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Comments on the consultation paper entitled – The Review of the FATF Standards – Preparation for the 4th Round of Mutual Evaluations (second public consultation)

Dear Sir or Madam

The Swiss Federation of Small and Medium Enterprises (sgv) is the largest umbrella organization for private businesses in Switzerland. As such, it represents over 99 percent of all Swiss enterprises and specific professional organizations. In our understanding, it is primordial for business to assume responsibility in the social, economic and regulatory realm; however, overbearing regulation must be avoided by allowing the business sector to self-govern itself.

Basing on these core-values, we see three important shortcomings in the consultation paper (a more detailed explanation of our position follows below):

- Unclear and inconsistent updates regarding beneficial owners (Rec. 5, 33 and 34)
- Overly strict measures for managing a register of beneficial owners, bearer shares and nominee shareholders (Rec. 33)
- No expansion of international cooperation for the purpose of exchanging information between the responsible authorities (Rec. 40)

I. Introductory remarks

The recommendations made in the consultation paper seem overly vague, making thus the task of commenting them difficult. It is with unease that general assumptions on the specificity of the recommendations have to be made in order to infer on how they could influence Swiss regulations. The more un-determined the recommendations are, the more open they become in the process of their implementation. This, on its turn, impacts the reliability of the recommendations negatively. From our point of view, a revision of the recommendations made seems also premature.

Furthermore, the suggested changes would result in immense additional costs for financial institutions. In some cases, the proposed requirements extend beyond the framework of combating money laundering and the financing of terrorism, and must therefore be regarded as inappropriate. It is essential that a clear cost/benefit analysis be conducted for these changes.

II. Comments on the individual recommendations and suggested changes

II.a Beneficial ownership

Ad Recommendation 5

In general we agree with the changes. However, we assume that the pursuit of clarity will not entail a requirement to identify the beneficial owner in the same manner as the contractual partner, even if the wording is "to identify the beneficial owner". If in effect identification of the beneficial owner is meant, then this suggestion must be unequivocally rejected. Furthermore, we also reject more extensive measures for verifying beneficial owners.

The clear distinction between beneficial owners and beneficiaries is crucial.

The suggested changes pertaining to the identification of contractual partners and the understanding of their business activities as well as determining beneficial owners have already been implemented in Switzerland. Swiss financial intermediaries identify the contractual partner (legal entities and asset-holding entities), verify their identity and determine the beneficial owners by means of Forms A and T, created specifically for this purpose by applying a risk-based approach. We are of the opinion that Forms A and T are sufficient for legal arrangements for the purpose of verifying identity. Expansion of this Swiss standard is thus rejected based on the risk-based approach and on the fact that Switzerland has already achieved a very good standard and consistently implements the regulations.

Ad Recommendation 33

We welcome the fact that the FATF recognizes that there is no particular need for transparency among listed companies and thus has not planned any provisions to this effect. Listed companies are already subject to disclosure obligations under stock market law.

However, the general implementation of new regulations for legal entities will lead to unnecessary administration costs for the producing economy and should clearly be rejected.

The benefits of introducing a requirement to maintain a register of beneficial owners are far outweighed by the costs of such a measure. Moreover, the requirement that the basic information in registers be available to the public is already met in Switzerland through the Commercial Register, which is available to the public and can be viewed free-of-charge worldwide via the basic data. We would like to emphasize that all persons representing companies and foundations entered in the Commercial Register have been formally and personally identified at a counter or by notarization – this includes the provision of an identification document.

The measures to combat abuse of bearer shares are very extensive. Suggestions a to c are generally rejected. Suggested changes a and b would lead to the elimination of bearer shares, which is rejected due to its far-reaching impact. Possible abuse could be sufficiently avoided by means of the existing system in place in Switzerland to determine the beneficial owner.

The suggested measures in connection with combating abuse with regard to nominee shareholders also go too far. Solution a requires changes to other legal areas as well as intervention in the private sphere, which is not desirable. In this area too, the existing method of determining beneficial owners is sufficient for the purposes of combating abuse. Here it must also be noted that it is not at all clear who should be in charge of market oversight in relation to the battle against unregistered nominee shareholders. We feel that this should not be the FATF.

The call for similar measures in connection with foundations, institutions and limited liability partnerships is also rejected. The existing provisions are wholly sufficient: financial intermediaries must identify and maintain written records on beneficial owners after applying the risk-based approach. More extensive measures are not required.

The FATF's aim of striking a balance between avoiding unnecessary burdening of the producing industries and collecting required information in the financial sector (RBA) can best be achieved by adopting the Swiss standards for distinguishing between operational companies that use their own resources to develop a business activity and vehicles that serve financial control, governance and optimization purposes. No further recommendations are therefore necessary.

Finally, the FATF intends via Recommendation 33 to render more precise definitions in connection with the steps that the countries must take in order that the required information on beneficial owners can be accessed quickly. The requirements create a conflict regarding the right to the protection of privacy. It must therefore be ensured that an automatic exchange of information is not snuck in through the back door (see the comments below regarding Rec. 4 and 40). In addition, Swiss administration, criminal and civil law already provide the responsible authority (particularly in the areas of legal and administrative assistance) with sufficient access to information on shareholders and beneficial owners.

Ad Recommendation 34

We ultimately reject the suggestions regarding responsibility between countries with applicable jurisdiction which forms the legal basis for agreements (so-called applicable law), and countries with non-applicable jurisdiction, but where the actual administration of a mandate takes place. The result could be that a large part of regulatory responsibility regarding trusts, foundations, fiduciary companies, etc. would have to be administered in countries with applicable law, rather than in the country actually responsible for the administration of the mandate, as has been the case. The benefits of such a regulation would not outweigh the costs and would increase administrative expenses. Furthermore, it must be noted here that not all countries have trust law, which would create additional problems for the implementation.

The suggested changes made under Recommendation 33, such as the registration and related disclosure of beneficial owners as well as the assets of a mandate such as a trust, must also be clearly rejected. This type of registration obligation (especially for international succession planning) would massively infringe upon the protection of privacy.

A similar guarantee of quick access to information regarding beneficial owners for asset-holding entities such as trusts, fiduciary companies and entailed estates may not, we wish to repeat, be permitted to result in an indirect exchange of information sneaking in through the back door.

II.b Data protection and privacy

Ad Recommendation 4

The duties related to the fight against money laundering and the rights related to this data and personal protection could come into conflict. For this reason, the implementation must only be carried out within the limits of national laws so that it does not result in a circumvention of national data protection laws and legislation on protection of privacy.

Another reason for this restriction is to ensure that international financial intermediaries are not faced with unsolvable problems. The exchange of information must remain limited, in particular due to the lack of international (i.e. extending beyond the EU) standards on the protection of personal data.

Financial intermediaries cannot and should not be forced to disregard recognized regulations on the protection of personal data by submitting this data to states with insufficient levels of protection.

II.c Group-wide compliance programs

Ad Recommendation 15

The changes suggested by the FATF that group-wide programs aiming to combat money laundering and to exchange information are to be introduced for financial intermediary groups are fundamentally a good idea. This will relieve the parent company of some of the burden. However, the changes could come in conflict with national regulations because information is being exchanged.

In addition, there is the danger of placing companies at a disadvantage if they are domiciled in a country with very strict requirements and consequently necessitates all branches to fulfil the requirements for these group-wide programs, while companies domiciled in a country with fewer regulations are at an advantage.

Swiss law already recognizes such group-wide harmonization regarding the most important policies (see Art. 5 of the Ordinance of the Swiss Financial Market Supervisory Authority on the Prevention of Money Laundering and Terrorist Financing (FINMA Anti-Money Laundering Ordinance, AMLO-FINMA)).

II.d Special Recommendation VII (wire transfers)

It seems logical that in addition to originator details, questions regarding beneficiary data should be regulated. In this regard, however, it must be ensured that only those financial intermediaries who are actually able to perform a check must do so and that all other financial intermediaries are released from the obligation to do so. Taking into account the cost/benefit aspect, it must be noted that due diligence cannot be performed for every stage of transfers involving multiples stages.

In particular, if a UN sanction is affected, payments for intermediaries are rejected. These duties must be performed by the paying or receiving bank. Intermediary banks are only able to do this to a limited extent as not all information is available to them.

Swiss law already takes this aspect into account. It stipulates that an intermediary (i.e. the correspondence bank) must only perform manual risk-based spot checks with regard to completeness of data (see Art. 34 para. 2 AMLO-FINMA).

II.e Targeted financial sanctions in the terrorist financing and proliferation financing contexts

We welcome the suggested measures in principle and they have already been implemented in Switzerland. However, the proposed measures should not extend beyond those of the UN resolutions.

II.f International cooperation

Ad Recommendation 40

The proposal for an automatic exchange of information between FIUs should obviously be rejected. Any exchanges of information may only take place within the framework of national legislation (legal and administrative assistance) and the national legislator must define who can exchange which information with whom and under which conditions within the framework of the relevant administrative assistance.

If Recommendation 40 is modified as suggested despite our rejection, strong safeguards must be put in place. These safeguards must also be agreed to at the international level in order to create a completely level playing field.

II.g Other issues included in the revision of the FATF Standards

Due to the fact that the recommendations have not been implemented in some countries, the question of implementing the standards for individual partners is no longer of importance. The key issue is in fact the risk concerning individual countries and their implementation of the recommendations. This approach is clearly rejected as it could increase pressure on individual countries. It could result in a black list, which is not the aim here.

However, consistent implementation of the risk-based approach under supervision would be very welcome. In this regard, a standard national risk policy in dealing with national PEPs is also required. The standard should help countries define risk policies which are based on the degree of domestic corruption and the obvious irregularities in the shadow economy as a corruption-like part of the economy. It should be pointed out that the money laundering risk related to domestic PEPs in Switzerland is low. For this reason, a pragmatic procedure tailored to each individual country is preferable to a general broadening of regulation.

Furthermore, we must also stress, as previously explained in the response to "Consultation Paper 1", that an expansion to include domestic PEPs in Switzerland is fundamentally rejected.

Yours sincerely

Schweizerischer Gewerbeverband sgv

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