Basic information

Date: 27 February 2013

Initiation of consultation on the bill for implementing the revised recommendations of the international Financial Action Task Force of 2012

Switzerland attaches great importance to being a morally sound financial centre. It does everything it can to ensure that the financial centre is not abused for criminal purposes, in particular for money laundering or terrorist financing. Over the past few decades, Switzerland has been continually developing an effective and comprehensive system for combating money laundering which combines preventive and suppressive measures. The quality of this system is internationally recognised.

The international standards for combating money laundering and terrorist financing, originally drafted by the Financial Action Task Force (FATF) back in 1989, were extensively revised during the period 2009-2012 to accommodate recent developments in international financial crime. On this occasion the recommendations were extended to include measures against financing the proliferation of weapons of mass destruction. Switzerland approved the 40 revised recommendations in February 2012. Current Swiss legislation is already broadly in line with the new FATF standards. However, certain adjustments are needed in order for the revised recommendations to be effectively implemented in Switzerland and for some of the still unresolved deficiencies identified during the FATF country evaluation of 2005 to be remedied.

The key points provided for in the bill are as follows:

a. Identification of the beneficial owners of legal entities and transparency of the issuers of bearer shares

The measures taken in the area of the transparency of legal entities address both the new obligations resulting from the revised FATF recommendations and the deficiencies identified during the last FATF country evaluation of Switzerland. In particular, the revised standards require Switzerland to implement measures firstly to identify the beneficial ownership of legal entities and secondly to boost the transparency of unlisted companies issuing bearer shares. The measures taken with regard to bearer shares must also meet the requirements of the Global Forum on Transparency and Exchange of Information for Tax Purposes, which insist on the identification of every owner of these shares.

The proposed legal mechanism allows companies issuing bearer shares to choose between (i) disclosure of the shareholder, including the identity of the beneficial owners, i.e. the individuals who have a controlling stake in the company of 25% or more of the voting rights or the share capital, (ii) an option for the disclosure of the shareholder to be made to a financial intermediary as defined by the Anti-Money Laundering Act (AMLA), or (iii) simplified conversion of bearer shares into registered shares. These measures are enshrined in the Code of Obligations (CO) and in the Federal Act on Collective Capital Investment Schemes (CISA). The obligation to disclose the identity of beneficial owners above a shareholder threshold of 25% is also envisaged for unlisted companies with registered shares, for partners in limited liability companies and for members of cooperatives. Finally, the obligation to register with the Commercial Register of Trusts has been extended via an amendment to the Civil Code to cover all foundations, including religious and family foundations. The system is rounded off by sanctions under criminal law for failing to observe disclosure obligations.

b. Identification of the beneficial owner

FATF Recommendation 10 requires the financial intermediary to systematically identify the beneficial owner of a business relationship. Such a requirement is not formally enshrined in the AMLA, although the principle is already recognised and applied in Switzerland. This is why the preliminary bill seeks to amend the AMLA by formally including an obligation to identify the beneficial owners of unlisted companies or of any affiliates in which these companies have a majority stake. It also proposes the introduction of progressive due diligence obligations concerning the identification of beneficial owners and legal entities.

c. Serious tax crimes as predicate offences to money laundering

FATF has introduced "punishable tax offences (in connection with direct and indirect taxes)" to its list of offences which automatically constitute predicate offences to money laundering, but without actually defining these offences. Because this provision is to be implemented in domestic law, countries can restrict themselves to offences classed as serious under national law. In Switzerland these are the crimes referred to in Art. 10, para. 2 of the Criminal Code.

As far as indirect taxation is concerned, the preliminary bill envisages extending Art. 14, para.4 of the administrative criminal law beyond cross-border goods traffic in order to cover other taxes levied by the Confederation, especially VAT on internal transactions and services, or withholding tax.

As far as direct taxation is concerned, a new offence in the form of qualified tax fraud has been introduced in the Federal Act on Direct Federal Taxation (DFTA) and the Federal Act on the Harmonisation of Direct Taxation at Cantonal and Communal Levels (DTHA). This involves an aggravated form of tax evasion committed either by making use of forged documents or through deliberate deception of the tax authorities. Such fraud constitutes a result offence and replaces the existing Articles 186 DFTA and 59 DTHA (use of forgery or “tax fraud”). Where the undeclared taxable elements come to at least CHF 600,000, the offence constitutes a crime and

is therefore classed as a predicate offence to money laundering (while the simple form still counts as a misdemeanour).

There are no plans to modify the current procedure beyond what is strictly necessary within the context of the current project. The prosecution of tax evasion (contravention) will therefore still be within the competence of the cantonal fiscal authorities, while the new offence of tax fraud (misdemeanour and crime) will fall within the remit of the cantonal criminal authorities, as is currently the case for tax offences.

The preliminary bill for implementing the revised FATF recommendations regulates certain aspects of criminal tax law, in particular the definition of serious offences. Other aspects concerning the reform of criminal tax law in a wider sense, particularly the prosecution procedure, will be dealt with in a separate bill which will be submitted for consultation in the next few months.

d. Politically exposed persons (PEPs)

The revision of the FAFT recommendations has introduced an obligation to identify national PEPs and persons exercising (or previously exercising) an important function at or on behalf of an international organisation, and extends the due diligence obligations to those categories newly created according to the principle of risk-based assessment. The obligations applicable to all types of PEP should equally apply to members of the PEP's family and to closely associated persons.

The bill provides for amendments at two levels:

Essentially the proposal is to add a definition of national PEPs who occupy senior public positions at federal level and PEPs in international organisations according to the basic FAFT definition, as well as adapting due diligence measures applicable to the newly created PEP categories. Financial intermediaries will be free themselves to extend - in practice – the field of application of the definition to PEPs at cantonal or communal level, while applying the general principle of risk-based assessment. It should be noted that national PEPs, unlike international PEPs, are not considered *a priori* as business relationships with a higher risk.

The formal proposal is that all the definitions, along with the corresponding due diligence obligations, should be enshrined in law to ensure that PEP regulations are applied in a consistent way by all financial intermediaries.

e. Extension of the AMLA provisions to cover the real estate sector and other commercial activities

During its last country evaluation of Switzerland, FAFT identified deficiencies concerning the requirement for certain professions outside the financial sector to comply with anti-money laundering regulations. Real estate is one of these sectors. At national level, various parliamentary initiatives are calling for AMLA regulations to be extended to real estate agents and notaries as well. Rather than making the law applicable to these two professional classes per se, the bill proposes introducing a new rule in the AMLA requiring all payments in excess of CHF 100,000 made as part

of a property transaction to be arranged through a financial intermediary subject to the AMLA. This payment method must be provided for in the property's contract of sale. Failure to do so means that the registrar must refuse to authenticate the transaction and the transfer of ownership will not be recorded in the land register. A similar obligation is also proposed for transactions involving movables. A criminal sanction is to be included in the AMLA for failure to comply with this new obligation.

By not requiring the real estate professions to comply with AMLA provisions, the advantage of this solution is that it upholds the principle of financial intermediation on which the AMLA is based.

Finally, a similar solution to the one provided for in the AMLA for sales of movables and immovables is to be introduced in the Debt Collection and Bankruptcy Act. Consequently, cash payments will be possible only up to a sum of CHF 100,000.

f. Powers of the Money Laundering Reporting Office Switzerland (MROS)

The Federal Council's bill of 27 June 2012 amending the AMLA already granted the MROS new powers allowing it to obtain additional information from financial intermediaries. It also allows the MROS to exchange financial information with comparable international bodies and regulates the forms of collaboration with them. The current preliminary bill provides for additional measures with regard to MROS investigations which are intended to make the system for reporting suspicious activity more effective.

According to FATF standards, the investigation conducted by the financial reporting office must add value to the information that it receives or is already in possession of. To assure the quality of the investigations, the MROS must have access to the widest possible range of financial and administrative information, or material originating from criminal prosecution authorities. For this reason it is proposed to manage internal administrative assistance in a way that allows the MROS, on request, to obtain all the information it deems necessary for its investigation of suspicious activity from other federal, cantonal and communal authorities. Furthermore, the MROS must have enough time to conduct a detailed investigation. To this end the procedure for freezing assets stipulated in the AMLA is to be relaxed. From now on, the freezing of assets will no longer be triggered when suspicions are reported, but will only take place once the MRSO communicates its suspicions to the competent criminal authority after a more detailed investigation of the case. A mechanism is also introduced into the AMLA to prevent the funds under suspicion from leaving Switzerland during the MROS investigation in an attempt to avoid possible confiscation in the future. In such a scenario, the financial intermediary must alert the MROS and delay the execution of the transaction for five working days. The same procedure applies on suspicion of the financing of terrorism.

Financial intermediaries will continue to transmit their reports when the threshold for justified suspicion is reached. On the other hand, the reporting right provided for under Art. 305ter, para. 2 of the Criminal Code is abrogated.
The coexistence of the legislation and the reporting obligation had incidentally been criticised by the FATF in its last country report on Switzerland.

The Financial Action Task Force (FATF) is the most important international body for cooperation against money laundering, terrorist financing and now the financing of the proliferation of weapons of mass destruction. The task force was founded in 1989 in Paris. Its main task is to identify money laundering methods, terrorist financing and now the financing of weapons of mass destruction, to develop recommendations for effective countermeasures and to harmonise policies on combating money laundering at the international level by means of minimum requirements.