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On 10 September 2020, the Council of States voted on various amendments to the Swiss Anti-Money Laundering Act (AMLA) and approved new regulation on the blockchain and distributed ledger technology (DLT):

It has decided to approve the planned amendment to the AMLA relating to the implementation of the Financial Action Task Force's (FATF) recommendations of the fourth country report on Switzerland. However, the Council of States excluded so-called "advisors" from the scope of the AMLA. Furthermore, the Council of States approved amendments to various laws relating to blockchain and DLT, which will result in changes to the AMLA as well. DLT trading systems will be regulated in the Financial Market Infrastructure Act (**FinMIA**), fall under a new, specific licensing category and be supervised accordingly. Are these decisions final? How does the legislative process continue? What consequences are financial intermediaries and other addressees of the AMLA facing? The authors provide answers to these questions.

AMLA and DLT: current political developments

By Thomas Müller
Dr. iur., Attorney-at-Law, LL.M.
Partner
Telephone +41 58 658 58 58
thomas.mueller@walderyss.com

and Thomas Nagel
Dr. iur., Attorney-at-Law
Associate
Telephone +41 58 658 20 00
thomas.nagel@walderyss.com

The AMLA is one of the fastest changing laws in Switzerland. Fundamental amendments are made to it practically every year. Just a few days ago, the Council of States voted on two draft laws which are of great importance for many economic players in Switzerland. In particular, service providers for companies and trusts, legal and tax advisors as well as operators in the field of blockchain and DLT are affected. In order to provide an overview, these changes are presented below, showing the state of the legislative process and when any changes can be expected to enter into force.

Implementation of the fourth country report on Switzerland by the FATF

Content of the draft law

The Federal Council approved the Communication on the amendment of the AMLA on 26 June 2019 (see Communication in Official Journal 2019, p. 5451 et seq. and draft law in Official Journal 2019, p. 5555 et seq.). The revision intends to implement the most important recommendations of the fourth country report on Switzerland by the FATF back in 2016, to increase legal certainty and to strengthen the Swiss financial sector in the long term.

The draft reform bill originally proposed eight measures: (i) new obligations for persons providing certain services in relation to companies or trusts – summarised under the term "advisors"; (ii) lower the threshold for cash payments subject to prudential supervision in the field of precious metals and precious stones trading from CHF 100,000 to CHF 15,000; (iii) implementation of a legal framework for the verification of the identity of the beneficial owner; (iv) a general obligation to update customer data; (v) adjustments in the area of the reporting system to the Money Laundering Reporting Office (**MROS**); (vi) improvement of transparency of associations with an increased risk of terrorist financing, i.e., associations, (vii) introduction of a control mechanism for the professional purchase of old precious metals; and (viii) give the Central Office for Precious Metals Control the role of the Money Laundering Supervisory Authority for assay officers (*Handelsprüfer*).

Resolutions of the National Council and the Council of States

In the 2020 spring session, the National Council did not support the draft law of the Federal Council. Politicians argued that the introduction of obligations for advisors, in particular for lawyers providing legal services in connection with companies or trusts, would lead to the factual elimination of the attorney-client privilege (article 321 Swiss Criminal Code, **SCC**). The extension of the scope of the AMLA to advisors was obviously the main reason that led to the National Council's decision not to approve the draft law of the AMLA. During the autumn session, the Council of States decided that the proposal would be accepted, but that the provisions on advisors would be excluded from the measures of the draft law. The agenda item will now be returned to the National Council, which must vote on this change. It is expected that the National Council will agree to the proposal of the Council of States and that the amendments will enter into force without the provisions on advisors. However, it is still too early for definitive statements. With the threshold of CHF 15,000 for cash payments in the trade of precious metals and gemstones and the controversial definition of "justified suspicion" in the law, which triggers an obliga-

tion to report to MROS (article 9 para. 1 letter a AMLA), there are two further points on which criticism from the National Council is expected.

Analysis

In our view, there are very persuasive arguments not to adopt the rules on advisors in the form in which they were proposed in the draft law. Too many questions, in particular on the unclear relation between the obligations in the event of suspected money laundering (e.g., the reporting obligation under article 9 AMLA) and the attorney-client privilege, remained unanswered. A key objective of the Swiss financial market laws – the protection of customers – would be undermined by the undifferentiated submission of attorneys under AMLA rules. The role of attorneys in the legal system could no longer be fulfilled by them: clients (e.g., banks) would be prevented from finding a solution with their attorneys or from asking a law firm for an internal investigation when coming into contact with potentially incriminated assets, as they would have to expect to be reported by any attorney to the authorities immediately. This shakes the attorney-client privilege, which is actually sacrosanct according to the understanding of Swiss law, to its very foundations. It should also be noted that attorneys are already subject to the AMLA under the current rules, for example when they accept, transfer or manage assets or otherwise act as financial intermediaries according to article 2 AMLA. Attorneys can of course also be punished if they knowingly assist their clients in money laundering (article 305bis SCC).

Although advisors (and attorneys) seem to be "off the hook", at least for the time being, this does not mean that the matter has been resolved. Earlier rather than later, the politicians will have to revisit the issue. The EU has already rather strict regulations covering advisors (see fourth and fifth iteration of the EU's anti-money laundering directive, AMLD IV/AMLD V), and this is putting political pressure on Switzerland to take legislative action. The FATF insists that lawyers in certain constellations also fall under national supervisory laws for combatting money laundering and terrorist financing. One can only hope that the legislator will consider a clear regulation and that next time a well-developed solution will be presented which takes adequate account of the attorney-client privilege. The next review of Switzerland by the FATF is planned for 2022. It is not assumed that Switzerland will be placed directly on the FATF's grey list ("Jurisdictions under Increased Monitoring") as a result of the deletion of the provisions on advisors. However, it can be expected that this point will be criticised again during the country review and that the Federal Council will soon be forced to present a new concept for the subordination of advisors under the AMLA.

Adaptation of federal law to developments in DLT

Content of the new regulation

The Federal Council approved the Communication to further improve the legal framework for blockchain and DLT on 27 November 2019 (see Communication in Official Journal 2020, p. 233 et seq. and draft law in Official Journal 2020, p. 329 et seq.). The draft law aims to increase legal certainty, remove obstacles to applications based on DLT and limit the risk of abuse. In order to provide a secure legal basis for the trading of rights through manipulation-resistant electronic registers, it is proposed to amend the securities legislation. As a consequence, the Federal Act on Intermediated Securities (**FISA**) has to be adjusted selectively. In addition, the law will clarify the separation of crypto-based assets from the bankruptcy estate in the event of bankruptcy. The banking insolvency provisions in banking law will be aligned with the adjustments in general insolvency law: Digital assets are excluded from custodian's estate in the event of bankruptcy.

In the context of the AMLA, the adaptation of the FinMIA is of particular interest. DLT trading systems, whose regulatory classification was previously unclear, will be covered by FinMIA (see definition in article 73a draft-FinMIA), fall under a new licensing category and be included in the AMLA as financial intermediaries if they fall under supervision of the Swiss Financial Market Authority (**FINMA**), according to article 2 para. 2 letter d^{quater} draft-AMLA. The legal framework is intended to create a licensing category for blockchain/DLT trading systems that can carry out activities that are considered financial intermediation and thus fall under the AMLA: a DLT trading system is defined (in simplified terms) as a commercially operated facility for the multilateral trading of DLT securities, the purpose of which is the simultaneous exchange of offers among several participants and the conclusion of contracts under non-discretionary rules (article 73a draft-FinMIA). To qualify as a DLT trading system, the traded assets must qualify as standardised securities in the sense of Swiss financial market law (article 2 FinMIA) and therefore be suitable for mass trading. From the point of view of financial market law, DLT trading systems are treated similarly to stock exchanges but benefit from various regulatory reliefs. Participants in DLT trading systems can be supervised financial institutions such as investment firms but also non-regulated legal entities and private individuals, provided that the latter trade in their own name and on their own account (article 73c draft-FinMIA). The latter constitutes a remarkable change in the regulation of stock exchanges and multilateral trading facilities. Under the current law, access to such exchanges and trading facilities have been limited to supervised financial institutions (which have been acting in their own name but for the account of their clients).

The Federal Council also announced in the Communication that it intends to adapt the Money Laundering Ordinance

(**MLO**) to the new technologies. Article 4 of the MLO should be specified to the effect that the issue of payment tokens in the course of an initial coin offering (**ICO**) is also covered by the AMLA (article 2 para. 3 letter b AMLA). In addition, it should contain the rule that decentralised trading platforms for DLT based currencies are also in the scope of the AMLA.

Resolutions of the National Council and the Council of States

In contrast to the previously discussed draft law, the adaptation of the laws to developments in DLT was not controversial in the Swiss parliament. The National Council approved the draft law in the 2020 summer session, and the Council of States accepted the bill in the autumn session without any dissenting votes. The changes are expected to enter into force in 2021. Instead of drafting a dedicated block chain law, Switzerland is seeking a pragmatic solution by making selective adjustments to existing laws.

Analysis

The revision of the law improves and clarifies uncertainties when it comes to DLT based assets – not only in the field of anti-money laundering, but also in civil law, bankruptcy law and especially in financial market law. The new Swiss DLT regulation is undoubtedly one of the most advanced in the world. Clear rules in the areas of financial market and money laundering related supervision also serve to convince sceptics who still unjustifiably associate the fintech sector with criminal activities. Switzerland therefore offers an ideal breeding ground for innovative startups.

Conclusion

While the future is still rather uncertain with regard to the FATF proposal and the submission of advisors under the scope of the AMLA, new regulations will soon be imposed on many DLT service providers. While the new provisions will provide legal certainty on issues that are unclear under the current legal framework, they will also impose various obligations on fintech companies.

As some changes are expected to enter into force in 2021, close legal monitoring of current projects is recommended in order to ensure that the numerous regulations.