



Scope of Art. 7 FIAA in relation to Art. 9 AMLA

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The Foreign Illicit Assets Act (FIAA; SR 196.1) came into force on 1 July 2016. It sets out new powers for MROS. Certain financial intermediaries contacted the Federal Department of Foreign Affairs (FDFA) and MROS to request clarification regarding mandatory SARs under this law. In order to answer these questions, these two authorities present a common position below.

1. Commencement of the legislation and competent authorities

The FIAA sets out an obligation for individuals and institutions to report and inform MROS without delay of assets covered by a freeze (Art. 7 para. 1 to 3 FIAA). The information contained in these reports is then transmitted to the FDFA and the FOJ by MROS (Art. 7 para. 5 FIAA).

If individuals or institutions are unsure about filing a mandatory SAR, practice prior to the FIAA shows that they sometimes contacted the competent authority to request clarification. Up until 30 June 2016, they contacted the FDFA (Directorate of International Law: DIL) for this purpose. Now, if the FDFA (DIL) receives any new requests for information in this regard, it will refer them to MROS, which has been the competent authority since 1 July 2016.

A limited number of information requests that were sent to the FDFA (DIL) before 1 July 2016 are still pending. In the absence of any specific transitional arrangements on this issue in the FIAA, these requests will be handled and completed by the FDFA (DIL), which will send MROS a copy of its final correspondence on the matter.

The powers and tasks of MROS under the FIAA are set out in Article 7 and Article 13. MROS is therefore not obliged to analyse the information received by virtue of Article 7 FIAA, contrary to what Article 23 AMLA provides for regarding SARs received on the basis of this act.

2. Reports in accordance with Art. 7 FIAA

As the reports under Article 7 FIAA are briefer than those provided for under Article 9 AMLA, an ad hoc form has been drawn up by MROS for this purpose and will be published on its website to help individuals and institutions report frozen assets (cf. appendix).

Definitions of 'Politically Exposed Persons' (PEPs) and 'close associates'

In practice, there are no issues regarding the duty to report bank accounts held by PEPs as defined under Article 2 letter a FIAA (or where PEPs are beneficial owners) mentioned in the lists attached to asset freeze orders. The same applies when a close associate as defined under Article 2 letter b FIAA features in these lists. Usually, financial intermediaries report such bank accounts very quickly, namely within a few days of a new freeze order by the Federal Council coming into effect.

Definition of 'assets'

The term 'assets' is legally defined under Article 2 letter c FIAA. The dispatch clarifies this notion by referring in particular to its meaning in criminal law. Assets may be tangible or intangible, movable or immovable. The dispatch also refers to the former freeze orders that used the terms 'funds' and 'economic resources' specific to sanctions legislation.

It follows from the above that the assets within the meaning of Article 2 letter c FIAA have a very broad scope (Federal Gazette 2014 5150 s.). Assets ('funds' according to the old terminology) are therefore all financial assets, including cash, cheques, monetary claims, drafts, money orders and other payment instruments, deposits, balances on accounts, debts and debt obligations, securities and debt

instruments, stocks and shares, certificates representing securities, bonds, notes, warrants, options, mortgage bonds and derivatives, interest, dividends or other income accruing from or generated by assets, credit, right of set-off, guarantees, performance bonds, other financial commitments, letters of credit, bills of lading, bills of sale and documents showing evidence of an interest in funds or financial resources. Assets ('economic resources' in the old terminology) are also assets of every kind, whether intangible or tangible, movable or immovable, in particular property and luxury goods.

Definition of 'persons and institutions'

The definition of 'persons and institutions' contained in the FIAA is broad and is clarified in the preparatory work. Firstly it includes financial intermediaries as defined under Article 2 paragraph 1 letter a AMLA and dealers as defined under Article 2 paragraph 1 letter b AMLA. It also includes other actors to which the due diligence obligations set out in AMLA do not apply. This is the case for authorities, such as land registries, which are required to report properties covered by a freeze (Federal Gazette 2014 5164). It also applies to company administrators, asset managers, securities depositaries or even traders, who may also fall under this definition (Federal Gazette 2014 5164 s).

3. Relationship between the FIAA and AMLA

Some practical difficulties have arisen when financial intermediaries as defined under Article 2 paragraph 1 letter a AMLA are called on to credit Swiss bank accounts held by persons or non-listed commercial companies with incoming wire transfers corresponding to the execution of commercial contracts concluded with foreign companies controlled by listed PEPs. Such difficulties may arise particularly in connection with contracts for the international sale of goods, when the seller has a Swiss bank account and the buyer is a company domiciled abroad and controlled by a listed PEP. Financial intermediaries that receive a wire transfer from abroad sometimes wonder whether it can be credited to the holder of the account in Switzerland without being subject to a SAR under the FIAA, or if instead the sum has to be frozen as an 'asset' of a listed PEP and be made the subject of a corresponding SAR.

Principles to comply with when applying Article 7 FIAA

Although the aims of the FIAA and the AMLA are not the same, these two pieces of legislation are complementary and should be applied in practice in a coherent manner. The concern about making it as easy as possible for financial intermediaries to implement the FIAA by assigning MROS the role of single point of contact to receive SARs instead of the FDFA has been clearly articulated during the preparatory work and parliamentary debates (Federal Gazette 2014 5164). It is therefore important to ensure that SARs filed under Article 7 FIAA and SARs filed under Article 9 AMLA do not produce results that are insufficiently coordinated or even contradictory. In this context, it is important to comply with the following principles:

1. Filing a SAR under Article 7 FIAA does not exempt the financial intermediary or dealer from filing a SAR under Article 9 AMLA (Federal Gazette 2014 5164 s.) if necessary, or from complying with its due diligence obligations in accordance with AMLA.
2. Conversely, filing a SAR under Article 9 AMLA does not exempt the financial intermediary or the dealer from filing a SAR under Article 7 FIAA if necessary.
3. No report should be filed under Article 7 FIAA when:
 - the account holder (or beneficial owner) is a PEP whose name does not appear in the appendix to the freeze order;
 - the account holder (or beneficial owner) is a close associate whose name does not appear in the appendix to the freeze order.
4. 'Funds' and 'economic resources' as used in old freeze orders (and sanction orders on the basis of the EmbA) constitute assets and must therefore be reported in accordance with Article 7 FIAA.
5. The freezing of assets under Article 3 FIAA is not a commercial sanction. However, all assets in Switzerland of a company with its headquarters in Switzerland and which is controlled by a listed PEP (or a listed close associate) must be reported under Article 7 FIAA and will therefore be frozen.
6. When international wire transfers are received by financial intermediaries in order to be credited to the Swiss accounts of non-listed clients, and even if the transfer corresponds to the execution of a contractual obligation concluded with a listed person (or a company controlled by a listed person), it is not necessary to file a SAR under Article 7 FIAA once the listed person has permanently divested themself of the asset through payment to the financial intermediary. In such

cases, the financial intermediary is still required to clarify the background and purpose of the transaction in accordance with its due diligence obligations arising from AMLA. If necessary, it may be required to file a SAR under Article 9 AMLA and it still has the option of filing a voluntary SAR under Article 305ter paragraph 2 SCC. However, under the FIAA, the aforementioned clarification is not its responsibility.

7. Persons or institutions who are not financial intermediaries or dealers according to AMLA are required to file a SAR under Article 7 FIAA provided they hold or administer assets in Switzerland belonging to persons affected by an asset freeze (Art. 7 para. 1 FIAA). The same applies if, without holding or administering such assets in Switzerland, these persons or institutions have knowledge of such assets by virtue of the functions they perform (Art. 7 para. 2 FIAA). As these persons and institutions are not subject to the due diligence obligations set out in AMLA, they do not have to clarify the background and purpose of the transactions, or file a SAR under Article 9 AMLA.

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