Preliminary Draft for a Federal Act on the Transparency of Legal Entities (TLEA)

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Key takeaways

- **The Swiss Confederation plans to introduce a federal transparency register on the beneficial owners of legal entities with the TLEA.**
- **In principle, the TLEA should apply to all legal entities under Swiss private law as well as to certain legal entities under foreign law.**
- **Furthermore, specific activities in connection with the formation and structuring of legal entities are to be made subject to the Anti Money Laundering Act (AMLA), and the provisions on combating money laundering are to be tightened.**
- **The consultation on the preliminary draft law will last until 30 November 2023.**

Introduction

On 30 August 2023, the Federal Council opened the consultation period on the preliminary draft of a Federal Act on the Transparency of Legal Entities (PD-TLEA). This act intends to create a federal transparency register in which the beneficial owners of legal entities and other legal formations, such as trusts, shall be entered. The transparency register shall make it easier for the authorities (but not private individuals) to access this information. This register should not only strengthen the integrity of Switzerland as a financial and business hub but also promote a more effective prevention of money laundering and white-collar crime. The TLEA shall combine and supplement the current regulations on the transparency of legal entities and the identification of their beneficial owners in the Code of Obligations (CO), the Collective Investment Schemes Act (CISA), the Banking Act (BA), the Tax Administrative Assistance Act (TAAA), and the Criminal Code (CC). The proposed legislation implements the recommendations of the Financial Action Task Force, which sets standards to aim to prevent money laundering, terrorist financing, and the financing of weapons of mass destruction, and monitors compliance by member states.

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Content overview

Introduction of a transparency register with the TLEA

All EU member countries have already introduced an official transparency register; the USA plan to introduce one in 2024. In Switzerland, the transparency register shall be kept by the Federal Department of Justice as a central electronic register. The register shall not be accessible to the public. In addition to the authorities, however, financial intermediaries and advisors subject to the AMLA, as well as lawyers who carry out activities subject to due diligence obligations under the AMLA may access the register to fulfill such obligations.

In the transparency register, the beneficial owners of legal entities must be registered. Beneficial owners within the meaning of the PD-TLEA shall be deemed all natural persons who ultimately control the legal entity directly or indirectly, alone or jointly with a third party, holding at least 25 percent of the capital or the voting rights in the legal entity (Art. 4 para. 1 lit. a PD-TLEA), or who exercise control in any other way (defined by the Federal Council, according to Art. 4 para. 1 lit. b and Art. 4 para. 2 PD-TLEA).

Scope of application of the TLEA

The PD-TLEA scope of application shall cover all legal entities under federal private law with the exception of those associations not required to be entered in the commercial register (Art. 2 para. 1 PD-TLEA). Under current law, companies limited by shares, partnerships limited by shares, limited liability companies, and investment companies with variable capital (SICAV) must already keep a list of their beneficial owners. Such an obligation, however, will be new for cooperatives, foundations, and associations, which must be entered in the commercial register. In addition, certain legal entities under foreign law will be subject to the PD-TLEA (see Art. 2 para. 2 PD-TLEA).

Exceptions

Excluded from the scope of application are, inter alia, legal entities whose participation rights are wholly or partially listed on the stock exchange, as well as subsidiaries that are more than 75 percent owned by one or more companies whose participation rights are wholly or partially listed on the stock exchange (Art. 3 lit. a PD-TLEA). The explanatory report to the PD-TLEA makes no comment on the application of this exception in the case of multi-level holdings. Unclear is whether indirect subsidiaries controlled by the (listed) parent company (through a direct subsidiary or the parent company) by more than 75% are also covered by the exception. According to the wording of the preliminary draft, this would not be the case, as they are not directly held by a listed company. However, the ratio legis, namely, to identify and register the natural persons who are the beneficial owners, would still be upheld, as it is impossible for another natural person to directly or indirectly control the indirect subsidiary. The indirect subsidiary would necessarily and exclusively have to report the executives of the listed parent company as beneficial owners, whereby this information is already disclosed. The exception for direct subsidiaries is justified with this argumentation in the explanatory report to the PD-TLEA.

Penal provisions

Intentional violations of the reporting and disclosure obligations are punishable by a fine up to CHF 500'000 (Art. 41 para. 1 lit. a-c PD-TLEA).

Advisors

Another important amendment shall be made to the AMLA: Advisors shall be subject to the AMLA if they professionally offer legal or accounting advice (or services) and if they prepare or execute in this capacity a transaction for their clients related to the sale or purchase of real estate; the establishment, formation, management or administration of a company, a foundation or a trust; the organization of the deposits of a company; or the sale or purchase of a company (Art. 2 para. 1 lit.c, 3bis and 3ter PD-AMLA). Legal advisors would be subject to further due diligence duties under the AMLA, in particular, reporting to the Money Laundering Reporting Office Switzerland (MROS) in cases of suspicion relating to the AMLA (Art. 8b et seq. AMLA and Art. 13a-13e AMLA). The attorney-client privilege, under Art. 13 of the Lawyers Act (FMLA), remains reserved. It must, however, be critically observed how this potential conflict between the attorney-client privilege and the reporting obligation under the AMLA, as an exception to the attorney-client privilege, will be handled seeing that delimitation difficulties may arise.

Further amendments to the AMLA

The preliminary draft provides for the following additional steps: lowering the transaction thresholds for precious metals, gemstones, and real estate sectors; revising the sanction system of the self-regulatory organizations; and, based on the Embargo Act, obliging legal advisors to take organizational measures to prevent violations of the ordinances.

Next steps

The consultation period regarding the preliminary draft ends on 30 November 2023; it remains to be observed what adjustments will be made as a result of this consultation and in the parliamentary deliberations still pending.

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No legal or tax advice

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