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Risk-Absorbing Capital Instruments under the Revised Insurance Regulations

Reference: CapLaw-2022-34

The regulatory framework for the supervision of Swiss insurance undertakings is currently undergoing a partial revision, which, inter alia, will bring changes regarding risk-absorbing capital instruments. This article provides an overview over the capital requirements of Swiss insurers and sets out the treatment of risk-absorbing capital instruments under both the current and future regulations.

By Hansjürg Appenzeller / Vanessa Isler

1) Revision of Insurance Regulations

The regulatory framework for the supervision of Swiss insurance undertakings is currently undergoing a partial revision. Several years in the making, on 18 March 2022, the Swiss Parliament finally adopted the partial revision of the Act on the Supervision of Private Insurance Undertakings (Versicherungsaufsichtsgesetz; Insurance Supervisory Act (ISA), and as revised by the partial revision (nISA)), which is currently expected to enter into force in mid-2023. On 17 May 2022, the Swiss Federal Department of Finance published the draft amendment of the Ordinance on the Supervision of Private Insurance Undertakings (Aufsichtsverordnung, Insurance Supervisory Ordinance (ISO) and as revised by the draft amendment (E-ISO)), aimed at implementing the revised provisions contemplated in the nISA. The consultation period for the E-ISO expired on 7 September 2022. Based on this consultation, further amendments to the E-ISO may be expected. The following considerations are based on the E-ISO as published on 17 May 2022 and assume that there will be no major changes with respect to regulatory capital in the final amended ISO.

While the main focus of the revision of the ISA is the introduction of a restructuring regime for insurance undertakings, the modernization of the rules governing insurance intermediation and the creation of a supervisory and regulatory system based on varied client protection needs, the E-ISO is also set to bring important changes relating to risk-absorbing capital instruments.

2) Treatment of Risk-Absorbing Capital Instruments under the Old and New Regime

a) Overview over capital requirements of insurers

Generally, insurance undertakings are required to have sufficient free and unencumbered capital to cover their entire business activities (article 9(1) ISA / articles 9 et seq. nISA). This is measured by way of the Swiss Solvency Test (SST), which, simply put, plots the capital an insurance undertaking should have, quantifying, among others, the market, credit and underwriting risks to which it is exposed.
(Zielkapital; target capital), against the available regulatory capital (risikotragendes Kapital; risk-bearing capital).

The results of the SST are expressed by way of the SST ratio, which, in simplified terms, is the ratio (expressed as a percentage) of the risk-bearing capital divided by the target capital in any given year. The SST ratio should always be above 100%. In practice, the average SST ratio for insurance undertakings is much higher, amounting to, on average, 264% for non-life insurers, 236% for life insurers and 203% for reinsurers in 2021 (cf. Report on the Swiss Insurance Market 2021, published by the Swiss Financial Market Supervisory Authority FINMA (FINMA) on 9 September 2022).

b) Risk-absorbing capital instruments as part of risk-bearing capital

The risk-bearing capital is made up of the core capital (Kernkapital) and the supplementary capital (ergänzendes Kapital).

i. Core capital (Kernkapital)

The core capital is calculated, both under the old and new regime, on the basis of the SST net assets which are determined based on a total balance sheet approach (i.e., the SST balance sheet contains all economically relevant balance sheet items of the insurance undertaking including off-balance sheet items but excluding any corporate tax items), minus certain deductions (article 48(1) ISO / article 9a para. 1 niLSA and article 32(4) E-ISO). While different terms are used for describing the valuation methodology applied to determine the value of the assets and liabilities shown in the SST balance sheet under the old and new regime (market consistent (marktnah) valuation and market consistent (marktkonform) valuation, respectively), no major deviations in the valuation of the insurance undertaking’s assets and liabilities are expected in practice.

Under the old regime, the market value margin (Mindestbetrag), which is also included in the determination of the market consistent (marktnah) value of liabilities (article 41(3) and Annex 3 ISO), is added to the SST net assets and, thus, considered positively in calculating the core capital (article 48(1) ISO). The market value margin is calculated as the sum of the expected values of the discounted capital costs of each one-year risk capital over the future one-year periods required by the insurance undertaking to fulfil its insurance liabilities. As such, the market value margin is intended to cover the cost of holding of the regulatory required capital for the run-off of the in-force business in the event an insurance undertaking ceases business operations. However, it should be noted that, pursuant to the E-ISO, the market value margin will no longer be added to the SST net assets when calculating the core capital (but still considered in the determination of the market consistent (marktkonform) value of liabilities, article 30(4) E-ISO). Instead, under the E-ISO, the core capital equals the sum of the SST net assets plus the Tier 1 risk-absorbing capital instruments, to the extent eligible for inclusion in the core capital (cf. article 32(2) E-ISO).
ii. Supplementary capital (ergänzendes Kapital)

Swiss capital regulation allows an insurance undertaking to augment its regulatory capital by adding so-called supplementary capital (ergänzendes Kapital) to the core capital. The supplementary capital consists of risk-absorbing capital instruments (risikoabsorbierende Kapitalinstrumente), in particular subordinated bonds and loans, which have certain prescribed equity-like features (hybrid capital). Risk-absorbing capital instruments can be included in the risk-bearing capital or considered in the target capital.

3) Current Requirements for the Eligibility of Risk-Absorbing Capital Instruments

The currently applicable regulation separates supplementary capital into upper and lower supplementary capital. Upper supplementary capital (oberes ergänzendes Kapital) is perpetual (i.e., it does not have a fixed maturity date) and can be included in the risk-bearing capital up to a maximum of 100% of the core capital. Lower supplementary capital (unteres ergänzendes Kapital), on the other hand, has an original maturity of at least five years. It can be included in the risk-bearing capital up to a maximum of only 50% of the core capital. In addition, in the last five years of the relevant instrument’s term, the amount eligible for inclusion in the risk-bearing capital
is reduced annually by an amount equal to 20% of the original nominal amount of the instrument (articles 47 and 49 ISO).

In order to qualify as risk-absorbing instruments pursuant to article 22a ISO and therefore be eligible for inclusion in the insurance undertaking’s risk-bearing capital or consideration in its target capital, the instruments have to fulfill the following requirements:

– the instrument is actually paid-in and not secured with assets of the insurance undertaking;

– the terms of the instrument do not allow any set-off against claims of the insurance undertaking;

– the terms of the instrument irrevocably stipulate that it is either (i) subordinated to the claims of all other creditors in the event of liquidation, bankruptcy or restructuring procedures with respect to the insurance undertaking, or (ii) will be converted into statutory equity upon the occurrence of certain conditions;

– the terms of the instrument entitles or under certain circumstances forces the insurance undertaking to defer or cancel interest payments;

– the terms of the instruments stipulate that debt and unpaid interest carry a loss without forcing the insurance undertaking to cease its activities;

– the terms of the instrument does not in any way require the debt to be repaid prior to the stated maturity date, other than in the event of a liquidation of the issuer; and

– the instrument may not be repaid voluntarily at the option of a holder of the instrument and any voluntary prepayment requires prior approval by FINMA (which shall be granted if the insurance undertaking can show that such prepayment will not jeopardize its solvency).

Not only the issuer of the risk-absorbing capital instrument can benefit from their inclusion in the risk-bearing capital or consideration in the target capital. Inclusion or consideration is also permitted on the group level with respect to the relevant consolidated group SST (article 198 ISO).

4) Changes Proposed for the Eligibility of Risk-Absorbing Capital Instruments

Insurance undertakings will continue to be able to include risk-absorbing capital instruments in the risk-bearing capital or consider such instruments in the target capital under the E-ISO. However, the E-ISO proposes a number of key changes, which are intended mainly to integrate into the new restructuring regime for insurance
undertakings and to increase comparability with the capital requirements under EU insurance regulation (i.e., "Solvency II").

a) Separation of risk-absorbing capital instruments into Tier 1 and Tier 2 instruments

By analogy with Additional Tier 1 Capital (AT1) and Supplementary Capital (Tier 2 Capital, T2) under the tiered capital requirements for banks set out in the Ordinance on the Capital Adequacy and Risk Diversification of Banks and Securities Firms (Eigenmittelverordnung; CAO), the E-ISO proposes to divide risk-absorbing capital instruments into Tier 1 instruments and Tier 2 instruments. Tier 1 instruments must be perpetual whereas Tier 2 instruments may be perpetual or dated. However, the requirements for Tier 1 and Tier 2 instruments differ in more meaningful ways based on their capacity to absorb losses while the (re-)insurer remains a going concern (cf. articles 34, 37 and 38 E-ISO):

<table>
<thead>
<tr>
<th></th>
<th>Tier 1 Instruments</th>
<th>Tier 2 Instruments</th>
</tr>
</thead>
<tbody>
<tr>
<td>Maturity</td>
<td>Perpetual (i.e., no fixed maturity date)</td>
<td>Perpetual or minimum maturity of five years</td>
</tr>
<tr>
<td>Principal loss absorption</td>
<td>Contractually defined conversion into statutory equity or complete or temporary write-down at least if (i) SST ratio falls below 80%, (ii) risk of insolvency exists or (iii) license is revoked</td>
<td>None (but see &quot;Liquidity protection&quot; and &quot;Determination of over-indebtedness&quot; in this table)</td>
</tr>
<tr>
<td>Liquidity protection</td>
<td>None specified ahead of principal loss absorption trigger but FINMA likely to require payment of interest to be deferred before or at the same time as Tier 2 instruments (see below 5(e))</td>
<td>Contractually defined, repayment of nominal amount and payment of interest must be deferred at least if (i) SST ratio falls below 100% or (ii) risk of insolvency exists</td>
</tr>
<tr>
<td>Eligibility</td>
<td>Tier 1 instruments approved by FINMA can either be included in the core capital (up to a maximum of 20% of the core capital) or be included in the supplementary capital (up to a maximum of 100% of the SST net assets)</td>
<td>Tier 2 instruments approved by FINMA can only be included in the supplementary capital (up to a maximum of 100% of the SST net assets)</td>
</tr>
<tr>
<td>Determination of over-indebtedness</td>
<td>To the extent not converted or written down, not excluded as liabilities in determination of over-indebtedness unless the requirements pursuant to article 51a(4) nISA are contractually defined and fulfilled (see below 5(d))</td>
<td>Excluded as liabilities in determination of over-indebtedness by fulfillment of the requirements pursuant to article 51a(4) nISA (see below 4(b))</td>
</tr>
</tbody>
</table>

In analogy to Additional Tier 1 Equity (AT1) and Supplementary Capital (Tier 2 Capital, T2) under the tiered capital requirements for banks set out in the Ordinance on the Capital Adequacy and Risk Diversification of Banks and Securities Firms
(Eigenmittelverordnung; CAO), the E-ISO introduces two tiers of risk-absorbing capital instruments which are triggered by separate events and lead to different consequences. Tier 2 instruments are triggered earlier on and only cause for any redemptions and payments of interest to be deferred. Tier 1 instruments are triggered if the risk-bearing capital clearly no longer covers the target capital and necessarily lead to a write-down or a conversion into equity, whichever is specified in the terms of the relevant instrument.

Despite the explanatory report to the E-ISO extolling the virtues of Tier 1 instruments, we do not expect to see a large number of Swiss insurance undertakings issuing Tier 1 instruments in the near future, both due to the increased cost of capital for the issuance of Tier 1 instruments and the limited demand given that Tier 2 instruments can also be included in the risk-bearing capital up to 100% of the SST net assets.

In addition to the introduction of tiered risk-absorbing capital instruments, the E-ISO no longer includes the market value margin for the calculation of the core capital (see above 2)(b)(i)). Side-by-side the risk-bearing capital under the current ISO and the E-ISO looks as follows:

b) Future requirements for the eligibility of risk-absorbing capital instruments

Under the E-ISO, risk-absorbing capital instruments will continue to have to meet certain requirements in order to be eligible for inclusion in the core capital or supplementary capital, as the case may be.
While the eligibility requirements for risk-absorbing capital under article 37 E-ISO to a certain extent mirror the current requirements under article 22a ISO, there are some key differences to observe under the E-ISO. The main difference is obviously the introduction of two different tiers of risk-absorbing capital instruments (see above under 4(a)). However, article 37 E-ISO also introduces additional changes. Firstly, Tier 2 instruments (as to Tier 1 instruments, see below 5(e)) have to additionally fulfill the requirements set out in article 51a(4) nISA for an eligible risk-absorbing capital instrument to be excluded for the purposes of determining the issuer’s overindebtedness. This important provision prevents the situation where somewhat ironically the claims arising from a risk-absorbing capital instrument might themselves trigger an overindebtedness and thereby render the instrument’s loss-absorbing function moot. Secondly, article 37(1) lit. e E-ISO introduces the new requirement that any repayment of Tier 2 instruments with a fixed maturity is only permitted if the extent that such repayment does not cause the SST ratio to fall below 100% nor cause a risk of insolvency or if such Tier 2 instrument is replaced by another (Tier 1 or Tier 2) instrument which is not only of equal or higher quality but also has an equal or preferable impact on the SST calculation with respect to the amount included in the risk-bearing capital. However, article 37 E-ISO no longer a priori prevents prepayments prior to the stated maturity date of the relevant instrument (but still requires prior approval by FINMA). Article 37(1) lit. d E-ISO, on the other hand, should be understood

<table>
<thead>
<tr>
<th>Eligibility requirements under current ISO</th>
<th>Eligibility requirements under revised ISO</th>
</tr>
</thead>
<tbody>
<tr>
<td>Instrument is actually paid-in and not secured with assets of the insurance undertaking (art. 22a para. 1 lit. a ISO)</td>
<td>Instrument is actually paid-in and not secured with assets of the insurance undertaking (art. 37 para. 1 lit. a E-ISO)</td>
</tr>
<tr>
<td>No set-off against claims of the insurance undertaking (art. 22a para. 1 lit. b ISO)</td>
<td>No set-off against claims of the insurance undertaking (art. 37 para. 1 lit. b E-ISO)</td>
</tr>
<tr>
<td>Instrument either (i) subordinated to the claims of all other creditors in the event of liquidation, bankruptcy or restructuring procedures or (ii) will be converted into statutory equity upon the occurrence of certain conditions (art. 22a para. 1 lit. c ISO)</td>
<td>Instrument either (1) if Tier 1: triggered at least if SST-ratio falls below 89%, (ii) risk of insolvency, or (iii) loss of license and leads to complete write-down or conversion into equity capital or (2) if Tier 2: triggered at least if SST-ratio falls below 100% or (ii) risk of insolvency and entities/forces insurance undertaking to defer capital payment and interest AND not taken into account for determination of indebtedness pursuant to art. 51a para. 4 E-ISO, i.e. a) Claims for redemption and interest payments are subordinated to all non-subordinated claims and all subordinated claims arising from risk-absorbing instruments non-eligible for inclusion in the risk-bearing capital/target capital in the event of liquidation, bankruptcy or restructuring procedures; b) Claims for redemption and interest payments only satisfied to the extent all senior claims are covered, including in the event of liquidation bankruptcy or restructuring procedures; and c) No redemption or interest payments if this would lead to serious liquidity issues (art. 37 para. 1 lit. e E-ISO)</td>
</tr>
<tr>
<td>Insurance undertaking entitled or, under certain circumstances, forced to defer or cancel interest payments (art. 22a para. 1 lit. d ISO)</td>
<td>Instrument intended to be permanent and voluntary prepayment requires insurance undertaking’s consent and prior approval by FINMA (art. 37 para. 1 lit. e E-ISO)</td>
</tr>
<tr>
<td>Debt and unpaid interest carry a loss without forcing the insurance undertaking to cease its activities (art. 22a para. 1 lit. e ISO)</td>
<td>Repayment of stated instruments only permitted if (1) redemption does not lead to SST-ratio falling below 100% or a risk of insolvency; or (2) instrument is replaced by an instrument of equal or higher value (art. 37 para. 1 lit. f E-ISO)</td>
</tr>
<tr>
<td>No requirement that the debt to be repaid prior to the stated maturity date, other than in the event of a liquidation of the issuer (art. 22a para. 1 lit. f ISO)</td>
<td>No voluntary prepayment at the option of a holder of the instrument and any voluntary prepayment requires prior approval by FINMA (art. 22a para. 1 lit. g ISO)</td>
</tr>
</tbody>
</table>
as an editorial improvement to clarify article 22a(1) lit. g ISO and does not intend to introduce any substantive change.

Pursuant to FINMA’s current practice, risk-absorbing instruments may contain a moderate incentive (e.g., interest step up) for repayment without limitations as to the time when such incentive applies. Article 37(3) E-ISO codifies this practice for Tier 2 instruments, but such incentive may only kick in ten years after the issue date of the instrument.

c) Eligibility of risk-absorbing capital instruments on group level

Under the current rules, article 198 ISO allows insurance groups to include risk-absorbing capital instruments in the group risk-bearing capital with respect to the consolidated group SST. Article 198d E-ISO, which differentiates between two scenarios, will introduce more stringent requirements for the eligibility of risk-absorbing capital instruments for inclusion in the risk-bearing capital or consideration in the target capital with respect to the consolidated group SST.

The first scenario captures the issuance of risk-absorbing capital instruments by a Swiss insurance undertaking which is part of an insurance group and is itself subject to the SST. In order to be eligible for inclusion or consideration on a group level, the relevant instruments must meet the following requirements (article 198d(1) E-ISO):

- the risk-absorbing capital instruments fulfill the requirements of article 37 E-ISO with respect to the issuing group company;

- the respective Tier 1 or Tier 2 trigger also makes reference to the SST ratio of the consolidated group SST and the insolvency risk of the top group company; and

- if such risk-absorbing capital instruments are guaranteed by another group company, (i) the definition of "insolvency risk" pursuant to article 37(1) lit. c E-ISO also extends to such group company and (ii) it is ensured that the guarantees regarding the risk-absorbing capital instruments will not be considered in the determination of the guaranteeing group company’s over-indebtedness.

The second scenario addresses the issuance of risk-absorbing capital instruments by a member of an insurance group that is itself not subject to the SST. In order to be eligible for inclusion or consideration on a group level, the relevant instruments must meet the following requirements (article 198d(2) E-ISO):

- the risk-absorbing capital instruments fulfill the requirements of article 37 E-ISO with respect to the issuing group company;

- the respective Tier 1 or Tier 2 trigger also makes reference to the SST ratio of the consolidated group SST and the insolvency risk of the top group company; and
– if such risk-absorbing capital instruments are not guaranteed by another group company, it is ensured that the risk-absorbing capital instruments will not be considered in the determination of the issuing group company’s over-indebtedness; or

– if such risk-absorbing capital instruments are guaranteed by another group company, (i) the definition of "insolvency risk" pursuant to article 37(1) lit. c E-ISO also extends to such guaranteeing group company and (ii) it is ensured that the guarantees regarding the risk-absorbing capital instruments will not be considered in the determination of the guaranteeing group company’s over-indebtedness.

By extending the decisive triggers and references regarding insolvency risk to the issuing group company, the guaranteeing group company and/or the top group company, the revised ISO aims to prevent financial resources flowing out of the group due to payments arising under risk-absorbing capital instruments in situations where the group and the top group company no longer meet the requirements of the consolidated SST and face the risk of insolvency, respectively.

d) Transitional provisions

Article 216c E-ISO allows for grandfathering periods for risk-absorbing capital instruments issued under the current ISO and approved as eligible by FINMA:

– Instruments that do not meet the eligibility requirements of article 37 E-ISO can be included in the supplementary capital or considered in the target capital until the earlier of (i) the repayment date and (ii) 10 years following the revised ISO entering into force (i.e., expected to run until mid-2033).

– Instruments are exempt from a bail-in by way of conversion into equity or write-down pursuant to article 52d(4) nISA for a maximum of 10 years following the revised ISO entering into force.

5) Issues in Practice

Despite not even having entered into force, the revised rules on the eligibility of risk-absorbing capital instruments have already brought to light a number of issues which merit a closer look, if not clarifying statements in the final version of the revised ISO.

a) Infection risk if eligibility of risk-absorbing capital instrument is revoked during their term

Article 51(4) lit. a nISA discounts risk-absorbing capital instruments from being included in the determination of the issuing entity’s over-indebtedness if they fulfil certain requirements (see above 4)(b)). If FINMA revokes the relevant instruments eligibility, in particular due to the lapse of the grandfathering period for legacy instruments
(see above (4)(d)), claims arising out of such instruments (if they do not fulfil the requirements of article 51(4) nISA) would suddenly be included in the determination of the issuer’s over-indebtedness and could therefore trigger an insolvency event. In practice, however, if such instruments do no longer eligible for inclusion in the risk-bearing capital any more (e.g., at the end of the grandfathering period), they will likely be called for redemption. The reason being that such instruments would then constitute an overly expensive form of funding.

b) Effect of risk-absorbing capital instruments on the SST

Pursuant to article 34(1) lit. a E-ISO, the effect of risk-absorbing capital instruments on the SST by inclusion in the risk-bearing capital or consideration in the target capital in terms of amounts is determined by (a) the market consistent value (i.e., the financial expenditures of the issuer to fulfil the relevant liabilities; cf. article 27 E-ISO) on the effective date of the instrument’s inclusion in the risk-bearing capital and (b) the effect on the target capital for consideration in the target capital.

In our view it is not sufficiently clear how the market consistent value of the risk-absorbing capital instrument would be recognized in the SST net assets and eligible with respect to the risk-bearing capital. For instance, if such instrument traded at 80% of its nominal value on the effective date of its inclusion in the risk-bearing capital, article 34(1) lit. a E-ISO implies that it would only be included to that extent in the risk-bearing capital, but for purposes of the SST net asset calculation added to the liabilities at 100% of its nominal value.

c) Treatment of guarantee claims regarding claims under risk-absorbing capital instruments in the over-indebtedness of a guaranteeing group company

If a group company guarantees a risk-absorbing instrument, article 198d(1) lit. c and (2) lit. d E-ISO require that it is ensured that the guarantees regarding the risk-absorbing capital instruments will not be considered in the determination of the guaranteeing group company’s over-indebtedness. However, article 51a(4) nISA, which exempts claims stemming from risk-absorbing capital instruments from being included in the determination of over-indebtedness does not specifically refer to the guarantee claims which cover the relevant claims arising out of the risk-absorbing capital instruments.

In our view, this can only be an editorial error which crept into the nISA when the relevant paragraph was introduced during the parliamentary discussions. Firstly, the explanatory report to the E-ISO specifically points out with reference to article 198d(2) lit. c E-ISO that ensuring that risk-absorbing capital instruments are not included in the determination of the issuing group company’s of overindebtedness is equivalent to a contractual assurance that at least no financial recourses can flow out of the group by servicing claims of the creditors of the risk-absorbing capital instruments. While article 198d(2) lit. c E-ISO refers only to the scenario where there is no group-internal
guarantee, article 198d(2) lit. d E-ISO, referring to risk-absorbing capital instruments that are guaranteed by another group company, mirrors the same requirements with respect to the guaranteeing group company.

Structurally, this allows the conclusion that it is sufficient if the terms of the relevant instruments ensure that no financial resources can flow out of the group by servicing the creditor claims against the guarantor of the risk-absorbing capital instruments. This, in turn, can be accomplished by having the terms of the underlying guarantee comply with the requirements set out in article 51a(4) nISA per analogy.

Finally, if article 51a(4) nISA did not apply to claims arising from a guarantee on claims for repayment and payment of interest arising from risk-absorbing capital instruments, it would undermine the provisions entire purpose, namely to strengthen the insurance undertaking’s / insurance group’s capital situation in the event of insolvency. This is because taking the guarantee claim into account at the level of the guarantor could trigger the guarantor’s over-indebtedness, which in effect would likely result in a chain reaction within the insurance group, leading to the same results as if the capital claim and interest payments arising directly from the risk-absorbing capital instruments were included in the determination of the over-indebtedness of the issuer. Additionally, the only alternative to the above solution would be a subordination agreement with a moratorium (Stundung) (as required pursuant to Swiss corporate law for not considering debt in the determination of over-indebtedness), which in turn would trigger “cross-defaults” in other contracts (e.g., in standard market loan agreements and bond terms, under which any moratorium usually leads directly to an “event of default” and thus to an acceleration of the debt).

Essentially, this would make it impossible to issue risk-absorbing capital instruments with a guarantee from another group company, which in turn would make it significantly more expensive and more difficult for Swiss insurance groups to raise funds through the capital markets. Against this background, we would welcome a clarification in the final revised ISO.

d) Treatment of Tier 1 instruments in the determination of over-indebtedness

Other than Tier 2 instruments, article 37(1) lit. c E-ISO does not explicitly require Tier 1 instruments to fulfil the requirements set out in article 51a(4) nISA. However, if these requirements are not fulfilled, Tier 1 instruments can arguably not be excluded as liabilities for the purposes of determining the issuer’s over-indebtedness, which affects their loss absorbing properties. Therefore, an issuer is well advised to ensure that Tier 1 instruments also fulfil the requirements set out in article 51a(4) nISA and, thus, will not be considered as liabilities in the determination of the issuer’s over-indebtedness.
e) Absence of interest deferral in Tier 1 instruments

Tier 2 instruments are required to defer the repayment of nominal amount and the payment of interest at least if (i) the SST ratio falls below 100% or (ii) a risk of insolvency exists (article 37(1) lit. c E-ISO). By contrast, the E-ISO does not contain any deferral provisions for Tier 1 instruments. In practice, however, we would expect that the deferral with respect to Tier 2 instruments would be triggered before Tier 1 instruments are converted or written down.

In our assessment, that is an editorial oversight. It is not conceivable that Tier 2 instruments are required to defer interest while at the same time interest is paid on Tier 1 instruments prior to their conversion or write down. Therefore, we would expect FINMA to require the deferral of interest payments on Tier 1 instruments before or at the same time as such deferral is triggered with respect to Tier 2 instruments.

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Listing and Trading of GDRs on the SIX Swiss Exchange by Chinese Companies under SER’s revised Regulatory Framework

Reference: CapLaw-2022-35

Following approval from the Swiss Financial Market Supervisory Authority FINMA, SIX Exchange Regulation’s (SER) revised regulatory framework for global depositary receipts (Hinterlegungsscheine; GDRs) entered into force on 25 July 2022. These long-awaited revised regulations paved the way for the listing and trading of GDRs on the SIX Swiss Exchange (SIX) via the China-Switzerland Stock Connect Program. On 28 July 2022, the first four Chinese companies have listed GDRs in accordance with the Standard for Depositary Receipts on SIX and commenced trading in the newly introduced separate trading segment for GDRs. No GDRs had ever been listed on SIX before. This article provides an overview of the main aspects of SIX’s Standard for Depositary Receipts, the China-Switzerland Stock Connect Program and the revised GDR specific regulations of SER.

By Christian Schneiter

1) Standard for Depositary Receipts

Since 2007, the listing rules of SER have provided for a specific regulatory standard for GDRs which is called Standard for Depositary Receipts. GDRs – the Swiss equivalent to American depositary receipts (ADRs) which are used by non-U.S. companies to access the U.S. capital markets – are tradable securities that are issued
to represent a certain number of deposited equity securities, i.e. the listed underlying shares. They allow the indirect exercise of membership and economic rights attached to the deposited equity securities (see article 90 of the listing rules of SER dated 15 July 2022 (LR)). The underlying listed shares are deposited with a depositary who must either be (a) licensed as a bank under the Banking Act or as a securities firm under the Financial Institutions Act, or (b) subject to equivalent foreign supervision (see article 92 (1) LR and section 3)b) below).

On 28 July 2022, the first four Chinese companies, i.e. Ningbo Shanshan Co., Ltd., Gotion High-Tech Co., Ltd., GEM Co., Ltd., and Keda Industrial Group Co., Ltd., listed GDRs in accordance with the Standard for Depositary Receipts on SIX and commenced trading in the newly introduced trading segment for GDRs. These four Chinese companies raised a total of around USD 1.6 billion thereby. Previously, there was no public market for GDRs at SIX since no issuer had made use of the possibility to list GDRs on SIX before. On 21 September 2022, Lepu Medical Technology (Beijing) Co., Ltd. and on 26 September 2022, Joincare Pharmaceutical Group Industry Co., Ltd. became the fifth and the sixth companies to list GDRs on SIX and according to public reports, several other listed Chinese companies are likely to follow these newcomers’ lead.

Foreign listed non-Chinese companies have so far sought a secondary listing of their shares on SIX rather than a listing of GDRs. The main reason for them choosing that route is that under certain conditions significant exemptions for secondary listings of shares apply with respect to the SIX listing requirements as well as the obligation to publish a prospectus. Chinese listed companies are, however, bound by strict domestic regulations for doing secondary listings of shares abroad, making a follow-on on the GDR segment of SIX a less arduous route which has become attractive with the introduction of the China-Switzerland Stock Connect Program (see section 2) below).

2) China-Switzerland Stock Connect Program

In June 2019, the so-called Shanghai-London Stock Connect Program was launched in order to facilitate a new level of capital cooperation between the People’s Republic of China (China) and the United Kingdom. On 11 February 2022, the China Securities Regulatory Commission (CSRC) expanded the Shanghai-London Stock Connect Program to include companies listed on the Shenzhen Stock Exchange (SZSE), as well as the SIX and German stock exchanges. The effects of this expansion were quickly evident with several Chinese listed companies announcing their intention to seek to raise funds through listing and trading GDRs on SIX. However, as of mid September 2022 no Chinese company has listed GDRs in Germany. SIX worked with the CSRC, the SZSE and the Shanghai Stock Exchange (SSE) to establish a stock connect system (China-Switzerland Stock Connect Program) that enables Chinese companies listed on the SZSE or the SSE, respectively, to list and trade GDRs representing their
domestic shares (A Shares) on SIX (the focus of this article) and, vice versa, it allows Swiss listed companies to obtain a listing of Chinese depositary receipts in China.

Under the China-Switzerland Stock Connect Program investors are able to buy GDRs on SIX or another legitimate trading venue in the normal manner or (subject to Chinese law restrictions applicable to foreign investors) instruct a designated broker to buy A Shares on the SZSE or the SSE (where the A Shares are listed) and then instruct the depositary to create GDRs representing such A Shares (subject to the cap of the total amount of GDRs actually approved by CSRC). Vice versa, in order to sell GDRs, an investor may either sell GDRs on SIX or another legitimate trading venue in the normal manner or instruct a designated broker to redeem the GDRs and sell the underlying A Shares on the SZSE or the SSE (where the A Shares are listed). This means that the China-Switzerland Stock Connect Program involves a mechanism connecting the capital pools that exist at the participating stock exchanges in China and in Switzerland via a two-way depositary receipt program. The intention of this mechanism is to provide fungibility between the GDRs and the underlying A Shares by enabling investors or their brokers to place, buy and sell orders with the designated brokers who are able to seek the best price for the equity securities from either market. It should also be noted that pursuant to CSRC regulations, GDRs subscribed for by investors in an offering may not be redeemed within 120 days following the first day of trading. Therefore, during such a lock-up period GDR holders cannot redeem their GDRs and sell the underlying A Shares on the SZSE or the SSE and are thus, only able to sell their GDRs through SIX or another legitimate trading venue.

3) Revised Listing Rules

a) Key Amendments

The key amendments to the revised LR concern the listing requirements applicable for GDRs (see b) below) and the conditions for maintaining the listing of GDRs on SIX (see c) below).

A listing of GDRs in accordance with the Standard for Depositary Receipts on SIX has elements of a primary and a secondary listing of shares but is closer to a primary listing. After reviewing the previous LR and taking into account this aspect as well as the particularities of the China-Switzerland Stock Connect Program, the Regulatory Board concluded that in a few areas the previous LR provided for less stringent obligations than those of other financial centres which could prove negative from an investor’s point of view. As a consequence, the conditions for maintaining the listing have been brought closer to those of the SIX main market (see c) below). Under the previous LR, the GDR specific listing requirements with respect to the issuer and the GDRs were already the same as the relevant requirements applicable for a primary listing of shares on the SIX main market. Therefore, the listing requirements have undergone only a few selective changes relating to the required content of the deposit agreement and the prospectus (see b) below).
b) Revised Listing Requirements

Deposit Agreement: In order to ensure that the GDR holders can exercise the membership and economic rights attached to the underlying shares, the issuer of the underlying shares whose shares are listed on a foreign stock exchange (GDR Listed Issuer) has to enter into a deposit agreement with the depositary who issues the GDRs. Already under the previous LR, the deposit agreement had to provide for the underlying shares to be held by the depositary on a fiduciary basis (or on the basis of similar arrangements under applicable law) on behalf of the investors and also needed to ensure that the depositary can exercise the membership and economic rights attached to the underlying shares in the interest of the investors in the GDRs.

In addition to this, the revised LR newly require that the underlying shares must be held by the depositary in a way that they can be separated and segregated for the benefit of the investors in the event of debt restructuring or insolvency of the depositary (article 93 (1) LR). A further requirement is that the deposit agreement must now oblige the depositary to provide the Regulatory Board and/or SER, upon request, with all information and documentation in connection with the implementation of the deposit agreement, in particular with respect to the number of underlying shares deposited and GDRs issued (article 93 (2) LR).

Prospectus: On top of that, the LR provide that an issuer who applies for a listing on SIX must submit evidence that it has a prospectus that has been approved by a reviewing body (e.g. SER) or that is deemed to be approved in accordance with the Financial Services Act (FinSA) (article 95 (1) LR). An exemption from this obligation can apply when GDRs of the same category shall be listed that are already admitted to trading on SIX (see article 38 (1) (a) FinSA). When GDRs are, however, listed for the first time on SIX, as a rule, there is no exemption. The required minimum content applicable for an offering and/or a listing prospectus for equity securities is set out in article 40 FinSA and in Annex 1 of the Financial Services Ordinance (FinSO). With respect to a GDR listing prospectus it has now been clarified in the new para. 2 of article 95 LR that the prospectus must contain appropriate information about the depositary, the GDRs and the deposit agreement, in particular information about the rights of the GDR holders under the deposit agreement, insolvency protection (i.e. protection of the GDR holders in the event of debt restructuring or insolvency of the depositary) and the risks related to the GDR set-up. The disclosure of this information is required even in cases where the GDR listing does not trigger the obligation to publish a prospectus.

The other listing requirements applicable for a listing of GDRs on SIX in accordance with the Standard for Depositary Receipts remain unchanged. This means in particular that:

- The requirements that must be fulfilled by the GDR Listed Issuer (concerning, inter alia, the track record, the recognized accounting standard, the auditors and the audit report, the minimum equity capital, etc.) are the same as for the SIX main
market (see article 91 LR in conjunction with articles 10 to 16 LR). As regards the accounting standards of Chinese GDR Listed Issuers, SER accepts the Accounting Standard of the People’s Republic of China for Business Enterprises (ASBE) in addition to the international accounting standards (IFRS and US GAAP).

The same requirements apply to GDRs as for a primary listing of shares on the SIX main market (see article 94 (1) LR in conjunction with articles 17 to 26 LR). This means that at the time of the listing, the GDRs must, among other things, (i) have been validly issued, (ii) have a sufficient free float, *i.e.* at least 20% of all of the issuer’s outstanding GDRs (not the underlying shares) in the same category must be in public ownership and the capitalization of those GDRs in public ownership must amount to a minimum of CHF 25 million, (iii) be properly tradeable on SIX and (iv) be able to be cleared and settled via the settlement systems that are permitted by SIX. Further, there must also be evidence that the underlying shares to be represented by the GDRs are validly issued. This requirement is met in practice by a legal opinion containing a relevant confirmation issued by a Chinese law firm.

c) **Revised Conditions for maintaining the Listing**

As soon as and for as long as the GDRs are listed on SIX, GDR Listed Issuers have to fulfil certain conditions to maintain the listing of GDRs under the LR. The following are the main amendments in this respect:

- **Management transactions:** Under the previous LR, GDR Listed Issuers were exempt from the obligation to disclose management transactions in GDRs and the underlying shares. This exemption has been abolished. As a result, GDR Listed Issuers have to ensure that the members of their board of directors and the executive committee report transactions in both the GDRs and the underlying shares (see article 100 LR in conjunction with article 56 LR and the SIX Directive on the Disclosure of Management Transactions).

- **Corporate governance:** The SIX Directive on Information relating to Corporate Governance is not applicable to GDR Listed Issuers (see article 101 (1) LR). The revised LR, however, newly determine that a GDR Listed Issuer is (only) required to declare in both the prospectus in accordance with the FinSA and the annual reports that it adheres to the corporate governance standards of its home market (see article 101 (2) LR).

- **Interim reporting:** Under the previous LR, GDR Listed Issuers were exempt from the obligation to publish interim financial statements. This exemption has been revoked in the revised LR (see article 102 LR) and thus, GDR Listed Issuers are now subject to the same interim reporting obligations as the issuers whose equity securities are listed on the SIX main market.
- **Ad hoc publicity**: The revised LR now specify that GDR Listed Issuers are obliged to disclose price-sensitive facts, i.e. are subject to the ad hoc publicity obligations (article 103 LR in conjunction with article 53 et. seq. LR and the SIX Directive on Ad Hoc Publicity). This ad hoc publicity applies to both the GDRs and the underlying shares. With respect to the underlying shares this means, in particular, that if price-sensitive facts in the home market of the underlying shares are being made public, the GDR Listed Issuers must simultaneously disclose such ad hoc information in Switzerland.

- **Reporting obligations for depositaries**: Under the previous LR, depositaries were subject to the same reporting obligations (including, *inter alia*, ad hoc publicity) as GDR Listed Issuers. These obligations for depositaries have now sensibly been abolished (see article 103 LR).

d) **Items to be clarified**

With respect to the following two items SER created a practice which, whilst welcome, has no basis in the SER regulations:

- **Swiss paying agent requirement**: It is a listing requirement for the GDRs that services pertaining to interest and capital, as well as all other corporate actions, are provided in Switzerland (article 94 (1) LR in conjunction with article 24 LR). With respect to the GDR listings so far at SIX only international banks have been acting as depositary who have been using the European International Central Security Depositories Euroclear Bank SA/NV (as operator of the Euroclear System) and Clearstream Banking S.A. to make the respective book-entry settlement systems available for clearing and settlement of the GDRs. As it would be impracticable to use a paying agent in Switzerland under such set-ups, SER has been willing to grant exemptions relating to this listing requirement. In the interest of clarity, it would have been desirable if a GDR specific exemption had been created in article 24 LR.

- **Regular reporting obligations**: The process relating to the creation and redemption of GDRs under the China-Switzerland Stock Connect Program (see section 2 above) is not under the control of the Chinese GDR Listed Issuer. Whilst the number of GDRs listed at any time on SIX may increase or decrease at the option of the GDR holders and the A shareholders respectively, the total share capital of the Chinese GDR Listed Issuer remains unchanged. As the rules on regular reporting set out in the SIX Directive Regular Reporting Obligations (DRRO) are designed to handle capital reductions and capital increases of issuers but have not been adapted to cover such cross-border creation and redemption of GDRs and as it would not be practicable to report each change in the number of GDRs, SER’s practice is to grant Chinese GDR Listed Issuers an exemption from the regular reporting obligations and accepts a yearly report stating the number of issued (listed) GDRs, the number
of issued (listed) GDRs since last report, the number of newly issued (listed) GDRs (increase), the number of GDRs redeemed (reduction) since last report, the number of remaining (unlisted) GDRs and the number of remaining (unlisted) GDRs since last report. This practice, whilst welcome, has no basis in the DRRO. Therefore, it would be desirable to have the necessary clarity through appropriate amendments to Annex 1 of the DRRO.

4) Revised Trading Rules

A separate trading segment has been created for the GDRs listed on SIX in the revised SIX Trading Parameters Guideline. It is based on the model for the Mid-/Small-Cap Shares trading segment, i.e. the segment that includes shares which are listed in the regulatory standard for Special Purpose Acquisition Companies (SPACs). However, shorter trading hours apply as trading only begins at 3 pm (CET) and continues until 5.20 pm (CET) at which time the closing auction starts, and continues until trading closes at 5.30 pm (CET) with a random close of trading with two minutes. Following the closing auction, "Trading-at-Last" provides investors with on book trading at the official closing price until 5.40 pm (CET). Regular trading hours for the other equity securities (except in the Sparks trading segment) are quite different, with trading open between 9 am (CET) and 5.40 pm (CET) on each trading day.

In Switzerland as well in China, price-relevant (ad hoc) information has to be published outside trading hours. One of the intentions of these shortened trading hours for GDRs is to ensure compliance with the ongoing ad hoc publicity obligations of Chinese GDR Listed Issuers in Switzerland as well as in China as these allow them to publish ad hoc information outside trading hours in Switzerland (where the GDRs are listed) and in China (where the underlying shares are listed). Further, the shortened trading hours for GDRs serve to pool secondary market liquidity with the intention of optimizing price building and trade execution.

5) Conclusion

The introduction of the China-Switzerland Stock Connect Program provides a new channel for Chinese companies which are listed on the SZSE or the SSE to raise capital in Switzerland. One of the unique features of this new stock trading link is the fungibility of GDRs and the underlying A Shares. With the entering into force of the revised LR, a framework has been created which enables Chinese GDR Listed Issuers to efficiently list GDRs on SIX even though there remain some specific items which seem to be in need of clarification since SER’s practice, whilst welcome, has not yet been reflected entirely in the revised LR.

The establishment of the separate trading segment for GDRs on SIX with shorter trading hours is geared to pool secondary market liquidity and thus, to optimize price building and trade execution while allowing Chinese GDR Listed Issuers to release price-relevant facts outside trading hours simultaneously in both China and Switzerland.
It can be expected that the trend to SIX GDR listings via the China-Switzerland Stock Connect Program will continue unabated. Whilst so far, mainly international and Chinese financial institutions were involved in the GDR deals (as underwriters, bookrunners, global coordinators and depositaries), Swiss banks are also stepping into this new business.

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Transactions on carbon rights in Switzerland: Legislative landscape and perspectives
Reference: CapLaw-2022-36

The object of this article is to provide a first analysis of the possible characterization of carbon credits and derivatives relating to carbon credits under Swiss law.

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1) Introduction
Carbon credits, also known as CCs, emission allowances or carbon offsets, were officially set up under the United Nations’ 1997 Kyoto protocol on climate change as an attempt to committing industrialized countries and economies in transition to limit and reduce greenhouse gases (GHG) emissions in accordance with agreed individual targets.

Generally speaking, in the financial industry, a carbon credit is a "tradable permit or certificate that is issued by a government under an ETS. It provides the holder with the right to emit one ton of CO₂ or an equivalent amount of another GHG" (see the definition of the International Swaps and Derivatives Association (ISDA); ISDA, Report on the Role of Derivatives in Carbon Markets, p. 4).

In light of the growing importance of the fight against climate change, the carbon market, organised around the purchase, either on a mandated or voluntary basis, of these certificates, has experienced significant growth in size and sophistication. However, despite – and perhaps because of – such a rapid development, the regulatory approach of carbon credits across jurisdictions is considerably disparate.

Whereas certificates issued under mandatory emissions trading schemes are regarded as financial instruments in some legal systems, i.e., a characterization which*

* The content of this article is the personal opinion of the authors. This opinion is not necessarily identical with the position of Lenz & Staehelin.
may trigger licensing requirements when such products are traded, carbon credits may be bought and sold with virtually no requirements in other legal systems. Similarly, the triggers of regulation regarding carbon credits also significantly vary amongst the various jurisdictions.

Interestingly, under Swiss law, the legal characterization of carbon credits is not – yet – addressed. However, this matter is of particular relevance as the Federal Department of Finance is expected to publish a draft revision of the Financial Market Infrastructure Act (FMIA) for public consultation by the end of the year, and this question will most likely be addressed in this upcoming revision.

The Federal Act on the Reduction of CO\textsubscript{2} Emissions (CO\textsubscript{2} Act) defines emission allowances as tradable rights to emit GHG allocated or auctioned by the Swiss Confederation or by states or communities of states with emission trading schemes (ETS) recognized by the Swiss Federal Council (see article 2(3)). This definition stems from the Agreement between the European Union and the Swiss Confederation on the linking of their greenhouse gas emissions trading systems and merely characterizes an emission allowances certificate as a "document" attesting reductions in emissions achieved. Similarly, financial markets regulations such as the Swiss Financial Services Act (FinSA) or FMIA do not define the notion of emission allowances nor address their legal nature. Thus, for the time being, carbon credits are neither defined nor characterized within the current Swiss legal framework.

In light of this lack of clarity, it is worthwhile examining how carbon credits as well as transactions on carbon credits such as derivative contracts would be analysed under Swiss law, in particular in comparison to their treatment within the European legal framework. Eventually, it may be upon the basis of these considerations that the Swiss legal framework will be further developed. That being said, an analysis of the existing Swiss and European legal framework also shows that there are strong rationales for the discrepancies between those two systems, which should not be overlooked.

2) Current Swiss Legal framework

As a first step, the question arises as to whether carbon credits as such are to be considered financial instruments within the meaning of article 3 let. a FinSA. In particular, the question is whether these products would qualify as "securities" under Swiss law.

Pursuant to article 2 let. b FMIA, in conjunction with article 3 let. b FinSA, securities are defined as any "standardised certificated and uncertificated securities, in particular uncertificated securities in accordance with Article 973c of the Code of Obligations (CO) and ledger-based securities in accordance with Article 973d of the CO, as well as derivatives and intermediated securities, which are suitable for mass trading".


In view of this definition, one can legitimately doubt the fact that carbon credits certificates could be considered as "standardised". As a matter of fact, they seem to be highly heterogeneous, since each credit has features and attributes which are associated with the underlying project or place where it was carried out. In that sense, one could rather characterize carbon credits as widely non-standardized. Additionally, it is worthwhile noting that the SIX Swiss Exchange currently considers that these products are not tradable on a Swiss trading venue. Generally, carbon credits cannot be characterized as securities under article 3 let. b FinSA.

Likewise, it appears difficult to subsume carbon credits as such under another alternative provided for in Art. 3 let. b FinSA such as structured products (article 3 let. a cypher 4), derivatives in accordance with article 2 let. c FMIA (article 3 let. a cypher 5 FinSA), or bonds (article 3 let. a cypher 7 FinSA), among others.

Therefore, we are of the view that, carbon credits certificates, as such, would neither characterize neither as securities nor as any other financial instrument defined in article 3 let. a FinSA, and, as a result, would not fall into the scope of the FinSA.

As a second step, it is relevant to consider the legal characterization of derivatives transactions relating to carbon credits certificates (such as forwards or options). In that context, it seems that such OTC derivatives transactions may be characterized as derivatives transactions as defined by article 2 let. c FMIA, that is "financial contracts whose value depends on one or several underlying assets and which are not cash transactions". Hence, derivative contracts relating to carbon credit certificates would fall into the scope of the FMIA, triggering the application of the FMIA market conduct rules laid down in articles 93 to 117 FMIA, unless an exemption applies.

In addition, if the conclusion of derivatives on carbon rights is considered to be a financial service within the meaning of article 3 let. c FinSA, the financial service provider would be required to implement the FinSA rules of conduct and organizational measures (which will not be addressed in further details in this contribution). Of note, so-called proprietary trading activities (Gegenparteigeschäfte) are not considered to be a financial service under the FinSA and are, therefore out of the scope of the FinSA.

Regarding the implementation of the FMIA market conduct rules, one should examine whether an exemption provided by FMIA would be applicable to OTC derivatives transactions relating to carbon credits. In this context, three possible exemptions may spring to mind: spot transactions as defined in article 2 (3) let. a and para 4 FMIO, derivatives transactions relating to climatic variables pursuant to article 2(3) let. c FMIO, as well as derivatives transactions relating to commodities as defined in article 94(3) let. c FMIA.

- Spot transactions are deemed to be transactions that are settled either immediately or following expiry of the deferred settlement deadline within two business days,
including transactions that are continuously extended without there being a legal
obligation or without such an extension between the parties being usual (such as
rolling spots). Since Spot transactions are not deemed to be derivatives pursuant to
article 2(3) let. a FMIO, Spot transactions relating to carbon credits would be en-
tirely out of scope of the FMIA requirements and conduct rules.

– Similarly, pursuant to article 2(3) let. c FMIO, derivatives transactions relating to cli-
metric variables, freight rates, inflation rates or other official economic statistics that
are settled in cash only in the event of a default or other termination event are not
considered to be derivatives in the sense of the FMIA and are, hence, out of scope.

– Derivatives transactions relating to commodities are considered to be derivatives as
defined by article 2 let. c FMIA but are exempted from the FMIA market conduct
rules (i.e., clearing, reporting and risk mitigation duties) if they meet the following
cumulative requirements (article 94(3) let. c FMIA):

(a) The transaction is physically delivered,
(b) The transaction cannot be settled in cash at a party’s discretion, and
(c) The transaction cannot be traded on a trading venue or on an organized
trading facility.

With respect to the exception of article 2(3) let. c FMIO, there is nothing under Swiss
laws nor in the case law that would currently support a view that carbon credits would
enter into the scope of this exception.

With respect to the commodities exception provided for under article 2 let. c FMIA,
neither Swiss laws nor case law address the nature of derivatives relating to carbon
credit certificates. However, Annex 2 of the FMIO – “Data to be reported to a trade
repository” expressly lists "emissions" under the section "commodities underlying". Based
on this reference, it could be argued that the Federal Council considers that
emissions are a sub-category of commodities when publishing its Ordinance. A historic
interpretation of the law does not provide for any more guidance. Indeed, neither the
explanatory material such as the Message of the Federal Council on the FMIA of 3
address the question of the legal nature of derivatives relating to carbon credits. From
a teleological standpoint, there would be some merits in regarding emission allowances
and carbon credit certificates as commodities in light of their similarities.

Consequently, there are arguments to consider that derivatives relating to emission
allowances and carbon credit certificates may be regarded as commodities under the
FMIA. As a result, such transactions would certainly be considered as derivatives, yet
would not be subject to the FMIA market conduct rules mentioned above.
Thus, it seems worthwhile to considering and addressing the handling of carbon rights derivatives at the international level and to confronting the above-mentioned approach.

Finally, it is important to specify that in a purely cross-border context, i.e., where entities not based in Switzerland trade in derivatives transactions on carbon credits (such as forward on voluntary emissions reductions), the rules of the FMIA are not applicable to the non-Swiss counterparty. Thus, in such a case, a non-Swiss counterparty wishing to enter into such derivatives transactions in Switzerland would not be subject to any rules as a matter of Swiss law.

3) Overview of the European and International Legal Framework

By international comparison, in several jurisdictions, carbon units tend to characterize as "commodities" with the result that most derivatives on carbon credits do not fall within the scope of the relevant laws.

This seems to be the case in the United States, as VCCs characterize as commodities for the purposes of the Commodity Exchange Act (CEA), which defines VCCs very broadly (see Section 1a (9) CEA). As a result, the Commodity Futures Trading Commission (CFTC) enjoys enforcement authority over markets in VCCs and has taken various steps to assess its role in recent years (see ISDA, Voluntary Carbon Markets: Analysis of Regulatory Oversight in the US, p. 6). That being said, there currently is no overarching federal regulation that addresses the legal nature of VCCs in the United States (see ISDA, Legal Implications of Voluntary Carbon Credits, p. 14). In summary, swaps and options related to carbon credits certificate may trigger licensing requirements if cash-settled (irrespective of whether they are traded on exchange or OTC), while exchange-traded future contracts related to carbon credits are subject to regulation irrespective of whether cash or physically settled. In addition, contracts related to carbon credits falling within the forward contract exclusion from the swap definition do not trigger licensing requirements although they are subject to anti-manipulation requirements.

Similarly, we understand that in Singapore, there is no specific legislation covering the trading of carbon credits. Thus, relevant transactions (including spot, forwards, options, swaps or futures) do not fall under the major relevant market regulation (for more information, see the National Climate Change Secretariat of Singapore’s website under: https://www.nccs.gov.sg/singapores-climate-action/carbon-services-and-climate-finance/).

By contrast, at the European Union level, when considering the regulatory treatment of carbon credit certificates, it is of primary importance to distinguish between mandatory and voluntary carbon credits. The former refer to emission allowances (EUAs) consisting of any units recognised for compliance with the requirements of the EU
Emissions Trading Scheme (EU ETS), whilst the latter refers to all other CCs which can be acquired by entities wishing to voluntarily offset their emissions (EUVCCs).

The first primary difference between VCCs and EUAs relates to their issuance process. On the one hand, EUAs are allocated through auctions organized directly by the EU ETS to which most categories of market participants can participate in (see also: https://www.epa.ie/our-services/licensing/climate-change/eu-emissions-trading-system-/auctioning/). Most of the EU member States have procured the German regulated market European Energy Exchange (EXX) as the common platform to hold those auctions. On the other hand, VCCS are generated by third organizations, who are often project developers who design and implement real-world carbon reduction projects, leading to a reduction of one ton of GHG from the atmosphere. There is therefore no statutory or either legal framework regulating the creation of voluntary carbon units, which leads to non-homogenous carbon credits, whose quality depends of the underlying project.


Under the MiFID, spot transactions in carbon credits were not considered as financial instruments, whilst derivatives transactions relating to carbon credits could fall within the scope of regulation where "they must or may be settled in cash or have the characteristics of other derivative financial instruments". This meant that market participants were subject to potential licensing when they traded carbon credits in the form of derivatives.

However, since the coming into effect of the MiFID II in 2018, all EUAs are classified as financial instruments (see point 11, Annex I, Section C of MiFID II). The MiFID II classifies EUAs, i.e. carbon credits complying with the EU ETS, as a new type of financial instrument (see point 11, Annex I, Section C of MiFID II). What’s more, they are viewed and considered to be financial instruments irrespective of how or where they are traded or settled, and in particular irrespective of whether they are traded spot or in derivative format (see point 4, Annex I, Section C of MiFID II). Hence, market participants within the mandatory carbon market must meet reporting requirements

On the other hand, MiFID II does not classify EUVCCs as financial instruments. The voluntary carbon market indeed mostly functions independently of the compliance market and stays therefore largely unregulated. Nonetheless, although EUVCCs are generally not seen as financial instruments, derivatives on VCCs will be characterized as such if they meet the conditions of at least one of the categories of financial instruments listed out in Section C of Annex I to the MiFID II.

Derivatives on VCCs will usually meet these requirements and therefore become regulated financial instruments (see ISDA, Legal Implications of Voluntary Carbon Credits, p. 11). In this constellation, regulatory requirements under MiFID II and EMIR will consequently apply.

4) Brief Comparative Analysis

In light of the above, considering the international characterization of these products, and more precisely the European legal system’s approach of carbon credits and transactions relating to carbon credits against the Swiss legal system, two main distinctive features that can be noted.

First, one of the major distinctions relates to the division between voluntary and mandatory carbon emissions. For instance, this segregation plays a key role within the European financial architecture, given that the legal approach to carbon credits actually depends on it, as outlined above. By comparison, this differentiation is absent from the Swiss legal system, which does not provide for any specific treatment of carbon credit certificates as such as well as OTC derivatives transactions relating to carbon credit certificates.

Another relatively striking difference between the Swiss and European framework linked with the treatment of carbon credit certificates relates to their characterization as financial instruments. Once again, while European law views mandatory and, in some instances, voluntary carbon credit certificates as financial instruments, this is not the case under Swiss law, which does not currently provide for any specific treatment of these products and thus, does not approach them as financial instruments.

Consequently, at first glance, one might wonder whether it would not be appropriate to draw inspiration from the European legislation and to characterize carbon credits as well as derivatives on carbon credits as financial instruments under Swiss law. However, it should be noted that the somehow more stringent rules applying within the European Union are particular to the European system: they stem from its specificities. What’s more, as mentioned above, carbon credits appear to fall outside the scope of
the relevant laws both in the United States and in Singapore. In particular, they are not characterized as financial instruments.

By contrast, at the European level, the classification of carbon credits as financial instruments is made for the purposes of application of the EU financial markets regulation. It is not aimed to address the legal nature of carbon credits per se. This classification was primarily intended to reduce the risks around market abuse, to improve the efficiency of and accessibility to the carbon market as well as to strengthen investor confidence. Despite the material policy considerations behind MiFID II, the main policy drives relating to the European treatment of carbon credits appear to have evolved around market abuse, whose regulation is structured in a significantly different way than in Switzerland.

In short, most of the parameters that led to the regulation of EUAs are specific to the EU legislative architecture and political environment. They do not necessarily represent a set of universally applicable policy principles that mandate the trading in EUAs as a licensable activity. For all those reasons, not only the rules regarding carbon credits, but also their origin, nature and the whole financial architecture in which they are rooted profoundly differ between Switzerland and the European Union.

As a result, it would be simplistic to draw directly on the European legislation. Under Swiss law, as outlined above, there are good grounds for assuming that derivative contracts related to carbon credit certificates can be considered as commodity derivatives exempt from the market conduct rules under the FMIA, as they seem to be exempted from the relevant laws in the United States or Singapore. This approach to carbon rights is thus corroborated by a broader systematic interpretation.

5) Conclusion

The Swiss legislation is currently silent regarding the treatment of carbon credits. The uncertainty thereby generated may be detrimental to a rapidly developing market and to the competitiveness of Switzerland as a major financial centre. Thus, in the context of the upcoming revision of the FMIA, new specific rules related to the trading of carbon credits may be added. However, for the reasons mentioned above, it seems that it would be inappropriate for the Swiss legislator to follow the European rules without making necessary adjustments to Swiss specificities.

For instance, the notion of financial instrument as conceived within the European Union does not have the same rationale and origins as the Swiss one. Furthermore, it is important for the competitiveness of the Swiss financial centre to maintain certain distinctive features as regards the regulatory treatment of carbon credits. These arguments will probably be heard during the upcoming revision of the FMIA.
Besides, for the reasons mentioned above, derivatives transactions relating to carbon credits could already fit into the current legal framework and be treated as derivatives relating to commodities.

Such a solution seems to represent a proper response in view of the international developments and the particularities of the Swiss financial system. In any case, there would be a great value in preserving some flexibility for the carbon market within the Swiss legal framework.

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Corporate ESG Reporting
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Over recent years ESG (environmental, social and governance) matters have increasingly become the focus of a wide-range of investors, and corporates are expected to comprehensively report on these type of topics. In line with this general development and on the back of the so-called "Responsible Business Initiative", Swiss corporate law has been amended over the recent years to provide for specific ESG-related due diligence obligations and reporting requirements. These reporting requirements will apply for most part for the first time for the 2023 financial year (with some of the rules already applying to the 2022 financial year). This article provides and overview of the Swiss corporate law ESG due diligence and reporting obligations.

By Patrick Schärli

1) Swiss Corporate Law Rules on ESG Due Diligence Obligations and Reporting

Until recently Swiss corporate law did not provide for a significant number of ESG-related requirements. In fact, ESG matters in Swiss corporate law were essentially limited to compensation-related disclosures under the Swiss "say on pay" regulations that apply exclusively to Swiss listed companies. Additionally, Swiss-listed companies are also subject to disclosure rules around governance matters under the SIX Swiss Exchange’s directive on corporate governance. Already today, a good number of Swiss listed companies prepare sustainability reports on a voluntary basis.

With recent amendments to the Code of Obligations, things are about to change. On 1 January 2021 and 1 January 2022, respectively, new due diligence obligations and reporting requirements relating to ESG matters have entered into force and these new rules will apply for the first time for the 2023 financial year (with the
commodities-related transparency rules already applying for the 2022 financial year). These new rules cover a wide-range of topics, namely:

- **Reporting on non-financial matters**, which focuses on climate-related disclosures, but also requires disclosures on social issues and other topics (see paragraph 2 below).

- **Supply-chain due diligence and reporting** requirements aimed at the prevention of child labor and use of conflict minerals (see paragraph 3 below).

- **Transparency rules for commodities firms**, aiming to increase transparency on payments to government bodies (see paragraph 4 below).

Effective as of 1 January 2021, Swiss corporate law also requires large corporates to ensure that each gender is adequately represented in the board of directors and the executive board with the relevant representation quotas being 30% (board of directors) and 20% (executive board). Failure to comply with the gender representation quotas requires additional "comply or explain" type of disclosure. These gender representation rules are, however, subject to rather long transitional periods and apply for the first time for the 2026 financial year (with respect to the composition of the board of directors) and 2031 financial year (with respect to the composition of the executive board). Given these long transitional period, these gender representation requirements are not discussed further in this article.

2) **Reporting on Non-Financial Matters**

The reporting obligations on non-financial matters were introduced as part of a counterproposal to the failed "Responsible Business Initiative". With these new reporting obligations certain larger companies will have to report on a wide range of non-financial matters in the areas of environment, social responsibility and human rights. The Swiss rules generally follow similar regulations that apply in the European Union (in particular those laid out in the EU Directive 2014/95/EU (Non-Financial Reporting Directive)).

The Swiss non-financial reporting obligations apply only to so-called "companies of public interests". A "company of public interests" is a company that meets the following cumulative criteria:

- it is either (i) a listed company or (ii) a company subject to supervision by the Financial Markets Supervisory Authority FINMA (e.g. banks, securities firms, asset managers, insurance companies);

- it employs at least 500 FTE on average over the last two financial years (such number being calculated on a consolidated basis); and
- it exceeds at least one of the following financial threshold in two successive financial years: total assets of CHF 20 million or revenues of CHF 40 million. The financial thresholds have to be calculated on a consolidated basis.

Companies that are controlled by (i) another entity that is itself a "company of public interest" or (ii) by a company that prepares an equivalent non-financial matters report under applicable foreign law, are exempt from the Swiss reporting rules on non-financial matters.

Companies subject to the non-financial reporting obligations have to prepare a report on environmental matters (in particular with respect to CO₂ goals), social and employment aspects, human rights and anti-corruption. Such report has to include information on (i) the Company’s business model, (ii) concepts that are followed, including with respect to due diligence measures, (iii) implementation measures and assessment of efficiency, (iv) description of risks and mitigation measures; and (v) the Company’s key performance indicators (KPIs) for the subject matters.

With respect to climate-related reporting matters, the reporting obligations will be further specified in an implementing ordinance. Based on the initial draft of such ordinance, the climate-related reporting will have to be made on the basis of the principles of the Task Force on Climate-related Financial Disclosures (TCFD).

The yearly report on non-financial matters has to be approved by the Company’s board of directors and must be submitted for approval to the Company’s annual general meeting of shareholders. Moreover, the report has to be published online (on the Company’s website) immediately following its approval, and needs to remain publicly accessible for at least ten years.

The reporting obligations on non-financial matters apply for the first time for the 2023 financial year of in-scope companies. Failure to comply with these new reporting obligations (no reporting or false information) may be sanctioned with fines of up to CHF 100,000 under the Criminal Code.

3) Supply Chain Due Diligence and Reporting

The supply chain due diligence obligations (and related reporting requirements) were also introduced as part of a counterproposal to the failed "Responsible Business Initiative". With these new due diligence and reporting obligations, the Swiss legislator aims to prevent child labor and the use of so-called conflicts materials. It does so by imposing on certain Swiss-based companies a wide range of supply chain due diligence obligations. These obligations apply to the companies that:
- have their registered seat, head office or principal place of business in Switzerland;

- engage either in (i) the placing in free circulation or processing in Switzerland minerals containing conflict minerals, or (ii) the offering products or services for which there is a reasonable suspicion regarding child labor; and

- cannot benefit from one or several exemptions from the supply chain due diligence obligations.

The new diligence obligations are regulated in detail in the Ordinance on Due Diligence and Transparency in relation to Minerals and Metals from Conflict-Affected Areas and Child Labor (DDTrO).

a) Due Diligence Obligations with respect to Child Labor

Not all Swiss companies have to review their supply chain for child labor related issues. Rather, the due diligence obligations with respect to child labor provide for two specific exemptions from the due diligence requirements. The below listed exemptions, are, however, not available if the company offers products or services that have evidently been produced or provided using child labor:

- Small and medium enterprises (SME): Under the DDTrO, a SME is defined as a companies that, on a consolidated basis, do not exceed two of the following thresholds in two successive business years: (i) total assets of CHF 20 million, (ii) revenue of CHF 40 million, and (iii) 250 FTE on an annual average.

- Companies with a low risk of child labor are also exempt from the due diligence obligations. A low risk in relation to child labor can be assumed if a company operates only in countries whose due diligence response is rated as "basic" by UNICEF in its Children’s Rights in the Workplace Index. For purposes of this analysis, the relevant countries are the countries in which the company (i) purchases or manufactures products (based on the indication of origin of the relevant products, i.e. limited to the "made in" country), or (ii) primarily procures or provides services.

The relevant UNICEF index can be accessed online at https://www.childrensrightsatlas.org/country-data/workplace/. It is worth noting that, for example, the United States do not meet the criteria for the "low risk" exemption. The same is generally true for countries in Latin America, Africa and large parts of Asia.

With respect to the exemption for low risk of child labor, the relevant company has to document how it reached the conclusion that there is only a low risk of child labor. This can be done, for example, by documenting the relevant countries (and its corresponding rating under the UNICEF index) in which it manufactures products or provides services or from which it purchases products and procures services.
Moreover, it is recommended that exempted companies regularly review whether the risk ratings and list of relevant countries is still up to date (the explanatory report to the DDTrO sets forth an expectation that such review is performed at least on an annual basis).

If a company falls within one of the above exemptions, it is exempt from the due diligence and reporting obligations with respect to child labor.

Companies that are not per se exempted (i.e. they are not an SME or they do not have a low risk of child labor) are required to assess if there are reasonable grounds to suspect child labor in supply chain. Under the DDTrO, supply chain is defined as the company’s own operations and business activities as well as those of the company's direct and indirect suppliers. If, based on the company’s assessment, there are no reasonable grounds to suspect child labor, it has to document such finding in writing and it is then exempt from the due diligence and reporting obligations. While the relevant Swiss corporate law provisions and the DDTrO do not further specify what this initial assessment should encompass, the explanatory report to the DDTrO states that such initial assessment should be made by using the same tools as those for the regular supply chain diligence (i.e. site visits, use of certifications and international standards, representations from suppliers, or review of expert reports). The mere fact that a company has business activities or parts of its supply chain in a "at-risk country" is not in itself sufficient for establishing "reasonable grounds" to suspect child labor.

All other companies, i.e. companies that are not per se exempted and companies that have reasonable grounds for suspecting child labor in its supply chain, are required to comply with the supply chain due diligence and reporting obligations. Under these obligations, companies need to maintain a risk management system with a supply chain policy for products or services in relation to which there is a reasonable suspicion of child labor; and a system by which the supply chain can be traced. These companies are required to (i) identify and assess the risks of harmful impacts in their supply chain, (ii) draw up a risk management plan (with a risk-based approach), and (iii) take measures to minimize the identified risks, including, for example, site visits, use of certifications and international standards, or representations from suppliers. Moreover, companies have to maintain an internal system for reporting issues.

Companies that are obligated to comply with the Swiss supply chain due diligence and reporting requirements, can forego compliance with the specific Swiss rules if they already comply with an equivalent non-Swiss set of rules. The DDTrO sets out those non-Swiss rules that are currently considered equivalent, namely (i) ILO Conventions Nos 138 and 182 and the ILO-IOE Child Labour Guidance Tool for Business of 15 December 2015, and (ii) the OECD Due Diligence Guidance for Responsible Business of 30 May 2018 or the UN Guiding Principles on Business and Human Rights.
b) Due Diligence Obligations with respect to Conflict Minerals

Companies that are placing in free circulation or processing in Switzerland minerals containing tin, tantalum, tungsten or gold or metals from conflict-affected and high-risk areas, are required also required to put in place a risk management system, a supply chain policy with respect to minerals and metals that potentially originate from conflict-affected and high-risk areas, and a system by which the supply chain can be traced. Similar to the supply chain diligence obligations with respect to child labor, these companies are required to (i) identify and assess the risks of harmful impacts in their supply chain, (ii) draw up a risk management plan (with a risk-based approach), and (iii) take measures to minimize the identified risks, including, for example, site visits, use of certifications and international standards, or representations from suppliers. Moreover, companies have to maintain an internal system for reporting issues with respect to conflict minerals and metals.

The DDTrO specifies the relevant types of metals and minerals (and compounds thereof) in its Annex 1. The DDTrO defines "conflict-affected and high risk areas" as areas in a state of armed conflict or fragile post-conflict as well as areas witnessing weak or non-existent governance and security, such as failed states, and in which there are widespread and systematic violations of international law, including human rights abuses.

Unlike the child labor related due diligence obligations (see paragraph 3a) above), the due diligence obligations with respect to conflict minerals do not provide for an SME exemption. However, the conflict minerals rules provide for a de minimis exemption for those companies that only import or process smaller amounts of the relevant minerals and metals. The thresholds for the de minimis exemption are set out in Annex 1 of the DDTrO.

Companies that are obligated to comply with the Swiss conflict minerals related supply chain due diligence and reporting requirements, can forego compliance with the specific Swiss rules if they already comply with an equivalent non-Swiss set of rules. The DDTrO sets out those non-Swiss rules that are currently considered equivalent, namely (i) the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict and High-Risk Areas (OECD Conflict Minerals Guidance), dated April 2016, including all annexes and supplements; or (ii) Regulation (EU) 2017/821.

c) Reporting and Audit Requirements / Entry into Force / Criminal Sanction

Affected companies have to report (on a "comply or explain" basis) on their compliance with the diligence obligations in a separate report, which has to be approved by the board of directors (but not by the annual general meeting of shareholders). Such report has to be prepared in a Swiss national language or in English. The report has to be
published online within six months of the end of the financial year and it must remain publicly accessible for at least ten years.

As regards the due diligence obligations for conflict minerals, the new Swiss corporate law rules also require that compliance with these rules is verified by an independent auditor.

The supply chain due diligence obligations and related reporting requirements apply for the first time for the 2023 financial year of in-scope companies. Failure to comply with these obligations may be sanctioned with fines of up to CHF 100,000 under the Criminal Code.

4) Transparency Rules for Commodities Companies

With these new rules for commodities companies, the Swiss legislator aims to increase transparency around payments to government bodies in connection with the exploitation of commodities. These transparency rules apply to Swiss-based companies that meet the following criteria:

- they are subject to ordinary audit requirements, i.e. they are either (i) public companies, or (ii) they exceed two of the following thresholds: (a) total assets of more than CHF 20 million, (b) sales of more than CHF 40 million, or (c) more than 250 FTE; and

- they are either themselves or through a company that they control active in the area of extracting minerals, oil or natural gas, or in the harvesting of timber in primary forests.

While the transparency rules aims to cover companies that are active in any type of activity leading up to the actual extraction or harvesting of commodities, including exploration, prospecting, discovery, or development of an extraction sites, the transparency rules do not apply to commodities trading companies. As a result, the Swiss transparency rules currently only cover a fairly small number of companies, namely Swiss-based commodities groups that have subsidiaries engaged in extraction or harvesting of commodities.

In-scope companies have to prepare a so-called payments report. Such report has to disclose any payments (cash or in kind) in excess of CHF 100,000 per year that have been made to state bodies (i.e. national, regional or local authorities in a third country, including departments and businesses controlled by such authorities) in connection with business operations in the mineral, petroleum or natural gas extraction industry or to the harvesting of timber in primary forests. Such report has to include in particular the following type of payments:
- payments for production rights;
- taxes on production, revenues or profits (other than value added, sales taxes or similar taxes on consumption);
- user charges;
- dividends (other than dividends paid to shareholders in general);
- signing, discovery and production bonuses;
- license, rental and access fees or other considerations for permits or concessions; and
- payments for improvements to the infrastructure.

The payments report has to be drawn up on a consolidated basis. If the relevant Swiss-based company is part of a larger group of companies that has prepared its own consolidated payments report (which covers also the Swiss company) and further provided such report is drawn-up in accordance with Swiss law or an equivalent regulation, then such Swiss-based company is exempt from preparing and publishing its own report. In such a scenario, the Swiss-based company will, however, have to include information on such report (including indications as to where it is published) in the notes to its own financial statements.

The payments report must be prepared in a Swiss national language or in English and has to be approved by the board of directors (or similar body), but not by the shareholders’ meeting. The payments report has to be published online within six months of the end of the financial year and it must remain publicly accessible for at least ten years.

The transparency rules for commodities companies entered into force already on 1 January 2021 and they apply for the first time for the current 2022 financial year of in-scope companies. Should internationally coordinated developments in the future result in further transparency expectations for the commodities sector, the Federal Council may then decide to expand the scope of the Swiss transparency rules to encompass also other companies, e.g. commodities trading businesses.

Failure to comply with these transparency and reporting obligations may be sanctioned with fines under the Criminal Code.

5) Conclusion
With the amendments on ESG-related matters, Swiss corporate law now provides for a set of rules requiring reporting and other obligations on a number of different ESG
matters. While large corporates with an international investor base already nowadays report on many of these matters on either a voluntary basis or due to applicable non-Swiss regulations, the new Swiss corporate law disclosures will require also smaller public companies to expand their reporting (and implement the related internal measurement processes and procedures) rather significantly in order to comply with these new rules.

Some of the new ESG-related requirements will also apply to non-listed companies (in particular those related to supply chain due diligence obligations and reporting requirements) and thus, Swiss-based companies should carefully assess whether or not they are in scope of one or several of the new Swiss corporate law rules on ESG matters, not at least in view of possible criminal sanctions in case of non-compliance.

Finally, while the corporate law rules on ESG reporting have only recently introduced, it is worth noting that the Swiss system on corporate ESG disclosure is still developing. It is likely that the future will hold further regulations on ESG disclosure that may both broaden the scope of in-scope companies and provide further standardization on the type and level of detail of this type of disclosure.

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Spin-off and Listing of Accelleron Industries

Reference: CapLaw-2022-38

On 3 October 2022, Accelleron Industries AG, a global leader in high-power turbochargers for mission-critical applications, announced that its spin-off from ABB has completed successfully. Accelleron’s entire issued share capital has been admitted to start trading on the SIX Swiss Exchange in Zurich, under the ticker symbol “ACLN” effective as of 3 October 2022. The listing follows the approval by ABB shareholders for the spin off at ABB’s extraordinary general shareholders meeting of 7 September 2022.
Nestlé issued an aggregate of USD 4 bn notes
Reference: CapLaw-2022-39

On 13 September 2022, Nestlé Holdings, Inc. successfully completed its issuance of USD 750 m 4.000% Notes due 2025, USD 500 m 4.125% Notes due 2027, USD 500 m 4.250% Notes due 2029, USD 1.25 bn 4.300% Notes due 2032 and USD 1 bn 4.700% Notes due 2053. The Notes are guaranteed by the Nestlé group’s Swiss parent company Nestlé S.A. The offering of the Notes was done in reliance on Rule 144A and Regulation S under the U.S. Securities Act.

Finalization of Vifor Pharma acquisition by CSL Limited
Reference: CapLaw-2022-40

On 2 August 2022, CSL Limited announced that it has received all necessary regulatory clearances for the acquisition of Vifor Pharma AG announced on 14 December 2021. The settlement of the USD 11.7 bn public tender offer occurred on 9 August 2022.

Public tender offer for Bobst Group SA by its largest shareholder, JBF Finance SA
Reference: CapLaw-2022-41

On 25 July 2022, JBF Finance SA (JBF) announced a public tender offer for all publicly held shares of SIX listed Bobst Group SA, the parent company of Bobst, one of the world’s leading suppliers of substrate processing, printing and converting equipment and services for the label, flexible packaging, folding carton and corrugated industries.

JBF is a company whose shares are held by more than 60 members of the families of the descendants of Joseph Bobst, who founded Bobst in 1890. With 53% of the company’s shares, JBF is also Bobst Group’s largest shareholder. Through its tender offer, JBF expects to be able to take Bobst Group private through a delisting of its shares.
GDR offerings and listings on SIX Swiss Exchange

Reference: CapLaw-2022-42

On 28 July 2022, SIX Swiss Exchange officially launched the Swiss GDR-leg of the China-Switzerland Stock Connect with the participation of senior government representatives from China and Switzerland. In addition to the official launch celebrations, the first Chinese companies GEM, Gotion Hightech, Keda Industrial Group and Ningbo Shanshan successfully listed global depositary receipts (GDRs) on the SIX Swiss Exchange.

Zur Rose Group completes CHF 95 m Convertible Bonds and the CHF 44 m Capital Increase

Reference: CapLaw-2022-43

On 1 September 2022, Zur Rose Group announced the successful placement of newly issued shares raising gross proceeds of approx. CHF 44 m and CHF 95 m guaranteed senior unsecured convertible bonds. The convertible bonds were allocated to investors in a bookbuilding, subject to claw-back by existing shareholders who were granted the right to exercise their advance subscription rights. The convertible bonds were issued by a subsidiary of Zur Rose Group and are convertible into shares of, and are guaranteed by, Zur Rose Group.

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