Schweizerische Eidgenossenschaft
Confédération suisse
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Swiss Confederation

Der Bundesrat
Le Conseil fédéral
Il Consiglio federale
The Federal Council

Basic information

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Dispatch and bill for a federal act for implementing the revised recommendations of the 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 repressive measures. The high 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 between 2009 and 2012 to take into account developments in international financial crime. On this occasion, the recommendations were extended to include measures to combat the financing 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, targeted adjustments are needed in order for the revised recommendations to be effectively implemented and for some of the still unresolved deficiencies identified during the FATF evaluation of 2005 to be remedied. These adjustments are necessary, as Switzerland will have to undergo another FATF evaluation in 2015.

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

Transparency regarding legal entities and bearer shares

The measures decided 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 evaluation of Switzerland. In particular, the revised standards require Switzerland to implement measures firstly to identify the beneficial owners of legal entities and secondly to enhance 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 legislative solution allows companies with bearer shares to choose between (i) disclosure of the shareholder's identity and the identity of the beneficial owners of the shares if the shareholder has a stake of 25% or more in the voting rights or share capital, (ii) as a variation, disclosure of the shareholder to a financial intermediary as defined in the Anti-

Money Laundering Act (AMLA), or (iii) simplified conversion of bearer shares into registered shares, or (iv) the issuance of bearer shares in the form of uncertificated securities. In the last case, the central securities depository must be designated by the company and be in a position to access the identification data collected by the financial intermediary that identified the shareholder. These measures will be fleshed out in the Code of Obligations (CO), the Collective Investment Schemes Act and the Uncertificated Securities Act. The obligation to disclose the identity of beneficial owners as soon as a shareholding of 25% is reached also applies in the case of registered shares of unlisted companies and partners in limited liability companies. For administrative simplification and to minimize costs, it is to be noted that the obligation to disclose registered shares and financial interests of partners in limited liability companies will not be applied retroactively, and instead will have to be complied with only for new acquisitions. Finally, the obligation to enter foundations in the commercial register will be extended via an amendment of the Civil Code to cover all foundations, including religious and family foundations. The system will be rounded off with provisions under civil and criminal law on the failure to comply with disclosure obligations.

Identification of the beneficial owner

FATF recommendation 10 requires the financial intermediary to systematically identify the beneficial owner of a business relationship and verify this identification by means of a risk-based approach. Such a requirement is not formally enshrined in the AMLA, although the principle has been recognised and applied in Switzerland for a long time. Consequently, the bill seeks to amend the AMLA by formally including an obligation to identify the beneficial owners of unlisted companies or of affiliates in which these companies have a majority stake. Furthermore, it proposes the introduction of progressive due diligence obligations concerning the identification of the beneficial owners of legal entities.

Serious tax crimes as predicate offences to money laundering

The FATF has added "tax crimes (related to direct and indirect taxes)" to its list of offences which must mandatorily constitute predicate offences to money laundering, but without actually defining these offences. For implementation in domestic law, countries can restrict themselves to offences considered as serious under national law. In Switzerland, these were only the felonies as defined in Article 10 para. 2 of the Criminal Code until this bill was drafted.

As far as indirect taxation is concerned, the bill envisages extending the scope of Article 14 para. 4 of the Administrative Criminal Law Act – which circumscribes a felony – beyond cross-border goods traffic in order to cover other taxes levied by the Confederation, especially VAT on domestic deliveries and services, or withholding tax.

In the case of direct taxation, rather than modifying tax legislation in order to enshrine a felony there, the bill proposes amending the Criminal Code's approach regarding predicate offences to money laundering. Consequently, not only felonies, but also tax fraud in accordance with Article 186 of the Direct Federal Taxation Act or Article 59 of the Federal Act on the Harmonisation of Direct Taxation at Cantonal and Communal Levels – which is considered a misdemeanour – would be considered as predicate offences to money laundering if the amount of tax evaded exceeded CHF 200,000 per tax period. This proposal has the advantage of being based on current criminal law relating to tax offences and not being prejudicial to its revision, unlike the proposal submitted for consultation. Both bills thus remain completely separate. While the new proposal makes the predicate offence threshold lower than a crime, it is an exception that is strictly confined to direct taxation.

By setting a threshold of over CHF 200,000 in evaded tax, the new predicate offence should be limited to serious cases and the Money Laundering Reporting Office Switzerland (MROS) should not suddenly be inundated with suspicious activity reports on minor cases. The Federal Council believes that this threshold is reasonable. The damage to the community's pecuniary interests is great enough to warrant classification as a predicate offence to money laundering. Moreover, a higher threshold would be inacceptable in the eyes of the FATF.

Politically exposed persons (PEPs)

The revision of the FATF recommendations has introduced an obligation to identify domestic 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 the risk-based approach. The obligations applicable to all types of PEP should equally apply to members of the PEP's family and close associates.

The bill provides for amendments at two levels:

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

The formal proposal is that all the definitions – including the definition of a foreign PEP – and 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.

With regard to foreign PEPs, there is no change to the applicable regime. Business relationships with these people or their close associates are considered as business relationships with a higher risk in any case.

Regulations on cash payments for purchases of both movable and immovable property

During its last evaluation of Switzerland, the FATF 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 for property purchases 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 movable and immovable property is to be introduced in the Debt Enforcement and Bankruptcy Act. Consequently, cash payments at auctions will be possible only up to a sum of CHF 100,000.

Powers of the Money Laundering Reporting Office Switzerland (MROS; the Swiss Financial Intelligence Unit)

The amendment of the AMLA of 21 June 2013, which entered into force on 1 November 2013, already granted the MROS new powers to obtain additional information from financial intermediaries. It also gives the MROS the power to exchange financial information with its foreign counterparts under certain conditions and to regulate the specifics regarding collaboration with them. Within the framework of the current bill, additional measures with regard to MROS analyses are provided for in a bid to make the system for reporting suspicious activity more effective.

According to the FATF standards, the analysis conducted by the Financial Intelligence Unit must add value to the information that it receives or already has in its possession. To ensure high-quality analyses, 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 analysis of suspicious activity from other federal, cantonal and communal authorities. Furthermore, the MROS must have enough time to conduct a detailed analysis. To this end, the procedure for freezing assets stipulated in the AMLA is to be made more flexible. The freezing of assets is no longer to be triggered when suspicions are reported by the financial intermediary, but will only take place when the MROS communicates such suspicions to the competent criminal authority after a more detailed analysis of the case. The law provides for a period of 30 working days for MROS analysis of suspicious activity reports in accordance with Article 9 of the AMLA. This will allow the MROS to conduct a more in-depth analysis while at the same time limiting the period during which the financial intermediary has to monitor the business relationship under suspicion. Furthermore, a mechanism will be introduced in the AMLA to prevent the funds under suspicion from leaving Switzerland during the MROS analysis in an attempt to avoid 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 in the case of suspected terrorist financing. The deferred freezing of assets and the aforementioned mechanism apply to both the duty to report set out in Article 9 of the AMLA and the right to report in accordance with Article 305ter para. 2 of the Criminal Code.

Targeted financial sanctions related to terrorism and terrorist financing

In order to counter criticism from the FATF, it is proposed to include in the AMLA a formal procedure governing the handling of foreign lists by supervisory authorities and defining the obligations of the financial intermediaries to which the supervisory authorities have transmitted data on listed persons and organisations.

The AMLA will thus make provision for the foreign lists of persons and organisations that are sent to Switzerland to be examined for compliance with the minimum formal requirements by an interdepartmental working group appointed for that purpose. This working group is to be chaired by the Federal Department of Finance, which, after hearing the other authorities, will decide on the transmission of lists to the supervisory authorities (i.e. to FINMA and the Federal Gaming Board).

The supervisory authorities, for their part, will be given the new formal power to forward lists to financial intermediaries and self-regulatory organisations. If the financial intermediary knows on the basis of its clarifications, or has reason to assume, that the data on a listed person corresponds to that of a person involved in a business relationship or transaction, it will have to report its suspicions. While the duty to report currently arises only in the event of a well-founded suspicion, the change will extend it to cases where the financial intermediary has to assume, based on its clarifications, that the person or organisation it identified is a terrorist or terrorist organisation included on a foreign list. The freezing of assets associated with the report will ensue in accordance with the new Article 9a para. 3 or Article 10 of the draft AMLA.

The Financial Action Task Force (FATF) is the most important international body in the area of the fight 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.

Relevant department: Federal Department of Finance FDF