



TO: Chairperson, Select Committee on Finance [Mr Y Carrim, MP]

FROM: Constitutional and Legal Services Office

DATE: 7 October 2022

SUBJECT: AMENDMENTS OF THE SCHEDULES TO THE FINANCIAL INTELLIGENCE CENTRE ACT, 2001 (ACT 38 OF 2001) – questions to Legal Services on document from Select Committee on Finance at its meeting on 23 September 2022

During its meeting on 23 September 2022, the Select Committee on Finance (SeCoF) addressed various questions to the Constitutional and Legal Services Office (CLSO) on its observations as documented by the support staff of the Select Committee concerning the draft amendments to the Schedules to the Financial Intelligence Centre Act.

1. **Question 1:** *At para 4.3 of the document a concern raised by the NCRF on the potential Court challenge if the amendments are approved and implemented in the current form and the FIC's response that when these regulations are passed, the Constitutional Court would not entertain a hypothetical question of what the implications would be, and its assertion that it is unlikely that the Constitutional Court would rule on these amendments, were noted.*

1.1 Section 167(3) of the Constitution of the Republic of South Africa, 1996 (the Constitution) provides that the Constitutional Court is the highest court of the Republic may decide—

- (i) constitutional matters; and
- (ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court; and

makes the final decision whether a matter is within its jurisdiction.

1.2 Subsection (4) of section 167 provides that only the Constitutional Court may—

- (a) decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state;
- (b) decide on the constitutionality of any parliamentary or provincial Bill, but may do so only in the circumstances anticipated in section 79 or 121;
- (c) decide applications envisaged in section 80 or 122;
- (d) decide on the constitutionality of any amendment to the Constitution;
- (e) decide that Parliament or the President has failed to fulfil a constitutional obligation; or
- (f) certify a provincial constitution in terms of section 144.

1.3 Subsection (5) provides that the Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, the High Court of South Africa, or a court of similar status, before that order has any force.

1.4 The assessment of the impact of the amendments to the Schedules would have to fit into these broad parameters to be entertained by the Constitutional Court. Fundamentally, the application to review the amendments to the Schedules would have to indicate a constitutional issue and an arguable point of law. The point must be one of law; and it must be arguable.¹

2. **Question 2:** *At paragraph 4.4 of the document a comment was requested from CLSO on potential challenges if the rest of the proposed amendments in the FICA Schedules are acceptable except for the issues raised by the NCRF.*

¹ *Paulsen and Another v Slip Knot Investments 777 (Pty) Limited* [2015] ZACC 5.

2.1 The Financial Intelligence Centre Act provides in sections 73,² 75³ and 76⁴ for the Minister to amend Schedules 1, 2 and 3, respectively. These three sections contain

² **73. Amendment of list of accountable institutions. — (1)** The Minister may, by notice in the Gazette, amend the list of accountable institutions in Schedule 1 -

- (a) add to the list any person or category of persons if the Minister reasonably believes that that person or category of persons is used, or is likely to be used in future, for money laundering purposes;
 - (b) delete any institution or category of institutions from the list if the Minister reasonably believes that that institution or category of institutions is not being used, and is not likely to be used in the future, for money laundering purposes; or
 - (c) make technical changes to the list.
- (2) Before the Minister amends Schedule 1 in terms of subsection (1) (a) or (b), the Minister must consult the Centre, and—
- (a) if only one person or institution will be affected by the proposed amendment, give that person or institution at least 30 days' written notice to submit written representations to the Minister; or
 - (b) if a category of persons or institutions will be affected by the proposed amendment, by notice in the Gazette give persons or institutions belonging to that category at least 60 days' written notice to submit written representations to the Minister.
- (3) Any addition to or deletion from the list of accountable institutions in Schedule 1 in terms of subsection (1) (a) or (b) must, before publication in the Gazette, be approved by Parliament.

³ **75. Amendment of list of supervisory bodies. — (1)** The Minister may, by notice in the Gazette, amend the list of supervisory bodies in Schedule 2 to—

- (a) add to the list any entity or functionary which performs supervisory or regulatory functions in relation to any category of accountable institutions;
 - (b) delete any supervisory body from the list if that supervisory body no longer performs supervisory or regulatory functions in relation to any category of accountable institutions; or
 - (c) make technical changes to the list.
- (2) Before the Minister amends Schedule 2 in terms of subsection (1) (a) or (b), the Minister must consult the Centre, and give the entity or functionary concerned, or the supervisory body concerned, as the case may be, at least 60 days' written notice to submit written representations to the Minister.
- (3) Any addition to or deletion from the list of supervisory bodies in Schedule 2 in terms of subsection (1) (a) or (b) must, before publication in the Gazette, be approved by Parliament.

⁴ **76. Amendment of list of reporting institutions. — (1)** The Minister may, by notice in the Gazette, amend the list of reporting institutions in Schedule 3 to—

- (a) add to the list any person or category of persons if the Minister reasonably believes that the person or category of persons is used, or is likely to be used in future, for money laundering purposes but it is not appropriate to impose on such person or category of persons the duties which apply to an accountable institution under this Act;
 - (b) delete any person or category of persons from the list if—
 - (i) the Minister reasonably believes that the person or category of persons is not being used, and is not likely to be used in the future, for money laundering purposes; or
 - (ii) the person or category of persons is to be added to the list of accountable institutions; or
 - (c) make technical changes to the list.
- (2) Before the Minister amends Schedule 3 in terms of subsection (1) (a) or (b), the Minister must consult the Centre and—
- (a) if only one person will be affected by the proposed amendment, give the person at least 30 days' written notice to submit written representations to the Minister; or
 - (b) if a category of persons will be affected by the proposed amendment, by notice in the Gazette give persons belonging to that category at least 60 days' written notice to submit written representations to the Minister.
- (3) Any addition to or deletion from the list of reporting institutions in Schedule 3 in terms of subsection (1) (a) or (b) must, before publication in the Gazette, be approved by Parliament.

the empowering provision permitting the Minister to make the draft amendments to Schedules 1, 2 and 3 to the Financial Intelligence Centre Act. The sections also require that the Minister follow the prescribed procedure in exercising this power.

2.2 First, there is an obligation on the Minister to consult the Financial Intelligence Centre and any persons or institutions affected by the amendments (see sections 73(2), 75(2) and 76(2)). Second, Parliament is required to approve the draft regulations before the Minister may publish the amendments in the Government Gazette. The Act does not empower Parliament to approve the regulations in part or with amendments. To achieve this result, Parliament would have to reject the amendments to the Schedules and indicate that it will approve the amendments if these are consistent with the proposals by the respective committees.

2.3 What is required in the respective subsections (3) of sections 73, 75 and 76 of the Financial Intelligence Centre Act, is that both Houses of Parliament approve the draft amendments by resolution. Hence, Parliament may approve or reject the draft amendments. To enable the Houses, the Standing and Select Committees on Finance must report to the respective Houses, indicating either that the committee recommends approval of or rejects the amendments to the Schedules. The respective Houses will consider the reports for adoption.

3. **Question 3:** *At paragraph 4.5 of the document Members noted the NCRF's concerns that FATF has not conducted a risk assessment impact study to determine the impact on the retail clothing sector, as financial inclusion might be compromised. This was seen as a knee-jerk reaction and the FIC was cautioned that the proposed amendments should not set the government up for failure (unintended consequences of these regulations).*

3.1 The question concerning the legal implications of the unintended consequences of these regulations is a question that is related to whether the decision to implement the regulations affects the rights of specific person or persons, and whether that can withstand constitutional muster. The impact of the regulations will have to be proportional to the purpose of the regulations and will have to satisfy the least restrictive means test provided for in section 36 of the Constitution.

4. **Question 4:** *At 4.8 of the document the example of Botswana was raised, which was grey listed and later on removed from the list. The FIC clarified that the EU declared Botswana “red-listed” until the country addressed the challenges identified by FATF and later removed from the grey list and that Botswana’s matter was not related to the provision of credit.*

4.1 In its plenary held on 21 October 2021 in Paris, the Financial Action Task Force (FATF) removed Botswana from its grey list of jurisdictions, after Botswana (and Mauritius) received an on-site visit. Botswana and Mauritius work with Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG) of which both countries are a member, to continue to strengthen their AML/CFT regime. ESAAMLG is an affiliate member of the FATF. ESAAMLG assesses Botswana’s progress in addressing the technical compliance deficiencies previously identified for the purpose technical compliance re-ratings in order to be removed from the EU blacklist and the FATF grey list.⁵


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⁵ <https://bookbinderlaw.co.bw/botswana-compliance-update-fatf-grey-list/> ;
<https://www.republicworld.com/world-news/rest-of-the-world-news/fatf-removes-mauritius-botswana-from-its-grey-list-includes-jordan-mali-and-turkey.html> .