

Switzerland to Introduce a Central Register of Ultimate Beneficial Owners

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With the Swiss Government initiating consultation procedures on new law reforms aimed at achieving money laundering standards set in the Financial Action Task Force (FATF) Recommendations, Switzerland might soon introduce a central register of ultimate beneficial owners. The proposed measures furthermore include additional due diligence obligations for financial intermediaries as well as legal professionals specifically. It remains to be seen whether stakeholder groups approve of the proposed law reforms and, in the case of implementation, whether the envisaged solutions will withhold the next FATF country assessment.

1. Introduction

The Swiss Government has introduced a new corporate law reform and initiated consultation procedures in that context, with the objective of creating a national register of ultimate beneficial owners (UBOs).¹ This newest legislative advance comes in the form of proposed measures in the realm of transparency in ownership of legal entities. The background to this planned innovation is a revision of Recommendation 24 and the accompanying interpretative note of the FATF Recommendations,² which was published in March 2022. It states that countries should decide which form of register or alternative mechanisms they will use to enable competent authorities to have effective access to information.

The proposal for a central UBO register comes after a decade of reforms to Swiss corporate law, notably the latest stock corporation reforms, which entered into force on 1 January 2023.³ In the past, topics such as terrorism, the rise of financial crime and financial crises have had an impact as driving forces of these reforms. Consequently, there have been international efforts to increase the transparency of legal entities with a view to combat financial crime. Money

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¹ See Swiss Federal Council, press release, “Federal Council initiates consultation on strengthening the anti-money laundering framework”, (Berne, 30 August 2023), <https://www.sif.admin.ch/sif/en/home/documentation/press-releases/medienmitteilungen.msg-id-97561.html> (“Press Release”).

² Federal Department of Finance, State Secretariat for International Finance, *Regulierungsfolgeabschätzung zur Schaffung eines Registers der wirtschaftliche berechtigten Personen von juristischen Personen — Prüfpunkte 1 und 2*, 2, <https://www.news.admin.ch/newsd/message/attachments/82325.pdf>.

³ For an overview of the latest reforms in stock corporation law, see Flavio Amadò and Matteo Brunone, “Il nuovo diritto della società anonima” (2003) 1 *Novità fiscali* 33, 33–41.

laundering, terrorist financing and corruption are of particular concern in this context.

On 30 August 2023, the Swiss Government offered new anti-money laundering measures for consultation with the goal of ensuring a trustworthy and competitive Swiss financial centre, aligned with international anti-money laundering standards.⁴ The proposal aims to strengthen the prevention and prosecution of financial crimes, thus promoting the integrity and reputation of the financial centre and economic location of Switzerland through transparency.⁵ Consultations will last until 29 November 2023 and the Swiss government will present the proposed legislation and a corresponding message to Parliament in 2024.

The present article explores the background leading to this proposed new legislation (Section 2), presents the concept the Federal Council intends to introduce into the regulatory framework (Section 3) and briefly compares international jurisdictions (Section 4) before offering some remarks on outlook and concluding observations (Section 5).

2. Background

In response to the international tendencies in the corporate sector, the Swiss Government intends to make money trails visible and create transparency when it comes to the ownership of legal entities. In this context, legislation has pushed anonymity off the playing table more and more. The *société anonyme* is suddenly not so anonymous anymore.⁶ This development has been made evident, for example, with the elimination of bearer shares in Switzerland.⁷

Transparency in the ownership of legal entities (and other legal structures) is used to identify the real economic beneficiaries, i.e. the UBOs, so that they cannot hide their assets and financial transactions from authorities. The driving forces behind these global efforts are the Financial Action Task Force (FATF) and the Global Forum on Transparency and Exchange of Information for Tax Purposes (GFTI). The FATF Recommendations on combating money laundering, corruption and the financing of terrorism are by now globally recognised and have established themselves as an international standard to ensure the availability of information about legal entities whenever the applicant can demonstrate a legitimate interest.

Transparency has become a significant topic in this context. One example is the new Ordinance on Transparency in Political Financing, which entered into force on 23 October 2022, and which will apply for the first time in the 2023 elections.⁸ Among other legislative innovations, the revised stock corporation law

⁴ Federal Department of Finance, State Secretariat for Fact Sheet on the consultation, <https://www.news.admin.ch/news/message/attachments/82290.pdf> (cited as: “Fact Sheet”).

⁵ Tabea Kaderli, Simon Iseli and Kilian Künzi, “Büro für Arbeits- und Sozialpolitische Studien BASS, Regulierungsfolgeabschätzung zur Schaffung einer gesetzlichen Regelung für ein Register der wirtschaftlich berechtigten Personen in der Schweiz, Schlussbericht, im Auftrag des Staatssekretariats für internationale Finanzfragen” (Bern, August 2023), IV, <https://www.news.admin.ch/news/message/attachments/82326.pdf> (cited as: “Regulierungsfolgeabschätzung”).

⁶ On the developments regarding the “*société anonyme*”, see Dieter Gericke and Daniel Kuhn, “eue Meldepflichten bezüglich Aktionären, Gesellschaftern und wirtschaftlichen Berechtigten—die ‘société anonyme’ ist Geschichte” (2015) AJP 849, 849–867.

⁷ On the developments regarding bearer shares, see Philip Spoerlé, “Marginalisierung der Inhaberaktie und neue Sanktionen bei AG und GmbH” (2019) GesKR 339, 339–354.

⁸ See Swiss Federal Council, press release, *Neue Transparenzregeln bei der Politikfinanzierung gelten erstmals für die Nationalratswahlen 2023* (Berne, 24 August 2022), <https://www.bj.admin.ch/bj/de/home/aktuell/mm.msg-id-90040.html>.

entered into force on 1 January 2023. Focus remains on compliance with anti-money laundering rules and regulations.⁹ One example of the Swiss Government implementing more rules in order to achieve transparency is the new obligation of raw material and commodities companies to disclose payments to public authorities.¹⁰

3. UBO registers in other jurisdictions

Since the FATF Recommendations have become an international standard for creating the legal framework to combat money laundering, the financing of terrorism and corruption, it comes as no surprise that many international jurisdictions have already implemented the rules laid out in the Recommendations.

The EU has adopted regulation aiming at the creation of a transparency register as early as 2015¹¹ and virtually all other European jurisdictions have already implemented a register of beneficial owners. Information such as an Ultimate Beneficial Owner's (UBO) name, first name, date of birth, country of residence and citizenship need to be transmitted to the national registers. In the context of the EU's new guidelines on anti-money laundering rules, it is being discussed whether further information, for example the place of birth, address, national or tax identification numbers as well as date of acquisition of the owner rights and a description of the corporate structure of the legal entity should also be included in the entries to the registers.

Meanwhile, Norway's register is not yet available, and the Hungarian National Tax and Customs Administration holds a non-public register of UBOs.¹²

Not all national registers in the EU are created equal, however. Differences already occur when it comes to the question of which legal entities need to register their UBOs: In Belgium, for example, only corporations, foundations and trusts or other legal persons similar to trusts are concerned,¹³ whereas the Netherlands apply the obligation to register the UBO to a longer list of entities, and trusts are subject to a different regulation entirely^{14,15} to name only one aspect in two jurisdictions.

While the EU guidelines state that such registers have to be accessible to everyone, this is not without criticism in the context of human rights and data protection rights. Even though an economic owner can apply to have access to their information restricted partially or completely, this is only possible where the

⁹ For an overview, see Urs Meier, "Änderungen im Aktienrecht ab 1. Januar 2023" (Swissmem Newsletter, 26 September 2022), <https://www.swissmem.ch/de/aktuelles/detailansicht/aenderungen-im-aktienrecht-ab-1-januar-2023.html>.

¹⁰ Article 964d-I. Swiss Code of Obligations (CO), SR 220.

¹¹ See Chapter III of the Directive 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation 648/2012 and repealing Directive 2005/60 and Commission Directive 2006/70 [2015] OJ L141/73, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015L0849>.

¹² Germany Trade & Invest, "Register der wirtschaftlichen Eigentümer in Europa" (Rechtsbericht, 23 February 2023), <https://www.gtai.de/de/trade/eu/recht/register-der-wirtschaftlichen-eigentuemer-in-europa-215440>.

¹³ Article 74 of the Belgian Law of 18 September 2017 on the prevention of money laundering and terrorist financing and on the restriction on the use of cash (Anti-Money Laundering Act), unofficial English translation available at: https://www.nbb.be/doc/cp/eng/2023/law_18_09_2017_en_update_02_2023_bnb.pdf.

¹⁴ Compare the website of the Netherlands Chamber of Commerce, accessible at UBO register for ultimate beneficial owner, available at: <https://business.gov.nl/regulation/ubo-register-ultimate-beneficial-owner/>.

¹⁵ See for a detailed list see Nicole Franz, Friederike Henke and Steffen Kaiser, "Das UBO-Register in Belgien und den Niederlanden" (2020) RIW 587, 589.

need to protect their interests is greater than the public interest to have transparency on UBOs, for instances in cases where such a UBO would be in danger of falling victim to a crime such as extortion.¹⁶

In Germany, for example, all members of the public enjoyed access to the information in the national register for economic beneficiaries,¹⁷ until the ECJ (European Court of Justice) decision in *Luxembourg Business Registers* (Joined Cases C-37/20 and C601/20) of 22 November 2022 limited access to only those with a qualifying interest.¹⁸ The cases involved two registered beneficial owners of Luxembourg-based companies who asked to limit access by any member of the general public to their data, because disclosure of that data would entail a disproportionate risk of infringement of their fundamental rights. The Court held that public access to the transparency registers is not valid and constitutes a serious interference with EU fundamental rights.

In Liechtenstein, the national register was created based on the Act on the Register of Economic Owners of Legal Entities of 3 December 2020,¹⁹ in force since 1 April 2021 and implementing Directive 2018/843 on the prevention of the use of the financial system for the purposes of money laundering of terrorist financing. However, disclosure of UBO information to third parties is strictly limited to the credible purpose of carrying out due diligence obligations or anti-money laundering and anti-terrorist financing acts.²⁰ UBOs also have the possibility to apply for restricted access to their information in case of considerable risk, however, no such application has been submitted yet, according to the national statistics published in 2023.²¹

In the UK, companies are required to keep information on their persons of significant control since 2016, when Pt 21A of the Companies Act 2006 came into effect.²² Section 790K(1) of Pt 21A of the Companies Act 2006 specifies the information to be collected on individuals subject to the obligation to register, including nationality, date of birth and residential address.²³ This information has to be accessible upon request to any person without charge, as long as the applicant provides their name and address as well as the purpose of the request for information.²⁴ The legislation also provides for an alternative method of recording

¹⁶ Article 30(9) of Directive 2018/843 amending Directive 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138 and 2013/36 (AML Directive 2018) [2018] OJ L156/43, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32018L0843>.

¹⁷ Peter Picht and Goran Studen, "Deutschland führt ein «Transparenzregister» für wirtschaftliche Berechtigte ein" EF 6-7/17, 426.

¹⁸ *Luxembourg Business Registers* (Joint Cases C-37/20 and C-601/20) EU:C:22:912, <https://curia.europa.eu/juris/liste.jsf?language=en&num=C-37/20>.

¹⁹ Gesetz über das Verzeichnis der wirtschaftlich berechtigten Personen von Rechtsträgern (VwbPG) (3 December 2020), <https://www.gesetze.li/konso/2021033000>.

²⁰ Article 17 para. 2 lit. c of the Liechtenstein Law on the Register of Ultimate Beneficial Owners of Legal Entities of 3 December 2020, <https://www.gesetze.li/konso/2021.033>.

²¹ See statistic published on the website of the Liechtenstein government listing the number of application for restriction of access to UBO information as zero for the years of 2021 and 2022 respectively, available at: <https://www.liv.li/de/landesverwaltung/amt-fuer-justiz/stiftungsaufsicht-und-geldwaeschereipraevention/verzeichnis-der-wirtschaftlich-berechtigten-personen-vwbpg-einschraenkung-der-offenlegung>.

²² UK Companies Act 2006 Ch.46, Pt 21A, Information about people with significant control, 16 April 2016, <https://www.legislation.gov.uk/ukpga/2006/46/part/21A>.

²³ Section 790K(1)(d)-(f) of Pt 21A of the Companies Act 2006.

²⁴ Section 790(O) of Pt 21A of the Companies Act 2006.

the information on their UBOs, namely a central register,²⁵ and allows for the exclusion of certain material from the information available to the public.²⁶

Most recently, in the newest legislative development, the UK has created the Economic Crime Transparency and Enforcement (ECTE) Act²⁷ through very swift legislation in 2022, in line with international efforts related to the situation in Ukraine.²⁸ The ECTE Act thus establishes a register of foreign companies and their UBOs²⁹ with the objective of preventing foreign owners from laundering money through UK property by creating foreign legal entities.³⁰ As such, the law is stricter than its counterpart for in-country companies and does not provide for the possibility to exclude certain information on UBOs.

4. Proposed Swiss measures

Following the above-mentioned FATF Recommendations and their implementation in other jurisdictions, as well as to push transparency also in the Swiss jurisdiction, the Federal Council has now initiated consultation procedures on new legislation to strengthen the already existing anti-money laundering framework.³¹ The proposal includes three main points, which shall be presented below with a special focus on the creation of a UBO register.

1. Creation of a central UBO register

One of the three measures the Swiss government proposes is the creation of a federal register for beneficial owners.

a) Concept

All legal entities under the law will be forced to identify, document and report their economic beneficiaries, whereas this information shall be available to authorities and financial intermediaries but not to the public.³² This presupposes that these entities conduct thorough self-checks and are able to provide high-quality information to the register and intermediary, and in doing so, they will be fulfilling standards set in the FATF Recommendations.³³ In terms of oversight, the proposed register shall be managed by the Federal Department of Justice and Police, with an audit unit in the Federal Department of Finance.³⁴

²⁵ Chapter 4 of Pt 21A of the Companies Act 2006.

²⁶ Chapter 5 of Pt 21A of the Companies Act 2006.

²⁷ UK Economic Crime (Transparency and Enforcement) Act of 15 March 2022, <https://www.legislation.gov.uk/ukpga/2022/10/contents/enacted>.

²⁸ UK Department for Business & Trade Policy Paper, Factsheet: Economic Crime and Corporate Transparency Bill overarching (22 September 2022), [gov.uk, https://www.gov.uk/government/publications/economic-crime-and-corporate-transparency-bill-2022-factsheets/fact-sheet-economic-crime-and-corporate-transparency-bill-overarching](https://www.gov.uk/government/publications/economic-crime-and-corporate-transparency-bill-2022-factsheets/fact-sheet-economic-crime-and-corporate-transparency-bill-overarching).

²⁹ Article 4 of ECTE Act.

³⁰ Solicitors Regulation Authority, “News: The new Economic Crime Act” (12 April 2022), <https://www.sra.org.uk/sra/news/sra-update-102-aml-act/>.

³¹ The Swiss Government had already implemented a duty for companies to keep an internal register of all owners of bearer shares and UBOs in 2014, see Thomas G. Albert, “The Impact of the Revised FATF Recommendations on Swiss Corporate Law and Particularly on Bearer Shares” (2014) 8 I.C.C.L.R. 265, 267 with references.

³² Federal Department of Finance, “Bundesgesetz über die Transparenz juristischer Personen und die Identifikation der wirtschaftlich berechtigten Personen—Erläuternder Bericht zur Eröffnung des Vernehmlassungsverfahrens” Report (Berne 30 August 2023), p.49, <https://www.news.admin.ch/newsd/message/attachments/82297.pdf> (cited as “Report”).

³³ Report, p.47.

³⁴ Fact Sheet.

b) Parties concerned

Three groups are concerned by the new obligation to identify UBOs in a central register:

- (i) *Swiss legal entities* are mandated to identify and report their UBOs. This includes all corporate forms envisaged by Swiss corporate law (stock corporations, limited liability companies, investment companies with variable capital (SICAV), investment companies with fixed capital (SICAF), cooperatives, associations required to register in the commercial register, foundations). Exemptions may apply under certain conditions for listed companies, pension funds and legal persons whose participation rights are held by public authorities. The Swiss Government envisages simplified identification and verification rules as well as a simplified reporting procedure for certain categories of entities and justifies this because, by virtue of their legal form, structure or other legal arrangements applicable to them, those legal entities bear a lesser risk of being used for malicious ends.³⁵ Additionally, certain legal entities of foreign law are to be entered in the register, namely those which have a branch listed in the commercial register, those whose actual administration is located in Switzerland and those that own or purchase real estate in Switzerland. The Swiss Government states that, compared to Swiss legal entities, foreign companies carry an elevated risk in the context of money laundering and terrorist financing.³⁶
- (ii) *UBOs and third parties* are the parties concerned when it comes to providing the information to be registered. In fulfilling their obligations, legal entities will rely on information based in particular on the reports of shareholders, or the UBOs themselves. This may require these parties' cooperation if the necessary information is not systematically available (notably cases of indirect or other control of the legal entity).³⁷
- (iii) *Financial intermediaries*, consultants subject to the Anti-Money Laundering Act (AMLA)³⁸ as well as attorneys subject to the Federal Act on the Free Movement of Lawyers (FMLA)³⁹ are also concerned with the creation of a UBO register.⁴⁰ They may access the register to obtain information necessary to them in order to fulfil due diligence obligations.⁴¹

³⁵ Report, p.47.

³⁶ Report, p.47.

³⁷ On the importance of stakeholders' co-operation, see Fabian Teichmann and Marie-Christin Falker, "Die Empfehlungen der EBF zu effektiveren Anti-Geldwäsche-Massnahmen" (2021) CB 416, 417.

³⁸ Federal Act on Combating Money Laundering and Terrorist Financing (Anti-Money Laundering Act, AMLA) of 10 October 1997, SR 955.0, https://www.fedlex.admin.ch/eli/cc/1998/892_892_892/en.

³⁹ Federal Act on the Free Movement of Lawyers (Lawyers Act, FMLA) of 23 June 2000, SR 935.61, , <https://www.fedlex.admin.ch/eli/cc/2002/153/en>.

⁴⁰ For additional measures concerning this third group, see Section 4.2.

⁴¹ Report, p.49.

c) Appreciation

Unlike its EU counterparts, the Swiss central UBO register will not be accessible to the public. Even though the ECJ has recently ruled that making all information on the UBOs in the respective registers public is an infringement on the UBOs' fundamental rights, members of the public can still obtain access upon proving a real interest deserving protection.⁴²

In Switzerland, however, the Government intends to make the central UBO registers accessible only to relevant authorities and certain intermediaries and service providers with elevated due diligence obligations.⁴³ On the one hand, this might comply with European requirements in the context of fundamental rights. On the other hand, a non-public UBO register might not fulfil the standards set by the FATF Recommendations.

d) Expected impact

One aspect of concern for corporates are the costs that the creation of such a central register would bring for them.⁴⁴

- (i) For the corporate legal entities mandated to identify and report their beneficial owners, this new regulation is estimated to bring a combined implementation cost of about CHF 13 million (Swiss francs).
- (ii) Economic owners and other third parties under obligation to cooperate are estimated to face initial costs of about CHF 8 million.
- (iii) The third group, intermediaries, might be the only one of the three to benefit slightly from the new regulation with due diligence obligations arising from the AMLA and are expected to experience either reductions of costs up to CHF 3 million or costs related to the proposed regulation of up to CHF 7 million.

2. Further anti-money laundering due diligence obligations

The second envisioned measure is the application of anti-money laundering due diligence rules also to certain consultancy activities, which carry an elevated risk of money laundering. Particularly legal advice falls into this category as well. This advance is in response to the previous proposal already treated by Parliament in 2019.⁴⁵ This proposed measure specifically aims at preventing the misuse of certain services provided by legal professionals for the purposes of money laundering or terrorist financing, and activities, such as the structuring of companies or transactions concerning real estate, which are considered to be particularly risky.⁴⁶ The position of the legal profession and lawyers' and notaries' duty of professional secrecy shall be respected.⁴⁷

⁴² See Section 3.

⁴³ Report, p.17.

⁴⁴ For a detailed estimative cost analysis, see *Regulierungsfolgeabschätzung*, IV f.

⁴⁵ Legislative proposal for AMLA reforms, BBl 2019 5555, 13 August 2019, <https://www.fedlex.admin.ch/eli/fga/2019/1933/de..>

⁴⁶ Report, p.110.

⁴⁷ See Fact Sheet and Report, p.127.

It remains to be seen how far the Swiss Government will be able to push this measure in particular, given the considerable push-back Swiss legal professionals have been able to confront Parliament with in 2019 when the latter discussed previous proposed measures.⁴⁸ A crucial point of concern for legal professionals is the waiver or loss of the protection of professional confidentiality and the administrative burden related to these due diligence obligations.⁴⁹

3. Additional measures

Finally, the Swiss government also offers a series of additional measures to strengthen the anti-money laundering framework for consultation. These include measures to prevent sanctions under embargo legislation from being breached or circumvented. Additionally, the Swiss Government proposed to limit all cash payments in precious metals trading to CHF 15,000. Previously, the threshold was set at CHF 100,000, which the Swiss Government had only recently implemented and which applied for the first time for the financial year 2022.⁵⁰ While it would still be possible to make cash payments above this limit, certain due diligence rules would have to be applied and complied with. The proposed legislation also subjects all cash payments in real estate business to anti-money laundering due diligence rules, irrespective of the monetary amount involved.⁵¹

5. Outlook and concluding observations

A study on the expected consequences of the proposed legislation has found that overall, economic effects can be expected mainly in terms of international acceptance, reputation of financial institutions and legal certainty. The proposed legislation should not have any direct influence on the location attractiveness.

As of this time, art.3 of the AMLA already mandates financial intermediaries to know exactly who they are dealing with in terms of contracting parties.⁵² More legislation followed to concretise this due diligence obligation.⁵³ In practice, it therefore remains to be seen how much of an improving factor the national register to be implemented will be in combatting money laundering. With the latest FATF report on Switzerland only dating from 2020, the next country assessment will certainly happen in the foreseeable future, having been pushed back indefinitely from 2022. Whether a non-public UBO register as proposed by the Swiss government suffices to fulfil FATF requirements is up to the assessors to decide.

⁴⁸ See, among others, Peter Lutz and Martin Kern, “Anwälte im GwG-Schleppnetz—Berufsgeheimnis als Beifang” (2019) 10 *Anwaltsrevue* 435.

⁴⁹ Practical aspects remain to be clarified, such as an attorney commencing work before being formally mandated. See also Markus Meuwly, “Revision GwG—Beratende Anwälte im Visier des Regulators” (2020) 7 *Anwaltsrevue* 12.

⁵⁰ Rolf Sethe and Giulia Hiddink, “Entwicklungen im Gesellschafts- und im Wertpapierrecht” (2021) 117 *SJZ* 1015, 1016.

⁵¹ On this measure, see Press Release; Report, p.55.

⁵² Thomas Nagel and Klaus Wiesehöfer, “Identifizierungspflichten von Banken bei Geschäftsbeziehungen mit Sitzgesellschaften” (2022) 118 *SJZ* 139, 141; see also Tamara Taube, *Entstehung, Bedeutung und Umfang der Sorgfaltspflicht der Schweizer Banken bei der Geldwäschereiprävention im Bankenalltag* (Zurich: St. Gallen, 2013), p.106; Dieter Gericke and Daniel Kuhn, “Radikalkur bei der Inhaberaktie und Neuerungen bei den gesellschaftsrechtlichen Meldepflichten” (2019) *AJP* 1272.

⁵³ See also arts.44–55. AMLO-FINMA (Anti-Money Laundering Ordinance of the Swiss Financial Market Supervisory Authority, 3 June 2015, SR 955.033.0) and CDB 20 (Agreement of the Swiss Banks’ on the Code of Conduct with Regard to the Exercise of Due Diligence, 1 January 2020).

As was already visible with the previous parliamentary advance in creating new due diligence obligations in 2019, especially for the legal professions, the push-back was considerable and may be a force to be reckoned with again.

The consultation on the proposed legislation lasts until 29 November 2023. Depending on the amount and intensity of dissenting voices, the Swiss Government may then present the proposed legislation and message to Parliament in 2024.