CENTRE DE DROIT
BANCAIRE ET FINANCIER

Revision of anti-money laundering act

Bis repetita, fines and transparency

Par Katia Villard le 10 September 2023

The Federal Council's preliminary draft revision of the anti-money laundering provisions, put out to consultation on August 30, is, in part, déjà vu. Indeed, when the Money Laundering Act (AMLA) was last amended – and came into force less than nine months ago – a parliamentary majority curtly refused to make certain activities linked to the creation and management of domiciliary companies or trusts subject to the AMLA. As the representative of the Federal Council pointed out during the parliamentary debates, however, it would have been wrong to consider the matter closed. The Federal Council has returned to the issue, but – as expected – the new draft, which is more in line with international recommendations, is more incisive and complete than its predecessor. The circle of advisory activities subject to the anti-money laundering arsenal has been widened. Firstly, it is no longer only services relating to domiciliary companies that are concerned, but those relating to companies in general, i.e. including operating companies (art. 2 para. 3bis let. b to e and para. 3ter Draft-AMLA). Secondly, legal or accounting advice on the purchase or sale of real estate is also subject to the AMLA (art. 2 al. 3bis let. a Draft-AMLA). Supervision is carried out by a self-regulatory organization (SRO ; art. 12 let. d Draft-AMLA).

Where the above-mentioned activities are carried out by a lawyer subject to the Law on the Free Movement of Lawyers (LLCA), the Draft-AMLA provides for AMLA obligations – with disciplinary measures attached – to be anchored in this law, which will thus constitute a lex specialis in relation to the AMLA (art. 13a to 13e and 17a AP-LLCA). One provision exempts lawyers from AMLA due diligence obligations when the service is provided as part of a procedure (art. 13a para. 2 Draft-AMLA). Two clauses reserve – as is already the case under current law for lawyers subject to the AMLA by virtue of their activity as financial intermediaries (art. 9 para. 2 AMLA) – professional secrecy as an exception to the obligation to report (art. 13e para. 2 AP-LLCA and 9 para. 2 Draft-AMLA). In summary, the system provided for is as follows : lawyers are subject to AMLA duties of care when they provide a service within the meaning of art. 2 para. 3bis and 3ter Draft-AMLA, which may be part of the lawyer's typical or atypical activity. However, these duties do not apply when the service – which necessarily falls within the scope of the lawyer's typical activity – is part of a legal representation activity (at least temporal clarification in this respect would be welcome). On the other hand, with regard to the obligation to communicate, professional secrecy precludes any transmission to MROS of information obtained in the context of the lawyer's traditional activity, including advice. Supervision is ensured by the lawyers' supervisory authority (art. 14 AP-LLCA).

It should be noted that another measure that had been rejected by Parliament has now been

brought back into play, namely the lowering of the threshold from CHF 100,000 to CHF 15,000 for traders in precious metals and stones to be subject to the anti-money laundering provisions (art. 8a para. 4 Draft-AMLA). The current revision adds those trading in real estate, with no threshold limit for cash payments (art. 8a para. 4bis Draft-AMLA).

In terms of new features, a significant amendment to the AMLA anticipates a likely change in case law, following a “fair warning” by the Federal Supreme Court in its 2021 Annual Report (p. 16) : sanctions – particularly pecuniary – imposed by the SROs, which were previously anchored in the regulations of these bodies and considered as private law, are now provided for in the AMLA and will therefore come under public law (art. 19 Draft-AMLA). Various administrative measures along the lines of art. 30 et seq. of the FINMA Act are also provided for. In the event of a serious or repeated breach of AMLA obligations by a member – i.e. a financial intermediary within the meaning of art. 2 para. 3 AMLA or an advisor – the SRO will inform the Federal Department of Finance (FDF), which may impose fines of up to CHF 100,000 (art. 19b Draft-AMLA). In other words, according to the Federal Council’s preliminary draft, financial penalties for breaches of AMLA due diligence obligations may be imposed on the basis of public law on a financial intermediary within the meaning of art. 2 para. 3 AMLA or on an advisor, but not – at least not as the law stands at present – on a financial intermediary subject to FINMA supervision.

In addition, or rather first according to the order chosen by the Federal Council, the revision – unsurprisingly in view of international developments – provides for the introduction of a federal register of beneficial owners, by means of a new law on the transparency of legal entities and the identification of beneficial owners (AP-LTPM).

Subject to certain exceptions, legal entities under Swiss private law and certain foreign entities with a special link to Switzerland will be obliged to identify the natural persons who, according to the definitions laid down by the law, are to be considered their beneficial owners (art. 2, 4, 5 and 6 AP-LTPM). The information will be recorded in an electronic register kept by the Federal Department of Justice and Police (FDJP), accessible to the authorities and, for anti-money laundering purposes, to financial intermediaries, advisors and lawyers subject to AMLA obligations (art. 18 ff, 25 and 28 Draft-AMLA). Violation of the obligations imposed by the law will be punishable, in accordance with the provisions of administrative criminal law, by a fine of up to half a million francs (art. 41 ff AP-LPTM).

Lastly, the new law extends the scope of the AMLA to include the prevention of violations of coercive measures based on the Embargo Act (Articles 1 and 8 Draft-AMLA).

The consultation procedure will run until November 29, 2023.
