administration, Swiss-Impex

Many gold mining areas in the world are captured by organised crime. In Venezuela and Colombia in particular, brutal guerrilla syndicates control a large proportion of artisanal mines. Mining and smuggling gold has become the main source of financing for illegally obtaining weapons and bribing officials.<sup>9</sup> High-ranking Colombian authorities say that guerrilla groups and other mafia organisations make more money from illegal gold mining today than from selling drugs.<sup>10</sup> The *Miami Herald* describes illegal gold mining in Colombia thus:

“The precious metal has become the lifeblood of gangs and guerrillas and is turning once-pristine jungles into toxic landscapes tainted with mercury and cyanide”<sup>11</sup>.

In the Peruvian part of the Amazon, especially in the region of La Pampa, Madre de Dios, numerous gold mines are also firmly in the grips of organised crime.<sup>12</sup> Smuggling, corruption and illegal logging in protected zones occur side by side with gold production.<sup>13</sup> According to Peru's Financial Market Supervisory Authority, it can be assumed that illegal gold mining is financed with drug money, among other things.<sup>14</sup>

<sup>7</sup> National Crime Agency, undated, Gold seized by NCA at Heathrow as part of international cartel investigation; Royal Cayman Island Police Service (RCIPS), 23 July 2019, Statement on Joint RCIPS-CBC Investigation into Money Laundering and Smuggling.

<sup>8</sup> The Wall Street Journal, 16 October 2018, Stirring the Pot: Thousands Take a Shine to a Gold Mine in the Sahara; cf. Foreign Affairs, 24 February 2016, After Libya, a Rush for Gold and Guns; FATF 2015, Money laundering/terrorist financing risks and vulnerabilities associated with gold, 6 et seq.

<sup>9</sup> International Crisis Group 2019, Report N° 73: Gold and Grief in Venezuela's Violent South.

<sup>10</sup> Miami Herald, 16 January 2018, Dirty gold is the new cocaine in Colombia - and it's just as bloody.

<sup>11</sup> Ibid.

<sup>12</sup> El Comercio, 8 November 2019, Luis Hidalgo: "El Gobierno no sabe qué hacer con La Pampa".

<sup>13</sup> El País, 27 April 2016, El narco peruano lavó 250 millones de dólares en 2015; Miami Herald, 5 September 2017, Two Miami men convicted of laundering billions in Amazon gold; Bloomberg, 9 March 2017, How to become an International Gold Smuggler; Bloomberg 16 March 2017, Gold Company Manager Charged in Vast Peruvian Smuggling Plot.

<sup>14</sup> Sonntagszeitung, 23 September 2012, Die Schweiz profitiert von blutigem Gold aus Peru.

## 2.2 Conflict gold

Even more worrying is the issue of gold mined in conflict zones. The best-known examples of this are the eastern provinces of the Democratic Republic of the Congo. Almost all Congolese gold mining is conducted illegally and the yield leaves the country undeclared.<sup>15</sup> The mining sites are under the control of rebel groups or renegade members of the army, who primarily use the mines to finance their violent activities. The subjugation of the local population and the persistence of armed conflicts are closely linked to the exploitation of natural resources.<sup>16</sup> The conflict gold is only tradeable once it has flowed through gold refineries. Thus, the risk that such refineries play a role in conflict financing, either intentionally or unintentionally, is significant.

Most of the gold from eastern Congo is smuggled into the neighbouring countries of Uganda, Rwanda, Kenya and Tanzania.<sup>17</sup> There the raw gold is either resold or "laundered" for the first time in local gold refineries.<sup>18</sup> According to UN reports, there is no doubt that the bulk of east Congolese gold is smuggled via transit countries to Dubai.<sup>19</sup> Several gold refineries in Dubai are accused of buying far more "Ugandan" gold than Uganda produces.<sup>20</sup> Conflict gold from South Sudan is traded similarly.<sup>21</sup>

## 2.3 Kleptocrats

Corrupt and illegitimate regimes also deal in gold. Faced with dwindling oil revenues and harsh economic sanctions, the Maduro regime in Venezuela has discovered that the gold mines in the south of the country can be an important source of finance.<sup>22</sup> The *Miami Herald* draws this conclusion:

"Gold mining may be all that's keeping Venezuela in business. Organized crime runs it."<sup>23</sup>

The smuggling of Venezuelan gold to Colombia is in part documented in detail.<sup>24</sup> It takes place along the same routes as Colombian cocaine was smuggled northwards in the 1980s.<sup>25</sup> Today, entire truck convoys are reported to transport raw gold bars regularly from the Venezuelan mines to Colombia, along with other goods.<sup>26</sup>

---

<sup>15</sup> United States Government Accountability Office 2017, Information on Artisanal Mined Gold and Efforts to Encourage Responsible Sourcing in the Democratic Republic of the Congo, 1.

<sup>16</sup> De Koning, R. et al. 2013, Striking Gold, How M23 and its Allies are Infiltrating Congo's Gold Trade.

<sup>17</sup> UN Security Council 2017, Final Report of the Group of Experts on the Democratic Republic of the Congo, S/2017/672, 26; cf. Global Witness 2017, Time to dig deeper, 10 et seqq.; Reuters, 21 February 2017, Ugandan gold refinery to import from conflict-ridden South Sudan, Congo.

<sup>18</sup> UN Security Council 2017, Final Report of the Group of Experts on the Democratic Republic of the Congo, S/2017/672.

<sup>19</sup> Ibid., 26; cf. Global Witness 2017, Time to dig deeper, 10 et seqq.; cf. OECD 2015, Baseline study four: Gold trading and export in Kampala, Uganda, 7.

<sup>20</sup> The Sentry 2018, The Golden Laundromat, 2, 8. A Belgian refinery is now a target of money laundering investigations in Belgium, see: De Tijd, 18 September 2015, "Parket vervolgt grootste goudsmelterij".

<sup>21</sup> BBC, 20 July 2019, Sudan crisis, The ruthless mercenaries who run the country for gold.

<sup>22</sup> International Crisis Group 2019, Report N°73: Gold and Grief in Venezuela's Violent South.

<sup>23</sup> Miami Herald, 23 July 2019, Gold mining maybe all that's keeping Venezuela in business. Organized crime runs it.

<sup>24</sup> Oro Información, 2 August 2019, Maduro depende cada vez más del oro ilegal para salvar las sanciones de Estados Unidos; Oro Información, 23 July 2019, Crimen organizado controla negocio del oro ilegal en frontera entre Colombia y Venezuela.

<sup>25</sup> Cf. US Department of State 1990, International Narcotics Control Strategy Report, 157 et seq.; Ehrenfeld, R. 1990, Narco Terrorism, 115.

<sup>26</sup> Miami Herald, 23 July 2019, Gold mining maybe all that's keeping Venezuela in business. Organized crime runs it.

The Venezuelan Central Bank is also selling its gold reserves on international markets, even though it is, at the time of writing, on a US sanctions list.<sup>27</sup> Recipients have been identified in Turkey,<sup>28</sup> Russia,<sup>29</sup> Dubai<sup>30</sup> and Uganda.<sup>31</sup>

## 3 Preventive measures

### 3.1 Self-regulation

The refinery industry is aware of the diverse risks involved in dealing with gold. There are a considerable number of voluntary certification programmes, including rules on combating money laundering, conflict financing and organised crime. In most cases, they are based ultimately on a supply chain due diligence model developed by the Organisation for Economic Co-operation and Development (OECD).<sup>32</sup>

The London Bullion Market Association (LBMA) operates the most advanced and recognised certification programme in the refining industry.<sup>33</sup> All Swiss gold refineries are certified by the LBMA as good suppliers. To obtain LBMA certification, refineries must implement the "Responsible Gold Guidance", a self-regulatory standard developed by the LBMA and containing due diligence obligations with regard to the supply chain.<sup>34</sup> Compliance with the guidance is periodically checked by approved auditors.

According to the LBMA guidance, the refinery must suspend a business relationship if it appears possible that delivered gold may be of criminal origin.<sup>35</sup> In addition, if a supplier makes fraudulent statements about the origin of the gold, the reception of further gold must be temporarily halted.<sup>36</sup>

The main problem with the LBMA standard lies in its implementation. An OECD study came to the conclusion that LBMA-certified refineries often incur only minimal expense in clarifying the origin of gold. As a consequence, money laundering risks may not even be identified as such:

“Refiners asked their suppliers to sign an agreement to implement the refiner’s supply chain policy but then took no further checks on the supplier’s own due diligence on their suppliers.”<sup>37</sup>

Based on such self-declarations, money laundering risks can only be identified in the rarest of cases. In the case of high-risk suppliers in particular, the refineries would have to adopt additional control

---

<sup>27</sup> Bloomberg, 15 July 2019, Venezuela Defies Sanctions to Sell \$40 Million in Gold Reserves.

<sup>28</sup> Le Journal du Dimanche, 20 June 2019, Venezuela: comment Nicolás Maduro utilise l'or du pays pour contourner les sanctions internationales.

<sup>29</sup> New York Times, 17 April 2019, New U.S. sanctions on Venezuela Aim to Choke Off Government's Finances.

<sup>30</sup> Reuters, 19 March 2019, U.S. sanctions Venezuela gold mining company for backing Maduro.

<sup>31</sup> Gold Information, 2 August 2019, Maduro increasingly relies on illegal gold to save U.S. sanctions.

<sup>32</sup> OECD 2012, Due Dilligence Guidance for responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, Supplement on Gold.

<sup>33</sup> Cf. EBP 2018, Expert Study on the Swiss Gold Sector and related Risks of Human Rights Abuses, 115.

<sup>34</sup> LBMA Responsible Sourcing Programme 2018, Responsible Gold Guidance, Version 8, 11 December 2018.

<sup>35</sup> Ibid., 14.

<sup>36</sup> Ibid., 14.

<sup>37</sup> OECD 2018, Alignment assessment of industry programmes with the OECD Minerals Guidance, 68.

mechanisms to ensure that the gold they receive is not of illicit origin. The OECD Guidance requires on-the-ground assessments by qualified personnel when so-called "red flags" are identified.<sup>38</sup>

As the following examples show, refineries repeatedly process gold where publicly available information casts serious doubt on the legality of a supplier's sourcing practices:

- A Swiss refinery is said to have purchased five to nine tonnes of gold a year from a Colombian gold supplier between 2009 and 2018. The supplier is accused by the Colombian public prosecutor's office of laundering proceeds from illegal drug trafficking and financing armed groups.<sup>39</sup> Eleven individuals, including managers working for the supplier, have already been arrested.<sup>40</sup> According to the criminal investigations, the supplier systematically falsified the certificates of origin of its gold.<sup>41</sup> If it turns out that the certificates of origin were indeed systematically falsified, then the refinery probably never had full knowledge of the true origin of the gold it was processing.<sup>42</sup> Based on the numerous "red flags", it has certainly exposed itself to a considerable money laundering risk.
- Another Swiss refinery is involved in investigations by the Peruvian public prosecutor's office.<sup>43</sup> It is said to have been the sole buyer of a Peruvian supplier from 2000 to 2018, receiving over 100 tonnes of gold.<sup>44</sup> According to the Peruvian investigations, this supplier had also systematically concealed the true origin of the gold in a rather crude way: many of the suppliers indicated did not even exist.<sup>45</sup> Although the Peruvian supplier was repeatedly involved in public proceedings for illegal gold mining, smuggling and money laundering, the Swiss refinery maintained the business relationship for a very long time. This refinery, too, has exposed itself to considerable money laundering risks by not being able to fully rule out the possibility that the gold it receives may be of criminal origin.
- A US refinery pled guilty in 2018 to having accepted several billion dollars' worth of illicit gold from South America.<sup>46</sup> Despite being internationally accredited, the refinery had to admit to not having established compliance mechanisms that would have enabled it to reliably identify illegal gold.<sup>47</sup> As part of the guilty plea, the company was ordered by the US authorities to, among other things, refrain from buying gold from overseas for five years.<sup>48</sup>

The presumption of innocence always applies until it is overturned by criminal proceedings. And the scarcity of publicly available information makes it difficult to draw general conclusions about the

---

<sup>38</sup> Ibid., 80.

<sup>39</sup> Bilanz, 8 October 2019, Schweizer Raffinerien und ihre Nähe zu dubiosen Goldgruben.

<sup>40</sup> El Espectador, 12 April 2019, Oro de minería ilegal, el nuevo frente de batalla para la Fiscalía; El Colombiano, 12 April 2019, Fiscalía está tras red ilegal de oro.

<sup>41</sup> InSight Crime, 6 May 2019, Colombia's gold miners used false and dead miners to launder money.

<sup>42</sup> The refinery states: "the business relationship was based on comprehensive due diligence and KYC procedures as per our legal obligations. This included thorough discussions with local authorities and the Banco della [sic] Republica de Colombia (Central Bank of Colombia).", see: Argor Heraeus, 16 September 2019, Statement Regarding the Press Release by NGO Fastenopfer.

<sup>43</sup> SRF, 13 March 2019, Schweizer Goldschmelze Metalor unter Verdacht; Ojo-Público, 14 March 2018, Prosecutor's Office: Swiss-based Metalor financed the transport of tons of suspect gold in Peru; Metalor, 17 June 2019, Press Release: Metalor to stop all artisanal mining and mine collector's business.

<sup>44</sup> Society for Threatened Peoples, 14 March 2019, Peruanische Staatsanwaltschaft hegt Verdacht gegen ehemaligen Goldlieferanten von Metalor.

<sup>45</sup> Ojo/Público, 1 August 2018, Perú: investigan lavandería de oro de la minería ilegal.

<sup>46</sup> United States District Court for the Southern District of Florida, 12 March 2018, U.S. v. Elemetal LLC, Case No. 18-20173-Cr-Moreno; US Attorney's Office Southern District of Florida, 16 March 2018, Press Release: U.S. Gold Refinery Pleads Guilty to Charge of Failure to Maintain Adequate Anti-Money Laundering Program.

<sup>47</sup> US Attorney's Office Southern District of Florida, 16 March 2018, Press Release: U.S. Gold Refinery Pleads Guilty to Charge of Failure to Maintain Adequate Anti-Money Laundering Program.

<sup>48</sup> Ibid.



effectiveness of self-regulation. However, examples like the ones above – and there are many more<sup>49</sup> – make the result look mixed at best.

## 3.2 Anti-Money Laundering Act (AMLA)

The Swiss Anti-Money Laundering Act (AMLA) has proved to be a highly successful law in practice. In line with the concepts of "follow the money" and "take the profit out of crime", great progress has been made in combating financial crime together with the companies subject to the Act. Since its introduction, it has become much more difficult to hide illicit money in a Swiss bank. The Act is relatively simple in its concept, with five obligations to prevent and combat money laundering:<sup>50</sup>

- Identification of customers and any beneficial owners.<sup>51</sup>
- Identification of the nature and purpose of the business relationship.<sup>52</sup> Using a risk-based approach and professional knowledge, clients must be divided into risk categories. Where there is an increased risk of money laundering, additional examinations are necessary.
- Informing the Money Laundering Reporting Office Switzerland (MROS) of suspected money laundering without informing customers or third parties.<sup>53</sup> Suspicious assets must be frozen.<sup>54</sup> These communications often trigger criminal investigations, particularly in the field of white-collar crime.
- One or more qualified persons must be designated as an internal money laundering unit with responsibility for compliance functions.<sup>55</sup>
- Documentation of the transactions carried out and of the financial intermediary's anti-money laundering measures.<sup>56</sup> In criminal investigations, these documents may constitute substantial evidence in portraying the paper trail.

The scope of the Act, and thus also the question of which activities are subject to the above obligations, is determined by Art. 2 AMLA. In para. 3 of Art. 2, it states that only "trading" (*Handel*) in commodities or precious metals is subject to the statutory due diligence obligations.<sup>57</sup> The provisions of the AMLA are complemented by an Anti-Money Laundering Ordinance (AMLO). The definition of "trading activity" found in Art. 5 AMLO is highly complex and confusing, which is why it is briefly summarised below.

Pursuant to Art. 5 para. 1 AMLO, the purchase and sale of precious metals for the account of third parties is a trading activity within the meaning of the law.<sup>58</sup> This already evidences the limited extent to which gold refineries are subject to the Act:

---

<sup>49</sup> See Pieth, M. 2019, Gold Laundering, 166 et seq.

<sup>50</sup> Pieth, M. 2016, Wirtschaftsstrafrecht, 55; International standards are to be consulted for interpretation, even if they are not legally binding or at least not directly applicable. See for instance: Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of 8 November 1990 (CETS No. 141); FATF Recommendations 2012.

<sup>51</sup> Art. 4 para. 1 AMLA.

<sup>52</sup> Art. 6 AMLA.

<sup>53</sup> Art. 9, 10a AMLA.

<sup>54</sup> Cassani, U. (2018), Evolutions législatives récentes en matière de droit pénal économique: blanchiment d'argent et corruption privée, *Revue pénale Suisse*, 179 et seq., 198.

<sup>55</sup> Art. 8 AMLA, Pieth, M. 2016, Wirtschaftsstrafrecht, 164.

<sup>56</sup> Art. 7 AMLA.

<sup>57</sup> Pursuant to Art. 2 para. 1 lit. b AMLA, natural persons and legal entities that deal in goods commercially and in doing so accept cash are also subject to this requirement.

<sup>58</sup> In Art. 5 para. 1 lit. e. AMLO it is repeated that "trading" in precious metal for one's own account is subject to the law without further specifying the term "trading".

- The term “precious metals” (*Bankedelmetall*) only covers gold bars and granules with a minimum gold content of at least 99.5 percent.<sup>59</sup>
- In many cases, Swiss refineries do not buy and sell the gold they process themselves because of the high risk of price fluctuations. Instead of buying gold, refineries often carry out their business as agents. However, refining precious metals under an agency contract does not constitute a trading activity pursuant to the AMLO’s definition.<sup>60</sup> And even if a refinery were to buy precious metal, the AMLA would only apply if it did so “for the account of others”.<sup>61</sup>

Raw gold and gold bars with a gold content of less than 99.5% are considered “commodities”. Art. 5 para. 1 lit. c and d of the AMLO states that the “trade” in commodities is subject to the Act only in certain circumstances:

- Trading in commodities is subject to the AMLA if it is carried out for the account of a third party and on a trading exchange. However, this will practically never be the case, since gold is usually only tradable on trading exchanges as a refined precious metal, not in its raw form.
- Over-the-counter trading is subject to the AMLA if it is carried out for the account of a third party and the commodities “have such a high degree of standardisation that they can be liquidated at any time”.<sup>62</sup> However, since the commodities in question necessarily have a low degree of standardisation – i.e. less than 99.5 percent purity – this situation is likely to occur only extremely rarely.

It can therefore be assumed that a large proportion of gold imported into Switzerland is at no time subject to any anti-money laundering regulations. In particular, the core business of the refineries, namely the refining of raw gold, does not count as “trading” and is therefore excluded from the AMLA. This is disturbing, considering that it is the refinery that is usually in charge of selecting suppliers.

### 3.3 Current developments

Switzerland underwent a Financial Action Task Force (FATF) mutual evaluation in 2016.<sup>63</sup> As a result, the Swiss Federal Council ordered a revision of the AMLA. After completing the consultation process, a draft law containing several measures pertinent to the gold industry was presented.<sup>64</sup> The measures are not expected to come into force until early 2021 at the earliest. Two of the measures contained in the draft law are briefly described below and commented on in light of the previous analysis.

#### 3.3.1 Control mechanism for the purchase of scrap precious metals

As part of the ongoing revision of the AMLA, the Swiss Federal Council intends to subject the commercial purchase of scrap precious metals to a control mechanism.<sup>65</sup> According to the draft, commercial buyers of scrap precious metals must record from whom and from where the goods

---

<sup>59</sup> Art. 178 para. 2 lit. a PMCO.

<sup>60</sup> See Art. 5 AMLO in conjunction with Art. 2 para. 3 AMLA.

<sup>61</sup> Art. 5 para. 1 AMLO.

<sup>62</sup> Art. 5 para. 1 lit. d AMLO.

<sup>63</sup> FATF 2016, Mutual Evaluation Report Switzerland.

<sup>64</sup> See Swiss Federal Council, Message on the amendment of the Money Laundering Act of 26 June 2019, Swiss Federal Gazette 2019, 5451 et seqq.

<sup>65</sup> Art. 31a draft act-Precious Metals Control Act (PMCA), available under: <https://www.admin.ch/opc/en/classified-compilation/19330048/index.html> (accessed 8 December 2019).

originate. On the basis of this, they are to ascertain that the goods are of licit origin.<sup>66</sup> The Federal Council justifies the measure by stating that "the origin of the goods" is, in terms of combating money laundering, decisive in the purchase of precious metals.<sup>67</sup> One example might be gangs of thieves trying to sell stolen gold jewellery as scrap gold.

The Federal Council's explicit recognition in this proposal that money laundering risks also emanate from gold is welcome. What is disturbing, however, is that the control mechanism should only concern the purchase of scrap precious metals. Raw gold, gold bars, semi-finished gold products, etc. are excluded and gold refineries are not subjected to it at all.<sup>68</sup>

This may be explained by the fact that this control mechanism is not so much aimed at combating money laundering as at serving a key interest of refineries. These must, in accordance with Art. 168a para. 1 of the Precious Metals Control Ordinance (PMCO), prove that each of their suppliers has lawfully acquired its gold.

Swiss suppliers of scrap precious metals are regularly failing to provide such proof of lawful acquisition because – similar to the practice observed in Peru and Colombia – they often do not record the names of their customers or the origin of the gold. As a result, Swiss refineries are often unable to accept Swiss scrap precious metal, so it has to be exported.<sup>69</sup> According to the proposed control mechanism, professional scrap metal buyers must improve their documentation practices so that refineries can process domestic scrap metal without any problems.

Of course, many gold imports from abroad pose the same problems. However, as far as imported gold is concerned, the showing of an export permit is considered sufficient proof of lawful acquisition.<sup>70</sup> This practice is clearly insufficient. International money launderers and gold smugglers will in many cases be able to obtain an export permit for illicit gold. The emitting authorities are often bribed or are known to authorise uncontrolled exports of gold, for example in Uganda and the United Arab Emirates.<sup>71</sup>

### 3.3.2 Central Office for Precious Metals Control as new money laundering supervisory authority

Entities subject to the AMLA are also subject to supervision. Currently, gold refiners are directly supervised by the Swiss Financial Market Supervisory Authority (FINMA) in the limited area of their business to which the AMLA applies.<sup>72</sup> In future, however, it shall no longer be FINMA but the Central Office for Precious Metals Control (*Zentralamt für Edelmetallkontrolle*) that will be entrusted with supervising the gold refineries under the AMLA.<sup>73</sup> The Central Office for Precious Metals Control is a small unit affiliated to the Federal Customs Administration.<sup>74</sup> It is the linchpin for the implementation

---

<sup>66</sup> Swiss Federal Gazette 2019, 5535.

<sup>67</sup> Ibid., 5497 et seq.

<sup>68</sup> Art. 31a para. 1 *in fine* draft act-PMCA; Art. 31a para. 6 draft act-PMCA; Federal Gazette 2019 5534 m.V.a. Art. 1 para. 2 PMCA.

<sup>69</sup> Swiss Federal Gazette 2019 5498.

<sup>70</sup> Swiss Federal Council 2018, Goldhandel und Verletzung der Menschenrechte, 6.

<sup>71</sup> OECD 2015, Mineral supply chains and conflict links in Eastern Democratic Republic of Congo, 9, 11; Financial Times, 30 January 2017, Conflict gold blights the Democratic Republic of Congo; Africa Confidential 23 March 2018, The Great Lakes Gold rush; Montiel, A, Benezra, M. 2019, Organized crime controls gold exploitation in Venezuela, available under: <https://smugglersparadise.infoamazonia.org> (visited on 5 November 2019); Partnership Africa Canada 2014, All that glitters is not gold, 14 et seq.

<sup>72</sup> See above Section 2.2.

<sup>73</sup> Art. 36 draft act-PMCA.

<sup>74</sup> Art. 35 para. 1 PMCA.

of the Precious Metals Control Act (PMCA).<sup>75</sup> Within this framework, it also strives to maintain the good reputation of Swiss products in the international markets.<sup>76</sup> However, the Central Office is not familiar with the issue of money laundering supervision, so the required structures and resources must first be set up.<sup>77</sup>

The proposal to assign the supervisory function to this Central Office is ill-conceived. On the one hand, there is a palpable risk that the quality of supervision will suffer because the Central Office is inexperienced in dealing with money laundering risks. On the other hand, in enforcing the Precious Metals Control Act, the Central Office is also obliged to protect the good reputation of Swiss products, which could lead to numerous conflicts of interest. It would therefore appear more appropriate to keep gold refineries under the direct supervision of FINMA.

### 3.4 Interim conclusion

Regardless of how large the share of problem gold actually is in the context of Switzerland's total gold imports, the way gold refineries have dealt with high-risk gold of dubious origin until now suggests that there is a considerable exposure to the risk of damaging Switzerland's public interests.<sup>78</sup>

The limitations of the application of the AMLA to the refineries, coupled with the weaknesses in the implementation of self-regulation, indicate that gold refineries are not sufficiently protected from money laundering risks. Even the measures now contained in the Federal Council's draft revision of the AMLA are not sufficient to counter the money laundering risks in the gold sector. The change in supervisory function for the AMLA would lead to a weakening in Switzerland's anti-money laundering system.

## 4 What next?

It seems appropriate for gold refineries to be more strongly involved in efforts to preserve the integrity of Switzerland as a business hub. Refineries have the ability to trace back down the supply chain to identify illicit gold. They have the de facto power to decide which gold has access to international markets. In other words, refineries play the role of gatekeepers, just as banks do in relation to criminal money.<sup>79</sup> As soon as gold leaves the refinery, its origin is practically untraceable.

It is therefore imperative that the AMLA applies fully to gold refineries, in other words with regard to all inflows and outflows of gold. This could be implemented, for example, by reformulating Art. 2 of the Act. The practical implementation of this could be based on a large number of existing directives.<sup>80</sup>

---

<sup>75</sup> Its tasks include, in particular, quality assurance. It carries out fineness analyses of gold, silver and other precious metals. In addition, the official inspection and stamping, market surveillance and border control belong to its field of activity.

<sup>76</sup> Swiss Federal Gazette 1931 I, 895; Swiss Federal Supreme Court, Decision N°2C\_1008/2012 of 1 March 2013, E.2.1.; Swiss Federal Council, 6 November 2019, Federal Council approves the adjustment of fees for precious metals control.

<sup>77</sup> EBP 2017, Expert Study on The Swiss Gold Sector and related Risks of Human Rights Abuses, Final Version, 46; Pieth, M. 2019, Gold Laundering, 200.

<sup>78</sup> For example: public health and safety, protection of the good reputation of Switzerland as a business location, international cooperation in combating criminal and terrorist organisations.

<sup>79</sup> Cf. Pieth, M. 2016, Wirtschaftsstrafrecht, 155.

<sup>80</sup> E.g. OECD 2012, Due Dilligence Guidance for responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, Supplement on Gold.

This is not an unprecedented measure. Gold refineries in the US are subject to the Bank Secrecy Act, a law with objectives very similar to those of Switzerland's AMLA, and are required to establish compliance programmes to identify illicit gold.<sup>81</sup>

Nevertheless, it is clear that the proposed solution poses risks. Some counter arguments against applying the Act fully to gold refineries are briefly discussed below.

## 4.1 Counterargument 1: De-risking

The legislative measure proposed above will be confronted with the argument that refineries will increasingly withdraw from risky markets if they are fully subjected to the AMLA, with the consequence that artisanal and small-scale miners in developing countries in particular will be excluded from their supply chains (so-called de-risking). In fact, a large Swiss refinery has already imposed an internal embargo on artisanal gold, declaring that the traceability of artisanal gold is too costly and the reputation risk too high.<sup>82</sup>

It is estimated that 40-100 million people worldwide depend on artisanal gold mining for their livelihoods,<sup>83</sup> including broad swathes of the population in the Democratic Republic of the Congo, Peru, Colombia and many other countries. Overall, small prospectors are expected to account for between 10-20 percent of global gold production (roughly 350-700 tonnes of gold annually)<sup>84</sup>. The living conditions of artisanal miners are extremely difficult in many regions. In addition, intermediaries, who often act as part of criminal organisations and/or channel drug money into the supply chain, take a large cut of the value of the gold produced. It is these power structures that are directly responsible for many of the grievances and inequalities at the mining site.

The aim of making gold refineries fully subject to the AMLA is to require them to develop internal systems that can identify such criminal elements in the supply chain.

The shorter the supply chain, the lower the effort required to ensure the legitimacy of the business relationship. It can therefore be assumed that refineries, driven by the obligations of the AMLA and associated sanctions for breaches of due diligence, will have a genuine economic incentive to strengthen direct contacts with artisanal mines. This would be enormously beneficial to working and living conditions at the mining sites.

## 4.2 Counterargument 2: Competitive disadvantages

A legally mandated expansion of compliance systems will inevitably result in additional costs for refineries. Such additional regulatory costs often have an impact on competitiveness, especially internationally. In this respect, the proposed measure must also be assessed from the perspective of the economic freedom, property guarantees, etc. of the gold refineries.

In the view expressed here, the proposed measure constitutes an appropriate, necessary and proven means of protecting essential public interests in Switzerland. In particular, the fight against international drug-related and organised crime is carried out to protect public safety and health. There

---

<sup>81</sup> US Attorney's Office Southern District of Florida, 16 March 2018, Press Release: U.S. Gold Refinery Pleads Guilty to Charge of Failure to Maintain Adequate Anti-Money Laundering Program; US Attorney's Office Southern District of Florida, 17 April 2019, Press Release: United States Government and Cooperating U.S. Gold Refinery Enter an Agreement After Money Laundering Investigation.

<sup>82</sup> Metalor, 17 June 2019, Press Release: Metalor to stop all artisanal mining and mine collector's business.

<sup>83</sup> EBP 2017, Expert Study on The Swiss Gold Sector and related Risks of Human Rights Abuses, Final Version, 116.

<sup>84</sup> Pieth, M. 2019, Gold Laundering, 79.

is undoubtedly a public interest in a functioning preventive strategy against this threat, including making the core business of refineries subject to the AMLA.

Furthermore, Switzerland makes considerable efforts in other industrial and service sectors to maintain its reputation as a business hub with a high degree of integrity. There is an interest in ensuring that this effort is not undermined. The proposed measure is also deemed necessary because of the mixed results, at best, in terms of the effectiveness of existing self-regulatory models.

Finally, as global heavyweights in gold refining, the Swiss refineries could level the playing field by working in industrial forums such as the LBMA for the international implementation of the Swiss anti-money laundering standard.

## 5 Conclusion

Swiss money laundering regulations reveal substantial failings with regard to gold refineries. The under-regulation of gold imports presents a risk to Switzerland's public interests and it is therefore advisable to implement legislative countermeasures. In this respect, making Swiss refineries fully subject to the Swiss Money Laundering Act appears to be the best way of combating money laundering risks in the gold sector. Self-regulation, possibly in the form of collective action, can be a complementary solution.