CENTRE DE DROIT
BANCAIRE ET FINANCIER

Revision of the anti-money laundering provisions

Publication of the draft and dispatch by the the Federal Council

Par Katia Villard le 5 June 2024

On 22 May 2024, the Federal Council published the bill revising the anti-money laundering provisions. The revision comprises two parts. The first follows on from the amendment of FATF Recommendation 24 on the transparency of legal persons in early 2022. It provides for the introduction of a federal register of beneficial owners of companies, by means of a new law on the transparency of legal persons and the identification of beneficial owners (P-LTPM). The second part consists of several amendments to the MLA. Here we comment on the main ones : making advisors subject to the MLA, lowering the threshold for certain cash transactions to be subject to the MLA obligations, overhauling the sanction system for SRO members, using the anti-money laundering regime to ensure compliance with international sanctions, and restricting prosecution of negligent breaches of the duty to report.

The draft MLAT is broadly in line with the preliminary draft (commented on in : Villard, cdbf.ch/1300). Subject to a few exceptions, it applies to legal entities governed by Swiss private law, trustees and certain foreign entities with a special link to Switzerland – a branch registered in the commercial register, effective management in Switzerland or ownership of real estate in Switzerland (art. 2 P-LTPM). These entities will have to identify and register in the (electronic) transparency register or, in certain situations, in the commercial register the natural persons who, according to the definitions laid down by the law, are to be considered as their beneficial owners (for companies, art. 4 ff P-LTPM). The beneficial owners themselves must register with the company, as must trust relationships (art. 13 ff P-LTPM). The declaration must be made by the most senior member of the management body, who may delegate this task but remains responsible for its proper execution (art. 12 P-LTPM). The register containing the relevant information, kept by the FOJ, would be accessible to the authorities and, for anti-money laundering purposes, to financial intermediaries and advisors (art. 28, 34 and 35 P-LTPM). Financial intermediaries who discover a discrepancy between the information in the transparency register and the information in their possession would also be obliged to report it (art. 38 P-LTPM). However, failure by the financial intermediary to comply with its obligation to report discrepancies does not carry any consequences under the draft law. A supervisory authority – i.e. a unit of the FDF – would be responsible for checking the information in the register and monitoring compliance with the law (art. 42 and 46 P-LTPM). The entity itself, the shareholders, partners, etc. of a company, third parties involved in the chain of control and the beneficial owners or, subject to professional secrecy, third parties in a contractual relationship with the aforementioned persons are required to provide the supervisory authority with the relevant information and documents (art. 44 P-LTPM). In accordance with the provisions of

administrative criminal law, any violation of the obligation to notify the company in order to determine the beneficial owner, any violation of the obligation to notify the register or any provision of false information to the supervisory authority would be punishable by a fine of up to half a million Swiss francs (art. 50 P-LTPM). However, contrary to what was envisaged in the preliminary draft and in order to take account of the criticisms voiced during the consultation procedure, the violation must be intentional, as negligence alone would not be punishable.

With regard to the second part, it should be remembered that the first aim of the draft is to extend the circle of activities subject to the MLA, following on from the slimmed-down 2019 revision – and this is obviously the crux of the matter. The current main criterion for being subject to the anti-money laundering regime, namely financial intermediation, appears too restrictive. A whole range of activities based on legal or accounting advice in connection with the creation and management of companies or the sale/purchase of real estate would henceforth trigger the MLA obligations (art. 2 P-MLA). The Dispatch makes a number of interesting clarifications regarding the demarcation between activities that are subject to the AMLA and those that are not (Dispatch, p. 150 ff). Although the material scope of this extension was already the same in the preliminary draft, the latter nevertheless provided for a special regime for lawyers subject to the Law on the Free Movement of Lawyers (LLCA) and carrying out the aforementioned activities, in that the MLA due diligence obligations were anchored in the LLCA (and not in the MLA). It is conceivable that this lex specialis was intended, on a "psychological" level, to mitigate the outcry that the plan to subject certain consultancy activities to the MLA was causing in the legal profession, by providing them with an ad hoc regime. It also had the effect of making compliance with the MLA – and sanctions in the event of a breach – the responsibility of the lawyers' supervisory authority. In any case, the proposal did not convince the participants in the consultation procedure, who argued in particular that the lawyers' supervisory authority did not have the necessary resources to monitor compliance with MLA obligations. The draft therefore abandons the idea of "double anchoring", so that the obligations of all advisers who carry out an activity that is now subject to the anti-money laundering regime are regulated in the AMLA, whether or not the adviser is an LLCA lawyer. The due diligence obligations of advisors will be set out in a Federal Council ordinance based on a risk-based approach (art. 8c AMLA). The draft also includes in the MLA the exemption that initially appeared in the LLCA in the preliminary draft, by excluding from the scope of the law activities carried out in the context of judicial, criminal, administrative or arbitration proceedings (art. 2 par. 4 let. f P-LBA). It is not clear at this stage whether the exemption also applies to "potential future" proceedings. With regard to the obligation to communicate, art. 9 para. 2 let. b P-LBA provides for a special clause for lawyers and notaries in the sense that such an obligation can only be triggered if, cumulatively : (i) these professionals carry out a financial transaction in the name and on behalf of the client and (ii) the information to be communicated is not covered by professional secrecy (a reservation already provided for by current law for lawyers who are financial intermediaries).

To sum up, the planned system is as follows : lawyers are subject to MLA due diligence obligations when they provide a service within the meaning of art. 2 par. 3bis and 3ter MLA, which may be part of the lawyer's typical or atypical activity. However, these duties do not apply when the service – which is then necessarily part of the lawyer's typical activity – is part of legal representation. 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 typical activity, including advising.

Advisors are supervised by a self-regulatory body, with special provisions for lawyers and notaries to safeguard professional secrecy (art. 12 and 18a P-LBA).

Secondly, the draft revives another measure that was rejected by Parliament in the last revision in 2019, namely lowering the threshold from CHF 100,000 to CHF 15,000 for dealers in precious metals and stones (unworked or semi-worked) to be subject to the anti-money laundering provisions (art. 8a para. 2bis AMLA). It also adds real estate dealers, with no threshold limit for cash payments (art. 8a para. 4 AMLA). Judging by the results of the consultation procedure, the measure does not appear to be actively opposed.

However, in response to the almost unanimous criticism voiced during the consultation procedure, the Federal Council has decided not to modify the sanctioning system currently provided by the SROs by “transferring” it from private to public law. It should be remembered that the proposal was intended to anticipate a possible reversal in the case law of the Federal Supreme Court in this respect. The Message states that the measure “will, if necessary, be the subject of a separate legislative project” (Message, p. 37). While the current system seems to be working according to the participants in the consultation procedure, a review of the sanctioning system in the area of the MLA – and financial market supervision in general – nevertheless deserves to be undertaken. A change in jurisprudence – which would henceforth consider SRO sanctions as public law – would also require a legislative revision.

The new law also provides for an extension of the scope of the MLA, which would now include coercive measures based on the law on embargoes (art. 1 and 8 MLA). Although a pragmatic measure, this inclusion remains questionable from a dogmatic point of view, as it conflates two completely different situations (financial crime on the one hand, and international sanctions in the context of a particular geopolitical situation on the other).

Last but not least, the Federal Council is proposing a restriction on prosecution for negligent breaches of the duty to report under Art. 37 para. 2 AMLA, which was not initially envisaged and which follows on from the complaints expressed in this regard by representatives of the financial sector. According to the amended provision in the draft, the FDF should waive prosecution in cases of minor seriousness (Art. 37 para. 2 AMLA).
