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Social Trading

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The ongoing digitization of the financial services markets and the near ubiquitous availability of smartphones and mobile broadband internet resulted in a rise of digital-only financial service providers over the recent years. Unlike their more traditional "brick and mortar" competitors, these new financial service providers offer their services almost exclusively through digital channels and at significantly lower costs, making financial services, in particular securities trading, available to a broad base of retail investors. Combine this phenomenon with social media features, such as influencers, and the result is social trading. In this article, we take a closer look at the Swiss financial market regulatory aspects of social trading.

By Patrick Schärli / Patrick Schleiffer

1) What is social trading?

The core of social trading is the idea of making one's trading behavior and past trading returns (or losses) visible to others, be it your friends or any other followers. The transparency over the trading behavior allows friends, followers and other peers to copy or mirror trading activities of other users of the relevant social trading platform. In many ways, following a trusted peer or other expert trader with copy trading or mirror trading can be seen as a low-cost alternative to traditional portfolio management offered by incumbent financial services providers.

Social trading is usually offered through easy to access digital channels, allowing the operator of the social trading platform to offer the securities trading services, in particular trade execution, at low prices. Besides the competitive pricing, one of the key appeals of social trading is that it requires little or no knowledge about financial markets on the part of the regular user of such platforms; analyzing financial and fundamental data of potential investments is replaced by selecting and following trusted peers or expert traders. Social trading is, thus, particularly interesting for retail clients.

In this article, we use the term ***Popular Trader*** for those traders that other users of the platform follow (one can think of them as the equivalent of social media influencers). The term ***Copy Trading*** refers to the technique of copying selected trades of a Popular Trader and the term ***Mirror Trading*** refers to the automatic copying of all trades made by a selected Popular Trader.

In this article we discuss social trading platforms that offer to their clients the full range of trade services and that hold the relevant financial instruments for their clients. It would, however, also be conceivable that a social trading platform limits itself to providing a platform for users to share their trading strategies or portfolios, without also offering trade execution services.

2) Regulation of social trading platform operators

a) Licensing requirements

A social trading platform offers its users execution capabilities for securities trading. A social trading platform also maintains client accounts and holds securities for the account of its users. Additionally, a social trading platform holds cash deposits for its users (*i.e.* the not invested amounts), although some social trading platforms do not offer this service directly, but rather through a licensed bank.

Often, social trading platforms offer complex financial instruments (such as derivatives, structured products, CFDs) in order to enable platform users to mirror (synthetically) a portfolio of a Popular Trader and allowing the platform users to approximate the asset distribution and weighting of the portfolio they mirror. These types of financial instruments are typically issued by the social trading platform (*i.e.* the platform or one of its affiliate acts as counterparty).

From a Swiss law perspective, executing securities transactions for clients and maintaining securities accounts for clients are activities that require a securities firm (*Wertpapierhaus*) license under the Financial Institutions Act (***FinIA***). Additionally, issuing certain types of derivatives (namely standardized and mass-tradeable derivatives) and publicly offering such derivatives is an activity that is reserved for banks and securities firms. Whether or not the financial instruments issued by social trading platforms fall within this type of reserved activity would have to be assessed on a case-by-case basis given that some of these instruments are tailored to relevant users of the social trading platform and/or have limited tradability.

As far as holding cash positions of platform users is concerned, such activity may qualify as accepting deposits from the public, an activity that is subject to licensing requirements under the Swiss Banks and Savings Banks Act (***BankA***). If such cash positions are merely held temporarily for the purposes of settlement of transactions, the relevant cash positions do not qualify as deposits pursuant to an exemption under the Swiss Banks and Savings Banks Ordinance. If the relevant platform operator is licensed under the BankA, no additional securities firm license is required under the FinIA. Having said that, the internal organization of such a licensed platform operator would still have to be adequate for both the banking type of business (*i.e.* the acceptance of customer deposits) and the securities firm business (*i.e.* securities trading, issuing of derivative instruments).

The aforementioned licensing requirements under the BankA and the FinIA apply to Swiss-based financial institutions. As far as non-Swiss financial institutions are concerned, licensing requirements under the BankA and the FinIA are triggered only if such non-Swiss financial institution maintains a permanent physical presence (*e.g.* a branch or a representative office) in Switzerland. In the absence of such permanent physical presence in Switzerland, pure cross-border offerings of non-Swiss financial institutions are not generally not subject to licensing requirements under Swiss financial markets laws (with the exception of certain consumer financing activities and the offering of insurance products or if such non-Swiss financial institutions were also to become a direct participant of a Swiss trading venue).

Social trading platforms are typically not operating out of Switzerland, but are rather addressing the Swiss market on a cross-border basis through a digital service offering. Consequently, such non-Swiss operators of social trading platform are typically not subject to licensing requirements in Switzerland.

b) Financial services regulation

Separately, Swiss law dictates the rules on providing financial services to Swiss clients. These rules, which are set out in the Financial Services Act (***FinSA***) and its implementing ordinance (***FinSO***) apply irrespective of whether or not the relevant financial service provider is based in Switzerland or outside of Switzerland. Thus, also non-Swiss operators of social trading platforms have to assess their obligations under the FinSA when offering financial services to Swiss-based clients.

Under the FinSA, the term "financial service" includes the following activities:

– acquisition or disposal of financial instruments (essentially, this refers to execution of orders in financial instruments for clients);

– receipt and transmission of orders in relation to financial instruments;

– administration of financial instruments (portfolio management);

– provision of personal recommendations on transactions with financial instruments (investment advice); and

– granting of loans to finance transactions with financial instruments (the focus being on margin loans, Lombard loans and similar type of transactions).

FinSA defines "financial instruments" broadly to include shares, bonds and other debt instruments, derivatives, structured products, funds (including ETFs) and certain structured products. Many of these type of instruments can be traded on social trading platforms.

i. Social trading platforms are offering financial services

For purposes of the FinSA, social trading platforms qualify as a financial service provider given that they execute orders in financial instruments for clients in Switzerland (for purposes of the FinSA, a "client in Switzerland" is a client that is either (a) an individual that is permanently resident in Switzerland, (b) a legal entity that is incorporated in Switzerland, or (c) a Swiss branch of a non-Swiss legal entity). While the FinSA provides for a reverse solicitation exemption, such exemption is rather narrow and it is not applicable in cases where a financial service provider specifically addresses the Swiss market (*e.g.* through a website that is also directed to potential Swiss clients).

Besides acquiring or disposing of financial instruments for clients or transmitting orders in financial instruments to an execution broker, social trading platforms may also be considered as engaging in portfolio management. This is particular true in case of Mirror Trading, *i.e.* where the client authorizes the social trading platform to automatically execute transactions in financial instruments based on the portfolio and the trading activity of a Popular Trader. In this respect, the FinSA analysis is similar to those in the UK or under European regulations (see for example the assessment of copy trading by the United Kingdom Financial Conduct Authority (<https://www.fca.org.uk/firms/copy-trading>; last accessed on 16 March 2021) or the position of the European Securities and Markets Authority (ESMA) in response to question no. 9 of its MiFID Questions and Answers, Investor Protection & Intermediaries (>https://www.esma.europa.eu/sites/default/files/library/2015/11/2012-382.pdf>; last accessed on 16 March 2021)).

ii. FinSA obligations applicable to social trading platforms

Under the FinSA, also non-Swiss financial service providers are subject to rules of conduct (*e.g.* information obligations, best execution, suitability and appropriateness assessments (in case of investment advice or portfolio management), document retention obligations) as well as certain organizational requirements. In addition, financial service providers are required to categorize their client: Similar to MiFID II, the FinSA provides for a client categorization, consisting of three different types of investors, namely private clients, professional clients, and institutional clients. No client categorization is required if all clients are treated as private clients, which we expect to be typically the case for social trading platforms given their focus on retail clients.

To the extent a non-Swiss financial service provider (such as a social trading platform) is already subject to comprehensive financial services regulation outside of Switzerland (in particular in the EU or in the United Kingdom), the question arises whether such a non-Swiss financial service provider can rely on its home country conduct and organizational rules and requirements, instead of applying similar rules laid out in the FinSA. While the FinSA does not provide for an explicit substituted compliance regime, it was in our view the clear intention of the Swiss legislator that FinSA should not exceed comparable requirements and rules under the European laws and regulations (in particular MiFID II). Accordingly, to the extent a non-Swiss financial service provider complies with MiFID II (and the relevant national implementing laws) when servicing clients in Switzerland, such non-Swiss financial service provider should in our view, for the most part, also meet the requirements of the FinSA. This is in particular true for a client categorization that is equivalent to the FinSA rules (such as MiFID II, which is explicitly mentioned in the explanatory materials to the ordinances implementing the FiniA and FinSA as an equivalent standard).

When applying their home country regulations, non-Swiss financial services provider should, however, be aware that the FinSA provides for a number of specific Swiss features, non-compliance with which may result in enforcement action or criminal proceedings. These specific Swiss features also apply to non-Swiss financial service providers (such as social trading platforms):

- Obligation to disclose retrocessions, kickbacks and similar payments. Such payments need to be either handed over to the client or the client explicitly have to waive claims to such payments;
- Requirement to affiliate with an ombudsman service; and
- Requirement to register client advisors with a Swiss client advisor register.

iii. Ombudsman service

Financial service providers that do not provide financial services exclusively to professional or institutional clients must affiliate with an ombudsman prior to offering financial services in Switzerland. Given that social trading platform are regularly used by and open to retail clients, social trading platforms will be required to affiliate themselves with a Swiss ombudsman service prior to admitting Swiss retail clients to their platforms.

iv. Client advisor register

Under the FinSA, client advisors of non-Swiss financial service providers a required to be registered in a Swiss client advisor register prior to approaching and providing financial services to clients in Switzerland. The term "client advisor" is limited to the individual actually maintaining the client relationship. Individuals in a mere supporting function (such as middle and back office) are not considered "client advisors". The same applies to experts with specific area of expertise, provided they are brought in by the individual that is otherwise responsible for maintaining the client relationship.

Where there is no such individual providing financial services (*e.g.* where a financial service is exclusively rendered through a digital platform), our view is that no client advisor registration is required and that the client advisor registration obligation should not be seen as a "back-door" registration obligation *e.g.* for directors, compliance officers or staff in charge of the technical support that are not actually rendering financial services to clients. Given that social trading platforms typically offer their services through a purely digital platform without human client advisors, our view is that such platforms are in most cases not subject to the obligation of having employees registered in the client advisor register in Switzerland.

However, if a social trading platform also employs actual client advisors within the meaning of the FinSA, it will have to register such advisors in Switzerland if the social trading platform is also offered to individual clients (retail clients) in Switzerland. In this context, we note that while the FinSA provides for an exemption from the client advisor registration obligation for non-Swiss financial service providers that are prudentially supervised in their respective home jurisdiction, such exemption is according to the prevailing view in Switzerland only available if the relevant financial services are exclusively offered to per se professional clients (and not also to HNWIs that have opted to be treated as professional clients under the FinSA) or institutional clients. This is not the case for social trading platforms as they are typically targeting retail clients.

c) Product-level regulation

Separately to licensing requirements and rules applicable to financial services, Swiss law provides for product-level rules and regulations restricting the type of financial instruments which can be sold to Swiss-based retail investors. These product-level rules are of particular relevance for social trading platforms that operate in a multitude of jurisdictions and should be taken into account for determining whether or not a client can copy or mirror trades in certain financial instruments.

Under Swiss law, product-level regulations and restrictions apply in particular to structured products and collective investment schemes. Social trading platforms will need to ensure compliance with such product-level regulations, in particular if mirrored trades relate also to these types of products (*e.g.* a trade in a non-authorized ETF).

i. Structured products

Under Swiss law, product-level requirements apply to structured products (such as capital protected instruments, capped return instruments, or certificates). More specifically, structured products can only be sold to Swiss retail clients the issuer and/or guarantor of such products is either a Swiss bank, insurance company or a securities firm, or a foreign financial institution that is subject to an equivalent prudential supervision. Non-compliance with these rules may result in criminal sanctions.

ii. Collective investment schemes

Under Swiss law, collective investment schemes are defined rather broadly and essentially encompasses any vehicle or contractual arrangement in which investors pool their funds for purposes of collective investments and which is administrated and managed by persons other than the investors; this includes investment funds, mutual funds or ETFs.

Collective investment schemes are subject to rather strict and comprehensive sales restrictions in Switzerland. In particular, offering and sales of collective investment schemes to Swiss retail investors requires that the relevant collective investment scheme is authorized for such purpose by the Swiss regulator FINMA.

iii. Requirement to provide key information documents (KID)

Similar to the PRIIPs regulation, the FinSA provides for a requirement to provide retail clients with KIDs whenever they sell financial instruments with a derivative component. The obligation to prepare a KID applies to manufacturer of relevant financial instruments and, the distributor/seller of such financial instruments is under an obligation to provide a copy of the KID to its retail clients. No KID is required (i) if relevant financial instruments are offered to retail clients in the context of a portfolio management agreement, (ii) for shares and similar equity instruments, including convertible bonds, or (iii) for debt instruments without a derivative element, *e.g.*, straight bonds or floating rate bonds- Instead of a Swiss KID, a PRIIPs KID may also be used.

3) Regulation of the Popular Traders

a) No specific regulations governing general investment recommendations

By allowing others to follow their trading activity and portfolio, Popular Traders can be seen as providing recommendations with respect to financial instrument transactions. In addition, social trading platforms often also have micro-blog or other type of communication features allowing Popular Traders to discuss their trading strategies. This raises the question whether Popular Traders are providing a financial service. In most cases, this will not be the case because the recommendations are general in nature and not personalized for a specific follower. For this reason, the activity of a Popular Trader does generally not amount to investment advice within the meaning of the FinSA and thus, Popular Traders do themselves typically not qualify as financial service providers. The situation could be assessed differently if a Popular Trader responds to specific questions from its followers, although one off-responses to such specific and individualized questions may not meet the "commercial activity" threshold required for financial service providers to fall within the scope of the FinSA.

Unlike other jurisdictions (such as Germany for example), Swiss law does not specifically regulate general recommendations with respect to financial instrument transactions. Having said that, the activities of the Popular Traders are still subject to limitations under applicable market abuse regulations.

b) Market abuse considerations

Regulations against market abuse generally encompass rules against insider trading and against market manipulation. Depending on the number of followers, a Popular Trader needs to be aware that its activities and trading practices could run afoul of rules against insider trading and/or market manipulation. For example, Popular Traders with several thousand followers can potentially influence prices of not particularly liquid stock (as seen in the recent r/wallstreetbets / Gamestop example, coordinated trades of retail traders can significantly influence stock price). A particular issue is front running, *i.e.* where a Popular Trader purchase stocks or options outside of the social trading platform and then later executes a trade in the relevant stock, which is then copied/mirrored hundreds or thousands of times by the Popular Trader's followers.

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SPACs: The Swiss Capital Markets Law Perspective

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On 22 February 2021, luxury electric vehicle manufacturer *Lucid Motors* agreed to go public by merging with the Special Purpose Acquisition Company (SPAC) *Churchill Capital Corp IV* in a deal that valued the combined company at USD 24 billion. While SPACs are a dominant trend in the U.S. (representing 198 out of the 244 IPOs to date in 2021), continental Europe lags behind, with an incipient revival of SPACs in Germany with the IPO of *Lakestar SPAC 1 SE* in February 2021. To date, no SPAC has been incorporated in Switzerland and listed on Swiss stock exchanges. However, this might be about to change, not least because of the revision of the law on joint-stock corporations. Against this background, this article briefly highlights the key aspects of a SPAC-transaction and discusses three selected issues these vehicles have to face in Swiss capital markets law and regulation.

By Claude Humbel / Thomas van Gammeren

1) SPACs: An Overview

a) Preliminary Remarks

SPACs are companies formed to raise capital through an initial public offering (IPO) for the exclusive purpose of using the proceeds to acquire one or more unspecified business or assets to be identified after the IPO in a business combination.

b) Brief Timeline of a SPAC-Transaction

i. Pre-IPO-Phase

In the formation phase, financial sponsors assemble a management team and fund an equity stake in the SPAC. The equity investment then funds the initial business operations to launch an IPO. Although the ratio can vary, the founders' stock customarily represents approximately 20% of the post-offering stock.

ii. IPO-Phase

Shortly after the SPAC is established, it goes through an (expedited) IPO in which capital is raised with the goal of buying a target company. Apart from the following peculiarities, the IPO of a SPAC follows the structure of a traditional IPO. As there are no historical financials to be disclosed or assets to be described, the IPO prospectus of a SPAC mostly consists of boilerplate language and the D&O biographies. Typically, it indicates that the filer is a blank check company. Further, it describes the sector in which the SPAC intends to conduct a business combination and the criteria to be used for determining the suitability of a target company. In an IPO, SPACs typically issue tradeable "units" that consist of common shares carrying voting rights and warrants. Albeit being initially marketed as a unit, shares and warrants can be traded separately. Upon closing of the IPO, the SPAC funds a trust account (*i.e.*, an escrow account) with the capital that has been raised through the IPO.

iii. De-SPAC Transaction

Following the SPAC listing, the management has a fixed amount of time to find an appropriate acquisition target (usually 18–24 months). Once the management has identified such target, shareholders have to approve the potential business combination (in the U.S. the preferred method is a reverse merger, in Switzerland a business combination in which the SPAC is the surviving entity seems more viable). Investors that oppose this combination have rescission and redemption rights as specified in the SPAC's organizational documents. If the requisite percentage of investors (usually 60–80%) approves the management's proposal, the latter executes the combination. If needed in order to finance a portion of the purchase price, the SPAC arranges committed debt or equity financing, such as a private investment in public equity (PIPE) commitment. After the combination, the target company will be listed. On the other hand, if the business combination is not consummated within the set period of time, the SPAC is liquidated.

c) Advantages and Downsides of SPACs Compared to Traditional IPOs

i. Main Advantages

One advantage of a SPAC-IPO is that the preparation and registration process is accelerated to a matter of weeks, instead of months for operating businesses, and significantly reduces both legal and other underwriting fees. Going public through a SPAC also offers *the target company* a quicker and cheaper public listing than traditional IPOs and even – to a certain extent – direct listings. By not having to spend time and financial resources on marketing, roadshow, book-building, *etc.*, the management of the acquiree can save costs that come with a traditional IPO. Other (indirect) cost savings can relate to the underpricing risk that traditional IPOs entail. Finally, whereas traditional IPOs depend on market conditions, de-SPACs are largely independent from the latter. Since the target firms do not have to convince public investors by the lengthy marketing of a traditional IPO, this method of going public often comes into play when volatility is high and the (cyclical) IPO markets are ebbing.

ii. Potential Downsides

Quantitative studies have shown that private owners that chose to exit their company through business combinations with SPACs have earned less than those that preferred an IPO to go public. Although this result is driven by the pre-exit characteristics of the companies and not due to the exit mechanism itself, it reveals another potential risk inherent in such transactions, *i.e.*, the risk for investors of investing in sub-par companies that are attracted by the prospect of an expedited public listing. In our view, this risk is mitigated by the charter and contractual framework of a SPAC, in particular by the vote on the combination and by the rescission and redemption rights. Moreover, as SPAC listings become a better-known alternative, they might attract more sophisticated companies (see, *e.g.*, the Swiss tech-company *HeiQ*'s recent listing on the London Stock Exchange).

2) Switzerland's Stance on SPACs

a) Preliminary Remarks

At the time of writing, no SPACs have been incorporated and listed in Switzerland. However, Swiss banks are major players in the U.S. SPAC market and are currently exploring options to bring this vehicle to Switzerland. Most of a SPAC's characteristics can be replicated by contractual agreements and charter provisions. Nevertheless, both the Swiss law on joint-stock corporations and Swiss capital markets regulations pose some challenges. One of the impediments is the 10% limitation on the acquisition of one's own shares under article 659 of the Code of Obligations (CO). This is problematic in light of the obligatory rescission and redemption rights of the investors, both because of the high threshold and because the capital reduction mandated by article 659 (2) CO is a lengthy and costly process. The new capital band under article 653*s et seqq.* revised Code of Obligations (revCO) might solve this issue and give SPACs the flexibility they need. The capital markets law poses other, more challenging questions. In the following section, we will discuss three of the most prominent questions.

b) Potential Pitfalls in Swiss Capital Markets Law

i. Qualification as a Collective Investment Scheme or as an Investment Company under CISA?

At the European level, there is currently no uniform handling of SPACs by the competent financial market authorities. Neither does the Directive 2011/61/EU on the Alternative Fund Managers (AIFMD) explicitly encompass SPACs as a form of Alternative Investment Fund (AIF), nor has the ESMA issued any clarification on the matter (albeit being aware of the legal uncertainty on this question for almost a decade, *cf.* ESMA, Consultation Paper, Guidelines on key concepts of the AIFMD, 19 December 2012, ESMA/2012/845, at no. 55, p. 33). In Switzerland, FINMA's verdict on whether SPACs qualify as collective investment schemes or investment companies under the Collective Investment Schemes Act (CISA) is still outstanding. The following section explores this matter.

(1) The Federal Supreme Court's Jurisprudence on Collective Investment Schemes

Neither the CISA nor the Collective Investment Schemes Ordinance (CISO) comment on the question, which is relevant for SPACs too, of when a company can be considered as "operationally active" under article 2 (2) (d) CISA and therefore does not fall under the definition of a collective investment scheme and the scope of the CISA.

In this regard, the courts and the doctrine propose several and somewhat diverging qualifying criteria.

In its seminal decision *BGer 2C_571/2009*, the Federal Supreme Court held that the qualification as an "operating company" under article 2 (2) (d) CISA does not hinge on one single criterion but rather on an overall consideration of all relevant elements in the individual case. It further recognized the merits of the Federal Administrative Court's ruling (*BVGer B-4312/2008*), which had based its reasoning largely on the question of whether the assets are managed on behalf of the investors by a third-party that has a substantial legal and factual discretionary power with regard to the investment policy and the competence to in- or divest independently and when it deems appropriate (*Fremdverwaltung*). The lower court reasoned that a third-party management (and thus a collective investment scheme) is *not* given if the company's purpose makes sure that it invests exclusively in a specific operating company (or several, specifically defined operating companies) or if the investors' participation rights were extended in such a way that the investment decisions were essentially made by the investors and not by the management. While, in fact, the Federal Supreme Court did not disagree with this reasoning, it added that other criteria such as the statutory purpose, the source of funds, the degree and form of organization, the type of risk (market or investment risk) and market appearance have to be taken into account as well. Further, it admitted auxiliary criteria such as the subjective views of the investors on the purpose and the number of investors. In addition, it explicitly held that its criteria are not exhaustive and therefore other arguments – such as the criteria developed in legal scholarship – can flow into the assessment.

(2) The Federal Supreme Court's Criteria Applied to SPACs

The Federal Supreme Court has provided some criteria that further the understanding of what a collective investment scheme is and whether SPACs qualify as such. However, the jurisprudence remains blurry and a case-by-case analysis remains necessary since the outcome depends on the organization of the SPAC and its relationship with the investors. The above-mentioned criteria can be boiled down to (i) control, (ii) risks, and (iii) internal structure and value creation, as well as the auxiliary criteria of investor and market perception.

One paramount question is whether SPACs are self-managed or not (although, dogmatically, the question of whether an investment is an investment scheme should be treated separately, the Swiss jurisprudence hinges on this criterion). Thus, an analysis of the decision-power of the SPAC management is required. While the management has the responsibility to find the target company, the investors maintain control rights that far exceed those of general corporate law. The de-SPAC merger necessitates the approval of the majority of shareholders. Therefore, the investment decision lies in their hands, whereas in collective investment schemes investors hardly ever have the possibility to influence the investment decision. One might point at the passive and fragmented nature of public shareholder bases and the ensuing collective action problem. This is mitigated by the very nature of a SPAC that foresees an active involvement at the crucial investment decision stage. Most importantly, opposing shareholders maintain full control over their investment thanks to the rescission and redemption rights. Thus, the degree of control exerted by a SPAC management is not comparable with the discretionary power of the third-party management of a collective investment scheme. The fact that the IPO proceeds are almost entirely deposited in an escrow account and cannot be used but for a specific transaction that is contingent on the shareholder approval also suggests a material difference to the discretion and leeway enjoyed by a collective investment fund management that can decide on an investment at any time: In SPACs, the management's access to the funds is only possible in the aftermath of, and not before, the vote on the business combination. This element clearly points against the qualification of SPACs as collective investment schemes.

As the CISA aims to protect investors (article 1 CISA), it has to be assessed whether the investors ought to be afforded this additional layer of protection. From a *ratio legis* perspective, the risk involved for SPAC investors is considerably lower than for investors in collective investment schemes. By placing most of the IPO proceeds in an escrow account, investors' funds cannot be invested by the SPAC management while it seeks a target. Furthermore, SPAC investors can control their risk threshold and exit from an unsatisfactory investment by exercising their rescission and redemption rights once a merger is proposed or by simply selling their (listed and therefore liquid) shares. Additionally, the management cannot surreptitiously change the risk allocation of the investment. Moreover, the managers of SPACs usually have "skin in the game", as they hold up to 20% of equity. In sum, the need for supplemental protection is not comparable to collective investment schemes and does not justify the additional protection awarded by the CISA.

The assessment of whether a SPAC is an investment scheme or rather an operating company further revolves around its purpose, organization and the way it creates value. It can be argued that notwithstanding their statutory purpose (*i.e.*, the acquisition and long-term control of an operational company) SPACs initially have neither direct operational activities nor a strong internal organization. Besides, the jurisprudence on collective investment schemes has reiterated that the duration of a capital investment is irrelevant (*BGE 116 Ib 73*, at 2c), which might be problematic as SPACs are not operative from the beginning. While this may hold true, the rationale behind article 2 (2) (d) CISA is that in operating companies value creation lies within the sphere of influence of the management and does not hinge on external (*i.e.*, market) factors. Similarly, the value creation in SPACs resides in the merger with a successful and operating target company and, thus, builds on internal factors. Finally, while one cannot state that SPACs are "operative" from the beginning, it would be mistaken to assess that SPACs are investing the assets they have previously raised in an IPO *if* the funds are deposited in an escrow account (and not invested in treasuries). On the contrary, it would be objectionable to label an escrow account that is presumably burdened with negative interest rates in the current negative interest rate environment as an investment. In our opinion, the intended purpose of a SPAC cannot be disregarded solely because it is not operational for a short interval of time. Consistent with this purpose-driven reasoning, article 2 CISO grants newly established companies that intend to avail themselves of the exception for listed companies in article 2 (3) CISA an *interim period* of 12 months in order to complete their listing. While not directly applicable in the case at hand (see 2 [b] [i] [3] below), this supports the argument that the *final* purpose of the listed SPAC, *viz*. the business combination with an operating company, ought to be decisive – even though it is achieved after an interim period. Whereas, in our opinion, this criterion alone does not lead to a conclusive response as to the nature of a SPAC, it also does not preclude a potential qualification of a SPAC as an "operating company" under article 2 (2) (d) CISA.

(3) Qualification as an Investment Company?

In order to assess whether a joint-stock corporation qualifies as an investment company under the CISA, it must first be determined whether it pursues an investment activity. From the discussion above it follows that SPACs are not investment companies under the CISA, *provided that* they are properly structured, deposit the proceeds from the IPO in an escrow account, and subsequently use these assets for the exclusive purpose of combining with an operating target. Correspondingly, a SPAC could not be listed as an investment company under the current definition contained in article 65 (1) SIX Listing Rules, which defines investment companies as "companies under the [CO], the *sole* purpose of which is to pursue collective investment schemes to generate income and/or capital gains, *without engaging in any actual entrepreneurial activity as such*" (emphasis added). The fact that in the Swiss context SPACs will usually be the surviving (holding) company after the de-SPAC transaction and thus engage in actual entrepreneurial activities is a strong indicator against a possible qualification as an investment company. If, contrary to the view expressed here, one came to the conclusion that SPACs are not operating and self-managed companies, it remains conceivable that properly structured SPACs could still avail themselves of the exception in article 2 (3) CISA (however, they would fall under the AMLA, see 2 [b] [ii] below).

(4) Interim Conclusion

Whereas the question whether SPACs are collective investment schemes depends on a case-by-case assessment, there are several and substantial differences that suggest that SPACs are neither collective investment schemes nor investment companies and, therefore, do not fall under the CISA *if* they are properly structured.

ii. Consequences from an Anti-Money Laundering Perspective

In its revised Circular FINMA 2011/01 (in force since 1 January 2017), the FINMA reiterates at no. 94 that investment companies, which do not fall within the scope of CISA pursuant to article 2 (3) CISA, are still encompassed by article 2 (3) AMLA. This both applies to Swiss joint-stock corporations that are listed on a Swiss exchange, and investment companies that only have qualified investors under article 10 (3), (3^{bis}) and (3^{ter}) CISA and registered shares. In light of the above, SPACs that are adequately structured neither fall under the CISA nor the AMLA-regime.

iii. SIX Listing Rules

The third issue that SPAC-IPOs currently face relates to the prospectus. While compliance with the Financial Services Act (FinSA) and the Financial Services Ordinance (FinSO) is achievable, the SIX Listing Rules are more challenging: article 11 requires that the issuer must have existed as a company for at least three years, which is not the case with SPACs. In principle, exemptions from this rule are possible if it appears desirable in the interest of the company or the investors and if the necessary transparency for a well-founded investment decision is guaranteed (article 2 SIX Directive Track Record). Although SPACs do not fit perfectly in any of the categories enumerated in article 3 SIX Directive Track Record, that list is not exhaustive and its rationale covers many elements that characterize SPACs. Due to its nature, the duration of existence of a SPAC is irrelevant for its admission. Therefore, and since both investors and companies have an interest in the listing of SPACs, the SIX

Regulatory Board might grant exemptions for such vehicles, provided that all necessary investor information is granted and the prospectus clarifies their peculiarities. As a consequence of the fact that SPACs are not investment companies under the SIX Listing Rules, they will presumably not be listed on the SIX Swiss Stock Exchange's Investment Funds segment.

One *caveat* remains, however, as in order to prevent possible circumvention of the Listing Rules, exemptions from the track record requirement can only be granted to SPACs that have not yet identified any target at the time of listing.

3) Outlook

Whereas SPACs have gained a substantial market share in the U.S., they yet have to establish themselves in the Swiss capital market. However, it is only a matter of time until the first Swiss SPAC will be listed on a Swiss stock exchange, as they have the potential to represent an attractive alternative to traditional IPOs for Swiss companies that wish to go public. In our opinion, the legal pitfalls discussed above can be tackled if SPACs are structured properly.

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Key Highlights of the Modernization of the Commercial Register, Effective 1 January 2021

Reference: CapLaw-2021-17

As of 1 January 2021, the legal framework governing the commercial register in Switzerland has been modernized. The new rules primarily comprise amendments to the Swiss Code of Obligations (***CO***, article 927 *et seq.*) and to the Commercial Register Ordinance (***CRO***). The author highlights the key changes that the new rules did–and did not–bring about.

*By Daniel Häusermann**

1) Commercial Register Entries Still Become Effective Upon Registration

The question of when commercial register entries become effective under the new rules caused somewhat of a stir early this year, in particular among parties that are involved in capital market transactions. However, it was subsequently clarified that the law has not changed at all in substance.

*) The author thanks his colleague Francesco Bernasconi for helpful suggestions and comments.

To explain what happened, one has to look back at the rules that were in effect until the end of 2020. Under these rules, a commercial register entry became effective as of the date of the respective journal entry, subject to approval by the Federal Office of the Commercial Register (the ***FOCR***; article 932 (1) of the former CO). In relation to third parties, entries became effective on the working day following the publication in the Swiss Official Gazette of Commerce (the ***SOGC***; article 932 (2) of the former CO).

The new rules (article 936a (1) CO) no longer make an express distinction between the effectiveness of an entry *per se* and its effectiveness vis-à-vis third parties. For this reason, the Cantonal commercial registries were instructed to add a note to the preliminary commercial register excerpts (*i.e.*, those issued before an entry is published in the SOGC) saying that the new entry only becomes effective upon its electronic publication in the SOGC (article 34 CRO; FOCR Communication 4/20 of 10 December 2020, section 2.5). This situation affected the timelines of some capital increases by listed companies in early 2021, mainly because it was no longer clear at what point in time the new shares could be booked with the banking system and SIX SIS as book-entry securities and listed on a stock exchange.

On 10 February 2021, the FOCR published a new Communication 1/21, in which it clarified the situation. The FOCR explained that, like under the old rules, a commercial register entry becomes effective, subject to approval by the FOCR, immediately upon its registration in the journal. It is only vis-à-vis third parties that entries become effective on the date of the publication in the SOGC. (These third-party effects are rather limited: entries are deemed to be known by everyone; a fact that has not been recorded although it ought to have been recorded may not be relied on against a third party who was not aware of such fact; and *bona fide* third parties can rely on the truth of an entry in some circumstances, *cf.* article 936b CO.) Consequently, the FOCR reworded the note to be added to the preliminary commercial register excerpts, which now reads:

"This extract contains entries that have already been approved by the FOCR but not yet published in the SOGC. The entries only become effective <u>vis-à-vis third parties</u> upon publication in the SOGC." (emphasis added)

This view is supported by the legislative history of article 936a (1) CO (see Daniel Häusermann, *Handelsregistereintragungen werden schon vor SHAB-Publikation wirksam*, GesKR 1/2021, 104 et seq.).

The clarification by the FOCR is important in many ways. Most importantly, the uncertainty around the timetable for equity capital market transactions has been eliminated, and these transactions can be executed according to the same timetable as in the past.

2) Abolition of Commercial Register Blockage

Until the end of 2020, anyone was able to block the registration of new commercial register filings with respect to a specific company by simple request for up to ten calendar days and without having to show cause (article 162 of the former CRO). Although such commercial register blockages were rarely seen in practice, they did create execution risks in transactions that require a commercial register filing.

Under the new rules, it is no longer possible to temporarily block the commercial register without a court injunction. Rather, an interested party would have to petition a court to do so via a preliminary injunction (*vorsorgliche Massnahme*). In such a proceeding, the petitioner would have to overcome significant hurdles. For instance, a petitioner would have to credibly show a violation or imminent violation of their rights that could not be easily remedied after the registration in the commercial register (*cf.* article 261 Code of Civil Procedure), and the counterparty usually has a right to be heard before the court takes action (*cf.* article 265 Code of Civil Procedure *e contrario*). Last but not least, a petitioner would have to pay a court fee retainer and would potentially have to provide security for losses that a blockage may cause to the counterparty (article 101 Code of Civil Procedure).

The abolition of the commercial register blockage upon simple request is a welcome change, as it has lowered the execution risk of a wide variety of transactions, including mergers, certain acquisitions, and capital market transactions.

3) Reduction of Administrative Burden

The new rules reduce the administrative burden in relation to the commercial register in several ways:

– First, unless a statute requires otherwise, commercial register applications on behalf of a company no longer have to be signed by board members or, in the case of an LLC, managing officers. In these cases, a commercial register application can be signed by any authorized signatory of the company, or by another person based on a power of attorney (which itself has to be signed by board members or managing officers with corresponding signatory powers). Commercial register applications still have to be signed by board members or managing officers where the law expressly requires this to be the case (*cf.* article 17 (1) CRO), such as with regard to capital increases (article 652h (1) and 653h CO), changes with respect to authorized signatories (article 720 (2) CO), the dissolution of a company and the appointment of liquidators (article 737 and 740 (2) CO), as well as mergers, demergers, conversions of legal form and bulk transfers (article 21 (1), article 51 (1), article 66, article 73 (1) Merger Act). However, many of the above-referenced statutory rules that require that a commercial register application be signed by board members or managing officers will be amended by the new corporation law adopted on 19 June 2020 (*e.g.*, article 652h (1), article 653h, article 720 (2) and article 737 CO).

- Second, the commercial register fees have been lowered by about one third (*cf.* Ordinance on Fees of the Commercial Register of 6 March 2020, SR 221.411.1), as the commercial registries are now bound by the Swiss fiscal law principles of equivalence (*Äquivalenzprinzip*) and prohibition of profits (*Kostendeckungsprinzip*) (article 941 (3) CO). For example, the commercial register fee for establishing a corporation or a limited liability company has been lowered from CHF 600 to CHF 420.

- Third, articles of association and foundation deeds have to be made available via the internet free of charge (article 936 (2) CO).

- Fourth, the so-called "Stampa declaration" (a confirmation that no undisclosed contributions in kind, acquisitions and intended acquisitions of assets, contributions via set-off or special benefits exist) no longer has to be a separate document. Rather, such confirmation has to be given in the respective public deed.

4) Conclusion

The modernization of the legal framework governing the commercial register increases transaction security for many kinds of transactions and is also a welcome step towards a more streamlined and efficient handling of corporate affairs and housekeeping matters.

However, the commercial register ordinance will undergo further changes soon. On 17 February 2021, the Federal Council started a consultation process with regard to further updates to the CRO to implement the corporate law reform adopted on 19 June 2020. The consultation is open until 24 May 2021.

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New Swiss DLT Regulation: Status Update and Outlook

Reference: CapLaw-2021-18

In its efforts to adapt the Swiss legal framework to take into account business activities that rely on Distributed Ledger Technology (DLT), the Federal Council recently published the draft blanket ordinance in the area of blockchain. The purpose of this article is to highlight some of the most salient features of the proposed provisions, focusing on topics that may be of relevance for DLT-based capital market related activities.

By Stefan Kramer / Sandrine Chabbey

1) Introduction

With the aim of fostering innovation, Swiss lawmakers recently adopted an act whose aim is to adapt existing regulations to better account for business models based on Distributed Ledger Technology (DLT). On 19 October 2020, less than a month after the regulation on the adaptation of federal law to developments in distributed ledger technology (DLT Law) has been accepted by parliament, the Federal council published a draft ordinance setting out the changes it proposes to introduce at the ordinance level to prepare for the entry into force of the new legal provisions (blanket ordinance in the area of Blockchain, hereinafter referred to as the Draft DLT Ordinance). The consultation period for the published draft lapsed on 2 February 2021. Rather than offering a comprehensive analysis of the implementing provisions proposed by the Federal Council, this article focuses on certain key aspects that are or may be of relevance for DLT-based capital market related activities as well as certain views expressed by participants in the consultation process.

As a reminder, instead of creating a comprehensive new act on DLT, Swiss lawmakers opted to amend existing regulations to accommodate business models relying on the new technology. While part of the DLT Law, in particular modifications to securities law, including notably changes to the Code of Obligations, Intermediated Securities Act and Private International Law Act, already entered into force on 1 February 2021, the Draft DLT Ordinance relates to provisions of the new legislation which are set to enter into force on 1 August 2021 and consist, for the most part, of modification of existing financial market regulations.

2) Draft Blanket Ordinance in the Area of Blockchain – Certain Key Aspects

a) Proposed Specifications for DLT Based Trading Systems

One of the novelties introduced by the DLT Law is a new category of authorizations pursuant to the Financial Market Infrastructure Act (FMIA), namely the authorization for DLT based trading systems. The Draft DLT Ordinance therefore amends the Financial

Market Infrastructure Ordinance (FMIO) to account for this new entity and specifies, where required, the applicable regulatory framework.

Overall, the contemplated new provisions closely mirror those applicable to traditional trading venues and central depositories, with accommodations where needed to reflect the particularities of the new systems, such as the fact that unlike their more traditional counterparties, DLT-based systems may accept private clients as participants.

The draft FMIO provisions notably define the relevant thresholds for the activity of DLT-based trading systems to be carried out on a professional basis (*Gewerbsmässigkeit*), and therefore in scope of the new licensing regime. Specifically, the activity of such trading systems is deemed as being undertaken on a professional basis if it either (a) generates a total gross income of more than CHF 50,000 during a calendar year, (b) if the relevant trading systems maintains a durable business relationship with at least one securities firm or other regulated participants under the new article 73c (1) (b)-(d) FMIA or, alternatively, with more than 20 participants in total, or (c) may at any time freely dispose of third party DLT-based securities in excess of CHF 5 million. The contemplated provisions further allow those trading systems whose activity remains under specific thresholds, and may therefore be considered as small, to rely on a lighter regulatory regime. Concretely, under draft article 58k FMIO, a DLT-based trading system is deemed as small, provided that (a) trading volume in DLT-based securities remains below CHF 250 million per year; (b) volume of DLT-based securities held remains lower than CHF 100 million; and (c) settlement volume for DLT-based securities includes transactions with a value of less than CHF 250 million per year.

Another striking feature of the published draft is the decision to exclude derivatives designed as DLT-based securities (*DLT-Effekten ausgestaltete Derivate*) from trading on these new authorized financial market infrastructure. According to the Federal Department of Finance (FDF), this decision is essentially justified by the fact that the market for such products is still in its infancy and it is preferable to wait and see how it develops before admitting it to trading. This choice has been criticized by many participants to the consultation procedure, who emphasize that derivatives are one of the product categories with the greatest potential for efficiency gains through the use of DLT.

b) Proposed Clarifications for the Acceptance of Crypto Assets by Banks and other Custodians

As the Banking Act (BA) will be updated to account for business-models reliant on the custody of crypto assets, the Draft DLT Ordinance envisions introducing in the Banking Ordinance (BO) a definition of the assets whose acceptance may trigger licensing obligations as well as update the definition of activity carried out on a professional basis under the BA.

According to draft article 5a BO, references to crypto assets in the law generally covers all those deposited assets (pursuant to the new article 16 (1bis)(b) BA) which are generally destined to be used/are effectively mainly used as a mean of payment for the acquisition of goods and services or for the transmission of money or other value. Many position statements have criticized this definition, which they generally consider as too vague and potentially covering assets that should not be subject to the BA.

The draft ordinance further suggests modifying article 6 BO to account for the fact that the acceptance of crypto assets, if carried out on a professional basis, may also constitute an activity subject to licensing obligation. The Federal Council proposes to apply the same thresholds to determine whether acceptance of crypto assets may be deemed as an activity carried out on a professional basis as those already relevant to the acceptance of other bank deposits. Many participants to the consultation procedure find this solution unsatisfactory and argue that it would be more appropriate, in particular in light of the related risks, to refer to the more permissive definition applicable to asset managers (see notably article 19 of the Financial Institutions Ordinance).

c) Proposed Modifications of the Anti-money Laundering Framework

The Draft DLT Ordinance further introduces changes to the Anti-Money Laundering Ordinance (AMLO). Among others, the published draft contemplates qualifying all payment services by any service provider who facilitates the transfer of virtual currencies if it maintains a durable business relationship with counterparties. The FDF justifies the decision to refer to the lasting relationship instead of the more commonly used criteria of control over the assets in question by the fact that, in relation to virtual currencies, transfer schemes are increasingly decentralized and financial intermediaries no longer automatically have the ability to dispose of the assets. Hence, it is of the view that the criteria of the durable business relationship better accounts for the different *modi operandi* of intermediaries dealing with virtual currencies.

The approach chosen in the draft provisions has been widely criticized. In particular, it has been deemed as too broad and potentially covering a whole array of ancillary activities, such as IT, hence subjecting to the Anti-Money Laundering Act (AMLA) entities who cannot comply with its requirements (or solely in a very limited manner). Even though the stated goal of the contemplated rules is to facilitate the application to anti-money laundering regulation, many argue that the change to the new rule would most likely create insecurity and make it difficult for market participants to determine whether the law applies to them or not. Furthermore, to the extent that the approach is not in line with international practice, it has been argued that the contemplated regulation may hurt the competitiveness of Swiss financial markets.

3) Outlook

The consultation period for the Draft DLT Ordinance ended on 2 February 2021. We can therefore expect a final version to be published relatively soon, in order to allow for an entry into force with the relevant legal provisions on 1 August 2021.

Based on the position statements that are publicly available, there appear to be a certain consensus among relevant organizations and market participants on the general appreciation of the published ordinance and the points that still need to be refined. It therefore remains to be seen whether – and how – the Federal council will amend its proposal to address the concerns raised.

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Upcoming Regulation on Sustainability Reporting and Human Rights Due Diligence in Switzerland

Reference: CapLaw-2021-19

On 29 November 2020, the initiative on responsible enterprises failed. The initiative provided, among others, liability of Swiss enterprises for their subsidiaries abroad who have breached human rights or environmental standards. As a result, the parliament's indirect counterproposal will likely enter into force (subject to a potential popular referendum). The indirect counterproposal provides for (i) non-financial reporting duties for larger publicly traded companies and prudentially supervised financial institutions as well as (ii) human rights due diligence requirements for enterprises processing or importing conflict minerals or enterprises having a reasonable suspicion of child labor.

By Annette Weber

1) What happened until now?

In 2015, several civil society organizations initiated the so-called "Responsible Business Initiative", which aimed to amend the Swiss Constitution. The popular initiative was submitted for voting on 29 November 2020 and was rejected. Although the majority of the Swiss people voted in favor, the majority of the cantons did not support the initiative, which would have been necessary for an amendment of the Swiss Constitution. The entry into force of the indirect counterproposal – while being very likely – is not certain due to pending appeals. Like any new statute, the indirect counterproposal may become subject to a popular referendum if so petitioned by 50,000 Swiss nationals or eight cantons within 100 days after the publication of the indirect counterproposal in the Federal Gazette. In such a referendum, if any, no majority of cantons would be needed anymore.

2) What obligations does the indirect counterproposal introduce?

The indirect counterproposal introduces two sets of duties: (i) non-financial reporting and (ii) mandatory human rights due diligence.

a) Non-financial reporting

The European Union published already in 2014 the so-called non-financial reporting directive (Directive 2014/95/EU), which applies to larger companies. The indirect counterproposal follows the EU approach by introducing a similar non-financial reporting duty.

i. Subject enterprises

The duty for non-financial reporting is applicable to companies of public interest with more than 500 full-time employees on average and either a balance sheet total of CHF 20 million or a turnover of CHF 40 million, in each case on a consolidated basis in two consecutive business years. Companies of public interest are (i) companies having (a) their equity securities listed on a stock exchange, (b) bonds outstanding or (c) contributing at least 20% of their assets or their turnover to the consolidated financial statements of a company falling under (b) or (c) and (ii) prudentially supervised financial institutions. In short, the non-financial reporting obligation applies only to larger Swiss companies and does not target small and medium-sized enterprises (SME).

Enterprises are exempted from the duty to produce a report on non-financial matters if they are controlled by an enterprise which is subject to the non-financial reporting obligation or which must prepare an equivalent report under foreign law. The exemption aims to avoid requiring companies to prepare several non-financial reports within a group of companies.

ii. Content of the report

The report on non-financial matters includes primarily information on environmental issues, in particular CO_2 goals, social issues, employee matters, compliance with human rights as well as the combat against corruption with a view to support the understanding of the enterprise's business, its business development and position as well as the impact of the enterprise's business on these matters. It also includes information on the enterprise's business more generally. In particular, the report includes:

- a description of the business model;
- a description of the applied concepts of the enterprise's business model, including the due diligence applied;
- a presentation of the implementation of the concepts and their effectiveness;

- a description of the main risks in connection with the described environmental and social issues as well as of the handling of the risks arising from the enterprise's business and, if relevant and proportionate, of the business relationships, products or services; and

- the main performance indicators relating to the enterprise's business model.

If an enterprise does not have a concept regarding one or more of the above-mentioned points, this must be clearly stated and explained (*comply or explain*). The report must not only cover the subject enterprise, but also its controlled subsidiaries. The indirect counterproposal leaves great discretion to the enterprises in the implementation. In my view, it would have been desirable to include expressly a mandate to the Federal Council to determine details on the implementation in order to ensure a more uniform implementation and to give enterprises guidance on the level of detail.

The statute allows companies to prepare the report in accordance with national, European or international standards, but requires companies to publish all information required under the Swiss regime. Any additional information required under the new Swiss regulation, but not required to be disclosed under the applied international standard, must nevertheless be included in the reporting. Hence, companies that already prepare a report according to an internationally recognized standard may continue to apply such standard, but may need to prepare a supplement for any additional information required under the Swiss non-financial reporting duties that is not covered under the international standard.

iii. Approval and Publication

The report on non-financial matters must be approved and signed by the highest management body (typically, the board of directors) and requires the approval of the body responsible to approve the annual financial statements (typically, the shareholders meeting). In contrast to the financial statements, the report does not have to be audited or verified by an independent third party. Such requirement would have improved the quality and credibility of the reporting in my view. Further, the board of directors must ensure that the report will be published promptly after the approval by the shareholder meeting and remain accessible during a period of ten years. The report must be in English or one of the Swiss national languages.

The above listed duties should not be confused with the recently enacted provisions on transparency of commodity enterprises (cf. articles 964*a* – 964*f* of the Swiss Code of Obligations). These provisions encompass payments of at least CHF 100,000 to governments by enterprises which (i) are active in the field of the extraction of minerals, crude oil or crude gas or logging of timber in primary forests and (ii) are subject by law to the ordinary audit.

b) Human rights due diligence

The second prong of the indirect counterproposal encompasses due diligence duties related to human rights. Like the non-financial reporting, the human rights due diligence is not a novel Swiss concept. Several other legislations abroad, such as the EU regulation (see Regulation (EU) 2017/821) already provide for human rights due diligence duties.

i. Subject enterprises

The human rights due diligence is applicable to enterprises whose registered office, central administration (*Hauptverwaltung*) or principal place of business (*Hauptniederlassung*) is in Switzerland provided that they either import to or process in Switzerland tin, tantalum, wolfram, minerals with gold or metals coming from conflict or high-risk regions or offer products or services for which there is reasonable suspicion of child labor being involved in the production. The statute authorizes the Federal Council to define exemptions for low annual import volumes and for SME with low risk for child labor. The exemptions aim to avoid a disproportionate effort especially for SME to comply with the new regulations. Further, the Federal Council will decide under which circumstances companies are exempt if they publish a report prepared in accordance with internationally recognized standards, in particular the OECD guidelines for multinational enterprises. The provisions define neither the terms "child labor", "conflict or high-risk regions" or "reasonable suspicion" nor do they task the Federal Council with defining these terms in the implementing ordinance. This is problematic in my view, as it will leave a number of enterprises with uncertainty.

ii. Human rights due diligence and reporting

A subject enterprise must introduce a management system which determines:

- the policy on supply chains for minerals and metals potentially originating from conflict and high-risk regions;
- the policy on supply chains for products and services, for which a reasonable suspicion of child labor exists;
- a system which traces the supply chain.

Further, enterprises must determine and assess the risks of harmful effects of their supply chains, prepare a risk management plan and adopt measures to minimize the identified risks. In addition, they must engage an independent expert who verifies the compliance regarding minerals and metals. Interestingly, the statute does not refer to an external control for child labor. In my view, it would have been desirable to require an external audit for the report on child labor as well because it is hard to find a justified reason for this distinction. The Federal Council will define these duties in more detail, whereby it will follow internationally recognized standards, in particular the OECD guidelines for multinational enterprises.

The highest management body (typically, the board of directors) must produce a report about its compliance with the due diligence obligations on an annual basis. Enterprises which offer products or services from enterprises which already produced a report for these products or services (for example, resellers) are not required to publish a report. The report must be published electronically within six months after the end of the financial year and be accessible for at least ten years. The report must be in English or one of the Swiss national languages.

c) Sanctions

The reporting of false information or the failure to report on non-financial matters or in connection with the reporting on human rights due diligence is subject to a fine of up to CHF 100,000 and in case of negligence up to CHF 50,000. The same sanctions face those persons who do not comply with the duties on storage and documentation of said reports. Based on the principle of *nulla poena sine lege* and absent any clear guidance from the Federal Council, enterprises which do not adhere to the obligations of the human rights due diligence because it is debatable whether or not they fall within the scope of application at all should not be sanctioned. Further, it is worth to note that the enterprise itself cannot be subject to the above-mentioned sanctions because the sanctions are misdemeanor (*Übertretung*) for which Swiss criminal law does not foresee corporate liability (see art. 105 para. 1 in conjunction with art. 102 of the Swiss Penal Code). I therefore expect that the provision will only be enforced in obvious cases of non-compliance, which will hopefully remain rare.

As the indirect counterproposal introduces new duties for the board of directors and the management, any failure to comply with the new obligations may give rise to claims against members of the board of directors and management (cf. art. 754 of the Swiss Code of Obligations). It might be difficult, however, to establish a damage as for example the non-publication of a report does typically not lead to any damage. Nevertheless, this liability exposure will require boards of directors and the executive bodies to properly allocate resources to comply with the new obligations, to implement and effectively oversee them.

3) Outlook

Before the indirect counterproposal becomes binding law, it first needs to be published in the Federal Gazette and is subject to a referendum if petitioned by the above-mentioned 50,000 Swiss nationals or eight cantons within a period of 100 days. Further, the Federal Council will need to draft an implementing ordinance. The timing of the publication of the indirect counterproposal in the Federal Gazette and any further implementation steps are not yet known due to pending appeals. Although in my view unlikely, it is possible that the provisions on the non-financial reporting will enter into force earlier than the provisions on the human rights due diligence as the latter require an implementation ordinance. Further, the implementation ordinance will likely go through a consultation process.

Once the indirect counterproposal has entered into force, transitional periods will apply according to which the statute will apply the first time to the financial year that will start one year after the entry into force of the statute. The earliest adoption date is in 2021 in which case enterprises have to apply the provisions the first time in 2022 and report the first time in 2023 covering the financial year 2022. Currently, it seems rather unlikely that the statute will enter into force this year.

Despite the uncertainty when the statute will come into force, it is advisable for enterprises to start verifying now what steps will be required and to work out a roadmap for the implementation as the implementation, in particular the human rights due diligence, might be complex and will take some time. Enterprises will need to implement adequate internal processes and controls in order to ensure compliance and, if applicable, involve business partners along the supply chain. Although the implementing ordinance is not yet available, international standards such as the OECD guidelines for multinational enterprises may provide helpful guidance.

The EU is currently assessing whether it should propose a revision of the non-financial reporting directive. A consultation regarding the potential revision of the directive with several stakeholders showed problems for preparers and readers in relation to the quality and the scope of information to be disclosed in non-financial reports. In particular, users claim a lack of comparability between different reports and the relevance of information provided. If the EU amends the non-financial directive, Switzerland risks that its regime on non-financial reporting will be regarded as outdated. Further, the Trustees of the IFRS Foundation published recently a consultation paper on sustainability reporting in the context of assessing the need for sustainability reporting under IFRS. Although the consultation process is still in an early stage, the initial feedback showed a need for uniform reporting. If IFRS will adopt sustainability reporting rules, Swiss subject enterprises reporting under IFRS will need to adhere to two different sets of rules (which are hopefully aligned). As the regulatory landscape is constantly changing, it would have been more advisable to delegate the content and implementation of the non-financial reporting duty to the Federal Council. This would have enabled Switzerland to be at the forefront of international developments.

Switzerland follows international trends and regulation for the non-financial reporting and the human rights due diligence. This is a prudent approach given that many multinational enterprises will have to adhere to different regulation. For non-financial reporting, however, Switzerland risks falling behind the EU and international organizations as they move towards higher disclosure standards.

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P.R.I.M.E. Finance – Public Consultation on Draft Revised Arbitration Rules

Reference: CapLaw-2021-20

In January 2021 P.R.I.M.E Finance announced a public consultation on its draft revised Arbitration Rules. In the most ambitious revision of its rules since its inception, P.R.I.M.E. Finance invited specialist firms, financial institutions, arbitrators and any interested parties to contribute their comments by 31 March 2021. Key features of the rules include central roles for the Permanent Court of Arbitration and the P.R.I.M.E. Finance panel of arbitrators, greater transparency, provisions to address complex arbitrations, emergency and expedited rules and an emphasis on efficiency.

By René Bösch

P.R.I.M.E Finance, the Hague-based Panel of Recognized International Market Experts in Finance, was launched in January 2012 to help resolve disputes concerning complex financial transactions. P.R.I.M.E. Finance's strength lies in the knowledge of its more than 200 experts in finance and dispute resolution worldwide. In 2015 P.R.I.M.E Finance joined forces with the Permanent Court of Arbitration (PCA), the world's oldest arbitral institution with over a century of experience. As a result, arbitrations brought under the P.R.I.M.E. Finance Arbitration Rules are administered by the PCA.

According to P.R.I.M.E Finance, from its inception it was envisaged that P.R.I.M.E Finance would offer a specialized forum for finance disputes to be resolved by arbitration. It was on this foundation that the P.R.I.M.E Finance Arbitration Rules (the ***Rules***) were drafted. With its current revision project, P.R.I.M.E Finance aims to ensure that the Rules are fully fit-for-purpose for users, reflecting current best practice in arbitration while preserving and expanding features of particular interest to financial market participants.

For that purpose P.R.I.M.E Finance established a Drafting Group and a Consulting Group, both composed of pre-eminent banking experts and dispute resolution practitioners representing the world's leading legal systems. Having met several times since its establishment in July 2020 the Drafting Group prepared a draft set of revised Rules that reflects breakthrough innovations in international arbitration and draws on the vast experience of members of both the Drafting and Consulting Groups.

The draft Rules focus on five key features: coordination among the PCA and P.R.I.M.E Finance, transparency, complex arbitrations, emergency and expedited rules, and efficiency. The combination of the PCA's efficiency in administering arbitral proceedings and the Panel's subject-matter expertise bring significant advantages for users in the banking and finance sectors. To ensure and increase transparency, amongst other things parties are required to disclose any third-party funding arrangement of any claim or defence, and the identity of that third party and final awards are to be published in anonymized form, to permit the emergence of a body of jurisprudence similar to the case law of courts in major financial centers.

One of the pitfalls in the arbitral process is that expediency often requires that all claimants, on the one hand, and all respondents, on the other, be treated alike, regardless of their interests. The draft Rules include detailed revised joinder and consolidation provisions, and a provision enabling separate arbitrations that are not eligible for consolidation to be coordinated in certain cases. They also comprehensively address emergency situations both before and after the tribunal is constituted, with provisions on emergency arbitration, interim measures and expedited rules. And finally, the draft Rules are built on efficiency.

Once the consultation period ends, the Drafting Group will analyse all comments received with the aim to finalize the new Rules and publish them later in 2021.

The draft Rules are available to download here https://primefinancedisputes.org/page/review-of-p-r-i-m-e-finance-arbitration-rules-1. Please send any comments to secretary@primefinancedisputes.org.

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Swiss Steel Holding successfully completes contested CHF 247 million capital increase

Reference: CapLaw-2021-21

Following the successful completion of the CHF 247 million capital increase of Swiss Steel Holding AG the newly issued shares started trading on SIX Swiss Exchange on 23 March 2021. This completed a contested and publicized process in which Swiss Steel Holding's second largest shareholder Liwet Holding AG had initiated court proceedings and filed an application seeking to block the capital increase. By decision of 29 January 2021, the district court of Lucerne rejected Liwet Holding AG's respective request. Liwet Holding AG also filed applications with the Swiss Financial Market Supervisory Authority FINMA and the Swiss Takeover Board, which were rejected by FINMA and the Swiss Takeover Board on 27 January 2021 and 5 March 2021, respectively. An appeal by Liwet Holding AG to FINMA against the Swiss Takeover Board's decision of 5 March 2021 remains pending.

ARYZTA AG announced the disposal of its North American business to Lindsay Goldberg LLC

Reference: CapLaw-2021-22

On 12 March 2021, ARYZTA AG (SWX: ARYN) announced that it has signed a definitive agreement to sell its North American business to Lindsay Goldberg LLC for a total enterprise value of USD 850 million. The transaction is expected to complete by the end of ARYZTA's current 2021 financial year and is subject to closing conditions customary for this type of transaction.

Cicor with a new major shareholder

Reference: CapLaw-2021-23

3 March 2021 – Cicor, a leading international technology company in the fields of printed circuit boards and hybrid circuits, printed electronics, microelectronics as well as EMS (Electronic Manufacturing Services), based in Boudry (Switzerland), has been informed that HEB Swiss Investment AG, Zurich, has sold all of its shares in Cicor Technologies Ltd. in a binding transaction to an investment vehicle of One Equity Partners (OEP). One Equity Partners (OEP) is a middle market private equity firm with over $8 billion in assets under management focused on transformative combinations within the industrial, healthcare and technology sectors in North America and Europe.

Credit Suisse Group AG issues USD 2 billion of bail-inable notes

Reference: CapLaw-2021-24

On 26 January 2021, Credit Suisse Group AG launched, and on February 2, 2021, suc-cessfully completed, the issuance of USD 2 billion 1.305% Fixed Rate/Floating Rate Senior Callable Notes due 2027 (the **Notes**) under its U.S. Senior Debt Program. The Notes are bail-inable bonds that are eligible to count towards Credit Suisse's Swiss gone concern re-quirement.

Seminar "Rescue Measures for Companies in Financial Distress: Restructuring, Debt Restructuring Moratorium, Liquidation, Bankruptcy and their Risks for Executive Bodies" *(Seminar "Rettungsmassnahmen für Unternehmen in finanzieller Schieflage: Sanierung, Nachlassstundung, Liquidation, Konkurs und ihre Risiken für Exekutivorgane")*

28 April 2021, Zentrum für Weiterbildung der Universität Zürich, Zurich

https://www.szw.ch/de/veranstaltungen

Seminar "SJZW-Conference New Corporation Law > Webinar" *(Seminar "SJZW-Tagung Neues Aktienrecht > Webinar")*

17 May 2021, Webinar

https://www.szw.ch/de/veranstaltungen

Seminar "The Latest on Collective Investment Law VIII" (*Seminar "Aktuelles zum Kollektivanlagenrecht VIII"*)

20 May 2021, Lake Side, Zurich

https://www.eiz.uzh.ch/EIZ/web/eiz/

Seminar "12th Conference on Restructuring and Insolvency of Companies: Hotsposts of Restructuring Law" (*Seminar "12. Tagung zur Sanierung und Insolvenz von Unternehmen: Hotspots des Sanierungsrechts"*)

2 June 2021, Metropol, Zurich

https://www.eiz.uzh.ch/EIZ/web/eiz/

Seminar "The New Corporation Law" (*Seminar "Das neue Aktienrecht"*)

9 June 2021, Zentrum für Weiterbildung der Universität Zürich, Zurich

https://www.szw.ch/de/veranstaltungen