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Rules of Conduct under FinSA – FINMA's Draft Circular

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Between 15 May 2024 and 15 July 2024, the Swiss Financial Market Supervisory Authority FINMA (FINMA) held a public consultation on a new circular on the rules of conduct under the Financial Services Act (FinSA). The circular is expected to enter into force in early 2025. This article outlines and critically evaluates some of the key aspects of the draft circular.

By Manuel Baschung / Fabrice Eckert / Philipp Klein

1) Introduction

FINMA's proposal submitted for consultation consists of a draft circular and an explanatory report. It is framed by FINMA as a means for creating transparency and legal certainty regarding a selection of FINMA's supervisory practices on the implementation of the FinSA by financial service providers subject to its supervision. According to the explanatory report, the topics selected for inclusion in the draft circular reflect questions of practice and interpretation that have arisen since the rules of conduct became applicable.

The draft circular comprises just three pages. The accompanying explanatory report, on the other hand, runs to several times as many pages and contains remarks that go beyond a mere explanation of the points set out in the draft circular. On some key aspects of interpretation, FINMA's views are expressed solely in the explanatory report.

Pursuant to the Financial Market Supervision Act (FINMASA) and its implementing ordinance, FINMA may issue circulars to increase transparency on FINMA's supervisory activities, and the explanatory report identifies this as a main objective of the proposal. In addition, the explanatory report also references the aim of increasing legal certainty, as well as FINMA's strategic goal for the period 2021-2024 to have a sustained positive impact on the conduct of supervised financial institutions.

Against this background, the draft circular and the associated explanatory report should be judged on whether they improve legal certainty for financial service providers and their clients, which in our view requires that these documents (i) are drafted clearly and precisely and (ii) adhere to generally accepted interpretations of the FinSA and the Financial Services Ordinance (FinSO). In light of the market practices and doctrine that have evolved since the FinSA's entry into force, we would also expect any deliberate departure by FINMA from such interpretations to be presented clearly and unequivocally.

2) Addressees of the Circular

The circular is addressed to financial service providers supervised by FINMA or supervisory organizations pursuant to article 43a FINMASA. According to the table of addressees in the draft circular, this primarily includes (i) banks within the meaning of article 1 of the Banking Act, (ii) portfolio managers within the meaning of article 17(1) of the Financial Institutions Act (FinIA), (iii) managers of collective assets within the meaning of article 24 FinIA, (iv) fund management companies within the meaning of article 32 FinIA and (v) account-holding securities firms within the meaning of article 41 FinIA. However, the table of addressees at the beginning of the draft circular is only indicative. It is also conceivable that supervised entities not presently mentioned in the aforementioned table (e.g. holders of a FinTech-license pursuant to article 1b of the Banking Act) provide financial services and thus qualify as financial service providers within the meaning of article 2(1)(a) FinSA. The draft circular also applies to such supervised entities. In our view, the description of the scope of the draft circular therefore only provides limited benefit/legal certainty to market participants.

The circular is not intended to apply to financial service providers within the meaning of the FinSA that are not subject to supervision by FINMA or a supervisory organization (e.g. foreign financial service providers that provide financial services to clients in Switzerland). In the case of such unsupervised financial service providers, the enforcement of the obligations imposed by FinSA is ultimately the responsibility of the courts and the Federal Department of Finance (FDF) (see article 89 FinSA in conjunction with article 50(1) FINMASA). As the FDF and the courts may be guided by the circular when interpreting the FinSA, the circular will also be relevant for financial service providers not subject to supervision in Switzerland.

The draft circular follows the structure of the FinSA and covers the six topics described below.

3) Topics of the Draft Circular

a) (Unregulated) Corporate Finance Services vs (Regulated) Financial Services

FINMA's proposal contains a relatively brief paragraph (margin no. 3) in the draft circular (and a much longer commentary in the explanatory report) on the exemptions pursuant to article 3(3)(a)-(c) FinSO, according to which services in the context of corporate finance and M&A advice, the underwriting and/or placement of financial instruments, as well as the financing of such transactions are not considered (regulated) financial services. FINMA's proposal is to exempt such activities from treatment as regulated financial services only if the clients use the service primarily for industrial, strategic, or entrepreneurial purposes rather than investment or hedging purposes. The explanatory report suggests that both the draft circular and the additional explanations that form part of FINMA's proposal respond to questions encountered by FINMA during the course of its supervisory activities. However, from our perspective, we also see aspects where the proposal could (re)introduce further legal uncertainty.

At least according margin to no. 3 of the French-language draft circular, FINMA seems to consider that the exemptions pursuant to article 3(3)(a)-(c) FinSO apply *only if* clients use the service primarily for industrial, strategic, or entrepreneurial purposes rather than investment or hedging purposes, and not that this is merely one important instantiation of these exemptions (the German-language draft circular is not quite as unambiguous).

The criterion of whether service recipients use the service primarily for industrial, strategic, or entrepreneurial purposes rather than investment or hedging purposes appears suitable mostly for distinguishing the (regulated) financial service of investment advice (article 3(c)(4) FinSA) from (unregulated) corporate finance and M&A advisory services (article 3(3)(a) FinSO), which is the context in which it was devised under MiFID. Even in that context, its application can be highly context-dependent (e.g., pursuant to the Committee of European Securities Regulators' (CESR) Q&A document on the definition of advice under MiFID of 19 April 2010, CESR/10-293, which FINMA relies on in the explanatory report, "[i]n the context of private equity and venture capital, the industrial purpose of the firms providing these services is purely financial" and "[w]here individuals authorised to act on behalf of these firms seek advice, their primary objective is likely to be mainly entrepreneurial, and also aligned to the industrial purpose of the private equity or venture capital firms […]"; para. 84), and its transposition from MiFID to FinSA is not entirely straightforward. The criterion is even more challenging to apply in the context of underwriting and placement activities (article 3(3)(b) FinSO).

Essentially, we believe that there are two reasons why an activity performed in relation to a third party may not constitute a regulated financial service: First, because the activity is not a typical investment service, it may not be one of the financial services enumerated in article 3(c) FinSA. Second, the interaction with a third party in the context of such an activity may not amount to a (regulated) financial service on behalf of that third party (e.g. an investor) as (end) client within the meaning of the FinSA, as the activity may, in a manner recognizable to that third party (the investor) and possibly subject to further conditions (which are outside the scope of this article), be conducted on behalf of the issuer or for the intermediary's own account.

The explanatory report indicates that the exemptions set forth in article 3(3)(a)-(c) FinSO apply only in instances where the service is provided to firms or their participants, or to issuers or offerors, and where such entities do not act as investors. The explanatory report also appears to suggest that the exemptions are primarily applicable to services rendered to the sell side, even in an M&A advisory context. However, we believe that such a narrow reading of these exemptions would lack any basis in the FinSO.

It is important to note that underwriting and placement activities conducted by a financial intermediary on behalf of the sell side, which in that context are exempt from the FinSA pursuant to article 3(3)(b) FinSO, may involve interactions with the buy side. However, these interactions do not necessarily justify an expectation on the part of the buy side that their interests would be placed above those of the sell side.

In such contexts, it is incumbent upon financial intermediaries to be upfront and consistent as to the side they are representing in the course of such an activity. However, they do not have to inquire about the motives of a third party with no reasonable expectation of loyalty from the financial intermediary, such as the ultimate purpose of an investment. The FinSA does not prevent financial intermediaries from offering their undivided loyalty to the sell side, even if their activities bring them into contact with the buy side.

Furthermore, it should be noted that under the FinSA a bank's investment banking division is not prohibited from acting on behalf of an issuer or a selling shareholder even as its private banking division provides investment advice to its clients with regard to an investment in such shares; in such a case, only the private banking division's investment advisory services may amount to a regulated financial service (if the subscription is made for investment purposes and not for industrial, strategic, or entrepreneurial purposes), with the result that the bank (specifically, the bank's private banking division) must manage and disclose any potential conflicts of interest in accordance with the FinSA.

Margin no. 3 of the Draft Circular, even if its reference to "clients" is to be read narrowly (as we believe it should be) so as not to include interactions with third parties who cannot legitimately expect to be treated as clients, does not reflect some of the relevant nuances in relation to the exemptions set out in article 3(3)(a)-(c) FinSO, such as those summarized above.

In our understanding of the FinSA, creating transparency for clients and counterparties as to whether (and what type of) regulated financial services are being provided to them is a core element of the investor protection framework. In light of this, the proposal may inadvertently make it more difficult to achieve this objective, as margin no. 3 of the draft circular and the related commentary in the explanatory report may indicate a broader scope of application of the FinSA than that set out in the FinSA and the FinSO themselves, which, moreover, cannot be easily delineated, thereby reducing clarity for clients and potentially diluting the scope of application of the FinSA.

b) Duty to Provide Information

The draft circular seeks to further specify the information requirements set out in article 8 FinSA and article 7 FinSO, in particular with regard to the information to be provided on (i) the type of financial service offered, (ii) the risks associated with certain financial instruments and (iii) the risks associated with the financial service offered.

i. Type of Financial Service

The FinSA distinguishes between transaction-related and portfolio-related investment advice. The draft circular requires financial service providers to inform their clients whether their investment advice is transaction-related or portfolio-related. While in essence this information obligation seems to be already covered by article 7(1) FinSO, the explanatory report further specifies that in the case of transaction-based advice, clients must be informed that the advice is purely instrument-based, i.e. the financial service provider does not take the client's portfolio into account in any way and therefore does not carry out a suitability test, but only an appropriateness test.

ii. Risks Associated With Certain Financial Instruments

The draft circular requires financial service providers to inform clients of the risks associated with contracts for difference (CFDs). This includes information on the current share of the CFD provider's retail clients who have lost money with CFDs or have been required to make top-up payments in connection with such financial instruments, the risk of top-up payment obligations and losses potentially exceeding the initial investment, and the risks related to leverage and margin, as well as counterparty and market risk. The draft circular seems to impose these requirements based on article 8(1)(d) FinSA and article 7(3)(b) FinSO.

One point worth noting is that the explanatory report specifies that the percentage of the financial service provider's clients who lost money with CFDs and had to make additional payments in this context should relate only to ***retail*** clients (and, accordingly, not include professional or institutional clients).

iii. Risks Associated With the Financial Services Offered

According to the FinSA, financial service providers must inform their clients about the risks associated with the financial services offered prior to the conclusion of a contract or the provision of the services (article (8)(2)(a) in connection with article 9(1) FinSA). According to the draft circular, in the case of portfolio management or portfolio-related investment advice, this includes the obligation to disclose the nature and extent of risk concentrations. The disclosure obligation applies if it cannot be ruled out that the client portfolio (i.e., the portfolio managed by, or the part subject to the investment advice of, the financial service provider) contains concentrations of risk that are not customary in the market. In addition to concentrations in individual financial instruments and asset classes, risk concentrations may result from concentrations of investments in the same issuers and correlated sectors, jurisdictions and currencies. In order to provide greater legal certainty, the draft circular contains two thresholds that indicate an unusual risk concentration: Investments of 10% or more of the client portfolio in individual financial instruments and investments of 20% or more of the client portfolio in financial instruments of the same issuer. However, it should be noted that (i) according to our understanding of the draft circular the thresholds leading to a concentration risk may also be higher, if the financial service provider implements further measures against concentration risks (e.g. portfolio monitoring or measurement of issuer risks on an aggregated basis) and (ii) these thresholds do not apply to collective investment schemes subject to regulatory risk diversification requirements.

c) Appropriateness and Suitability of Financial Services

The appropriateness and suitability test includes an obligation on the part of the financial service provider to inquire about the client's knowledge and experience. The draft circular stipulates that the client's knowledge must be inquired about separately for each investment category relevant for the financial service provided to the client whereby the level of detail of the inquiry must be adapted to the complexity and risk profile of the investments that may be used in the financial service.

According to the explanatory report, in the case of portfolio management and portfolio-related investment advice mandates, the financial service provider must regularly update the information obtained on the client's financial situation and investment goals. In our view, this applies only if the financial service provider provides the portfolio management or advisory services to the relevant client on an ongoing basis (and not, for example, in the case of one-off investment advice). This view is supported by the dispatch to the FinSA, which the explanatory report refers to.

Furthermore, the explanatory report stipulates that financial service providers are obliged to check the plausibility of the information provided by the client. Since article 17(4) FinSO states that financial service providers may rely on the information provided by the client unless there are indications that it does not correspond to the facts, this can only mean that the financial service provider must question the client's information in the event of obvious inconsistencies in the information provided by the client. In particular, this does not imply an obligation to actively investigate the accuracy of the details provided by the client or to take into account information that the financial service provider may have received outside of the relevant financial service (e.g. information from a separate credit lending relationship).

d) Use of Clients' Financial Instruments (Securities Lending)

In order for a client's consent to securities lending to be valid, the client must be clearly informed of the risks associated with securities lending (article 19(2)(a) FinSA). The draft circular outlines the information that, according to FINMA's practice, financial service providers have to provide to their clients to satisfy this requirement.

On the one hand, the draft circular requires financial service providers to inform their clients about the risks that banks and securities dealers already had to disclose before the FinSA came into force on the basis of FINMA Circular 2010/2 on Repo/SLB Transaction (margin no. 6-9), which has since been repealed. However, according to the draft circular, financial service providers must also inform clients (i) that they may terminate the agreement on the use of financial instruments with immediate effect or, if a fixed term has been expressly agreed in individual cases, that the use only ends upon expiry of the agreement and (ii) that the client has the option to exclude certain financial instruments from securities lending. In our view particularly the second of these additional disclosure requirements introduced by the draft circular is not a *risk* of securities lending transactions. Rather, the draft circular seems to intend to govern certain rights and obligations of the parties in securities lending transactions and therefore goes beyond article 19(2)(a) FinSA.

e) Conflicts of Interest

In the explanatory report, FINMA takes the view that the information sheets and contractual documentation on conflicts of interest used by financial service providers to disclose conflicts of interest in connection with the financial service provider's proprietary financial instruments frequently are too general or incomplete. The draft circular thus proposes certain principles that shall apply in connection with the investment in proprietary financial instruments:

- The draft circular holds that conflicts of interest are virtually inevitable with proprietary financial instruments. Nevertheless, pursuant to the draft circular, this fact alone does not make an investment in proprietary financial instruments impermissible. The draft circular explicitly states that financial service providers are allowed to only take proprietary financial instruments into account when selecting financial instruments. In this context, it should be noted that the explanatory report states that proprietary financial instruments do not only include financial instruments issued or offered by a financial service provider or its group companies, but also financial instruments of third parties with which the financial service provider has economic ties. According to the explanatory report, such economic ties may not only result from participations in the issuer or offeror of the financial instrument, but also from contractual agreements (e.g. distribution agreements) or personal relationships between members of the board or management of the financial service provider (*Gewährsträger*) and the relevant third party. This broad definition of proprietary financial instruments deviates from the principle in articles 10(2)-(3) FinSO, pursuant to which close economic ties require control (by equity participation or otherwise) over the issuer or offeror of the financial instruments (or *vice versa*), and would likely result in uncertainty for market participants whether a financial instrument qualifies as proprietary or not.

- A financial service provider must inform its clients on the scope of investment products that it considers when selecting the financial instruments (article 8(2)(c) FinSA). The draft circular and explanatory report add that clients must also be informed of the conflicts of interest that may result from investments in proprietary financial instruments as well as the causes that lead to such conflict of interest. In addition, financial service providers must disclose if they only consider proprietary financial instruments and inform their clients of the risk associated therewith.

- In addition to this disclosure obligation, financial service providers that take into account both proprietary and third-party financial instruments must take appropriate organizational measures to ensure that they do not prioritize their own interests and act to the detriment of clients when selecting financial instruments. According to the draft circular, financial service providers need to establish a product selection process that is based on objective criteria that are customary in the industry (e.g. performance expectations, compliance with risk profile, diversification and costs). The criteria must be designed in such a way that a general disadvantage of clients is avoided when making investment decisions. However, it is not necessary (nor feasible) that such process takes into account the individual interests of each client. In addition to the definition of an objective product selection process, financial service providers will also need to implement functional, personnel and informational separation between the operational units responsible for the creation or management of proprietary financial instruments and the unit responsible for product distribution (e.g. client advisors).

Compliance with the aforementioned disclosure and organizational measures is not only crucial from a regulatory perspective but may also be relevant for the contractual relationship between the financial service provider and its clients. In particular, if a financial service provider has implemented these informational and organizational measures, the case law recently introduced by the Zurich Commercial Court (decision HG190111 of the Zurich Commercial Court of 22 May 2023, consideration 3.5), according to which an asset manager is presumed to be in breach of its duty of loyalty in the event of a conflict of interest – for example when investing in its proprietary financial instruments – can, in our view, no longer be upheld. Any contrary interpretation would create a contradiction between Swiss financial market regulations and civil law, which cannot be the legislator's intention.

f) Compensation from Third Parties

In the draft circular, FINMA also sets out its expectations regarding the form and content of client information on retrocessions that the financial service providers receive and wish to retain.

- *Content*: The explanatory report to the draft circular states that in the case of transaction-related investment advice and execution-only relationships, it is sufficient to disclose to clients the ranges of the expected retrocessions per product category. On the other hand, FINMA requires that portfolio managers inform their clients of the amount of expected third-party compensations in relation to the total value of the client's assets under management (i.e. as a percentage ratio [range]; similarly, in the context of article 400(1) of the Code of Obligations, decision 4A_355/2019 of the Federal

Supreme Court of 13 May 2020). According to the draft circular (and FINMA's 2021 annual report), this requirement shall also apply to portfolio-related advice. Since the composition of the portfolio of an advisory client depends on the (future) investment decisions of the client (in contrast to a portfolio management mandate), it is questionable which financial instruments the financial service provider should use to calculate the expected amount of retrocessions at the beginning of the investment advisory service (see also decision 4A_574/2023 of the Federal Supreme Court of 24 May 2024, pursuant to which the requirement to disclose to the client the amount of expected third-party compensations in relation to the total value of the client's assets under management cannot be applied to investment advisory and execution-only relationships). Based on the explanatory report, it seems that in this case the financial service provider can assume that the client will follow the agreed investment strategy and the recommendations of the financial service provider. In practice, however, it seems advisable for financial service providers to briefly explain to their clients the basis on which they have made their calculations.

– *Form*: The draft circular states that the information on third-party compensations must be visually highlighted (e.g. printed in bold), if the information is provided to the client in a standardized manner. Such a visual emphasis may also be relevant from a civil law perspective. In particular, it results in the clause in question not being subjectively unusual for purposes of the "unusualness" test (*Ungewöhnlichkeitsregel*).

  Alternatively, third-party compensation may be disclosed in a separate letter or form. This document must either be delivered to the client or the client must be provided with a direct link (website) referring to it.

Finally, the draft circular requires financial service providers, upon request, to inform their clients of all third-party compensations actually received. In particular, the draft circular only permits financial service providers to charge a (cost-covering) fee for that service if a client requests such information more than once annually.

4) Outlook

The public consultation of the draft circular ran until 15 July 2024, and the final version of the circular is scheduled to enter into force at the beginning of 2025. While the intention of FINMA to provide further clarity for financial service providers and their clients with regard to its supervisory practice on some of the rules of conduct of the FinSA is to be welcomed, we believe that certain aspects of the proposal leave or introduce some uncertainty for market participants. It is to be hoped that these ambiguities will be resolved in the final version of the circular.

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Swiss Insurance Supervision Act establishes new Regime for Special Purpose Vehicle

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The revised Swiss Insurance Supervision Act (nISA) has introduced a new category of license: the Insurance Special Purpose Vehicle (SPV) (*Versicherungszweckgesellschaft; Entité ad hoc d'assurance; Società veicolo di assicurazione*). Instituted almost a decade after the first Swiss Franc-denominated catastrophe bond issuance, the SPV is a welcome update to the Swiss regulatory regime offering a domestic option for capital markets-facing alternative risk transfer. In future, the launch of the SPV might come to be seen as a first step on a journey which sees Switzerland establish an additional hub for insurance-linked securities (**ILS**). Several other elements would need to fall into place for Switzerland to compete with established markets, but as in life, so in (re-) insurance: never say never.

By Fabian Meier / Matthias Wühler

1) Introduction

In January 2015, reports about a special capital markets transaction comprising Swiss insurance risks were appearing in industry publications: *Gurten*, the first ever Swiss Franc-denominated private catastrophe bond issuance, had been completed. The transaction afforded protection to the building insurer of the canton of Berne (*Gebäudeversicherung Bern*, GVB) alongside its traditional reinsurance program. The launch of the new Swiss SPV rules almost a decade after *Gurten* is an opportunity to revisit that transaction.

The Gurten private catastrophe bond was issued through Kaith Re, a Bermuda exempted company registered as a class 3 insurer under the Bermuda Insurance Act of 1978 and registered as a segregated account company, acting in respect of its segregated account designated Leine Re, to benefit GVB. The protection provided to GVB via the Gurten private catastrophe bond was positioned alongside GVB's reinsurance program. It provided one year of annual aggregate protection to GVB on identical coverage terms to its traditional reinsurance program offering GVB an additional ("alternative") form of risk transfer.

The transaction summary illustrates the centrality of the SPV, a key component of the ILS value chain. Typically, a (re-)insurance company that initiates the transaction transfers underlying insurance risks to the SPV by way of a reinsurance contract. As this risk transfer is often regulated as (re-)insurance activity, the SPV requires a (re-) insurance license that is provided in a "simplified" form in jurisdictions that have an SPV regime. The SPV vehicle is funded by its investors (equity or debt) and most of its funds are used to secure payment obligations arising in relation to the reinsurance contract. Investors are rewarded for the provision of this principal by collateral yield and premium received under the reinsurance contract. The principal is, however, at risk and repayment of principal dependent on the performance of the underlying insurance portfolio.

With the new Swiss regulations on SPVs, limited purpose risk transformer vehicles can now be created, which addresses the lack of a suitable framework in the Swiss insurance regulation to establish similar structures domestically.

2) The SPV

All ILS jurisdictions of choice invariably provide a dedicated rulebook for the risk transformer vehicle (or several rulebooks for different types of vehicles). In this respect, Switzerland has now taken the first step to achieving parity in terms of the regulatory framework. Both Level 1 regulations, the nISA, and Level 2 regulations, the revised federal Ordinance on the Supervision of Private Insurance Companies, are in force as of 1 January 2024.

According to the legal definition in the nISA, an SPV is not an insurance company. This emphasizes its special purpose in risk transfers and further excludes a dual license as regular (re-)insurance company and SPV. Furthermore, the SPV must assume risks from (re-)insurance companies setting it up for reinsurance activities rather than primary insurance. Lastly, the risks ceded to the SPV must be fully collateralized by issuing financial instruments subordinated to the risk assumption obligations of the SPV (Art. 30e nISA).

a) Risk Groups (*Risikogruppen*): Segmentation of Assets and Liabilities

In order to transform insurance risks into securities, the issuer of said securities must be bankruptcy-remote from any unrelated business. In other words, investors are seeking exposure to the defined pool of risks, and nothing else. As it would be highly inefficient to set up a new SPV for each transaction (cost items extend beyond the minimum capital injected into the vehicle, with the SPV entertaining numerous relationships with service providers, custodians etc.), a crucial aspect of a functional SPV regime is the possibility to establish segmented and bankruptcy-remote compartments of assets and liabilities under the same SPV.

In the Gurten example, Leine Re represents this "compartment" and bankruptcy remoteness is achieved by way of recognition as a segregated account under the Segregated Accounts Companies Act of Bermuda. The Act, inter alia, (i) provides certainty that the assets of a segregated account are available only to meet liabilities linked to that certain account, and not to meet liabilities linked to another segregated account or the general account, and (ii) specifically establishes that a Segregated Accounts Company may issue securities and link these securities to a particular segregated account.

Swiss law now provides a functional equivalent to the Segregated Accounts Companies Act of Bermuda in Art. 30f nISA. The SPV consist of company assets (*Gesellschaftsvermögen*) and risk assets (*Risikovermögen*) which can be allocated to one or several "risk groups" (*Risikogruppe; Groupe de risques; Gruppo di rischio*), the Swiss equivalent of the Bermudian segregated account. Each risk group is a separate accounting, economic, and "legal unit" within the SPV (Art. 30f nISA). The liabilities of a risk group are limited to the assets of this risk group ensuring the segregation and mutual bankruptcy remoteness amongst different risk groups of the SPV. This segregation of assets and liabilities of assets is not an entirely new idea under Swiss law. Similar concepts already exist under the rules for collective investment schemes (umbrella funds) or the so-called asset groups in Swiss investment foundations. The nISA addresses the concept of a risk groups at a high level of abstraction, whereas the Level 2 ordinance specifies the working-level details (Art. 111m through 111u).

b) Other

The rules on corporate governance of an SPV are relaxed over those applying to insurance companies. Whereas a risk management and internal control function including compliance are mandatory (Art. 30e(3)(b) nISA), SPVs need not appoint a designated actuary (Arts. 111d Level 2 ordinance, Art. 23 nISA) and are exempt from comprehensive solvency regulation as well as business plan requirements for (re-) insurance companies. The delegation and outsourcing of the management as well as risk and control functions is permissible, with the exception of the overall management, supervision and control by the ultimate management body (e.g. the board of directors). The delegation rules also reflect the limited-purpose character of the SPV and enable the establishment of lean risk transfer vehicles administrated by external service providers.

FINMA maintains ultimate authority over the conduct of business of the SPV, not only in that the SPV requires a license, but in that the individuals holding decision-making authority on behalf of the SPV are subject to fit and proper requirements (Art. 30e(3)(d) nISA). Whether the fit and proper assessment in the context of an SPV would be the same as for a fully regulated insurance carrier is an interesting question that could arise at the occasion of an actual SPV registration. The first provision in Chapter 5a of the nISA, the chapter dealing with SPVs, specifically notes that SPVs are not insurance companies (Art. 30e(1)(a) nISA), and Art. 30e(2) nISA stipulates that the provisions applicable to insurance companies apply to SPVs analogously (as does Art. 111d(2) of the Level 2 ordinance for the provisions therein). For now, there is no specific lower-level guidance as to the fit and proper assessment of an SPV key function holder. In practice, the assessment will depend on the scope of activities of the SPV as well as its operational complexity.

3) Comprehensive Infrastructure of established ILS Hubs

The Gurten transaction was structured in Bermuda, a well-established market for ILS transactions. Bermuda has several advantages that make it an attractive location, some of which could provide valuable insights for Switzerland's future development in this area.

Bermuda has a well-developed legal and regulatory framework that supports the ILS market, providing a reliable environment for transactions. The Bermuda Monetary Authority is skilled at overseeing complex insurance and reinsurance activities, including ILS, and fast-tracks ILS transactions.

The preferential tax regime is likely the key factor. Jurisdictions that are preferred for ILS issuances have competitive taxation on the risk transformer vehicle (i.e., low corporate tax) and a full withholding tax exemption for investors. The withholding tax regime is a frequent subject of intense political debate in Switzerland. Without changes to the tax rules, Swiss SPVs will not be used as issuers in ILS transactions with international investors.

Other advantages in Bermuda include the well-established service provider market, capable of administrating and managing SPVs and ensuring operational efficiency as well as regulatory compliance.

4) Outlook

Almost ten years after Gurten, the launch of the SPV regime and especially the introduction of the concept of risk groups showcases a remarkable development of the Swiss regulatory regime. Switzerland has natural potential to grow as an ILS investment hub because (i) large (re-)insurance companies that are already active in the global alternative risk transfer market need it (ii) Switzerland is well-known for its ILS asset managers and structures and (iii) Swiss institutional investors, such as pension funds, often include ILS as part of their allocation to alternative assets. The success factors will include the establishment of a preferential tax regime, the time to market for Swiss SPVs as well as license conditions and costs in practice.

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Reflections on the 2024 AGM Season – Lessons Learned from the first Votes on ESG Reporting

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In 2024, most companies listed in Switzerland were obliged for the first time to publish a report on non-financial matters in accordance with articles 964a-c of the Code of Obligations. The following article describes the related issues primarily discussed in connection with this year's AGM season and examines whether clear trends and market practice have already developed in this regard.

By Thomas Reutter / Philippe Weber

1) Introduction

Most listed companies are subject to the provisions on sustainability reporting (transparency on non-financial matters in articles 964a to 964c of the Code of Obligations (CO)). These provisions not only prescribe the publication of a report on certain ESG matters but also mandate that such report be approved by the body responsible for approving the annual accounts, i.e. the shareholder meeting (*Generalversammlung*) in case of Swiss corporations. The provisions on non-financial reporting came into force on 1 January 2022 with a transition period of one year. Listed companies subject to a reporting duty, therefore, had to publish a report on non-financial matters and submit it for approval to the annual shareholder meeting for the first time in this year's AGM season.

Different approaches to the non-financial report and to the respective shareholder votes were discussed ahead of this year's AGM season. In this context, three key topics were of particular interest, i.e. firstly, the format of the report on non-financial matters, secondly, the nature of the shareholder vote (separate or implied; "binding" or "consultative"), and, lastly, the comfort package provided by third parties (in particular auditors) on such report. Against this background, involved companies and advisers were interested to see whether a uniform or at least a prevailing practice would already emerge during the 2024 AGM season.

2) Format of the report on non-financial matters

Overall, Swiss law does not mandate a specific reporting standard, except regarding climate matters, which are part of the environmental matters that must be included in the report on non-financial matters. In the EU, the CSRD requires a "dedicated section" on sustainability matters in the management report (article 19a (1) CSRD). No such express requirement exists under Swiss law. Therefore, Swiss law currently also allows various options: (1) a separate sustainability (non-financial matter) report, (2) a dedicated section of the annual report, or (3) the information required by article 964b CO to be spread out throughout a company's annual report.

It seems clear that option 3 is the least favored and, indeed, it has hardly been used by Swiss listed companies in their reports published in 2024. A slight majority of listed companies seems to have opted for a separate report. A majority of companies provided a GRI Index and a few companies also provided an index on where to find the information legally required to be published under Swiss law. Overall, content and volume of the reports varied considerably, in particular between companies of different sizes, and no clear tendency regarding the format of the report emerged from the 2024 AGM season.

3) Binding or consultative shareholder vote

Another question related to whether the shareholder vote on non-financial matters should be "binding" or "consultative" only. Generally, a binding vote is understood as a condition for a report to be considered finally approved. By contrast, a consultative vote allows shareholders to express their views to the board of directors in a legally non-binding manner. In some cases the distinction between a "binding" and a "consultative" vote has legal implications: for instance, as long as the entity-level annual accounts of a company have not been approved, the company cannot distribute a dividend or take other corporate actions based on such annual accounts. However, as no corporate actions depend on having the non-financial report approved by the general meeting and given that no submission for a renewed vote is generally needed in case of a rejection by shareholders, the distinction seems purely semantic. Nevertheless, absent a formal designation as "consultative" as is the case with the vote on the compensation report (see article 735(3)(IV) CO), we would caution against explicitly labeling the vote as being "consultative".

This notwithstanding, a slight majority of the 20 companies included in the Swiss Market Index (SMI) have decided – in what appears to have been a coordinated approach – to specifically designate the vote on non-financial matters as "consultative". Unsurprisingly, this was not well received by some NGOs, in particular proxy advisor Ethos. Ethos publicly stated that it had obtained legal opinions concluding that the shareholder vote should be "binding" based on the purpose of the law and demanded Novartis (usually the first SMI company to hold its AGM) to submit its non-financial report for "binding" approval latest at next year's AGM. To our knowledge, this controversy and more generally the debate about the nature of the resolution did not have a significant impact on approval rates of shareholders for the reports on non-financial matters.

Most other listed companies, however, did not attach a particular designation to the vote on non-financial matters and, therefore, implied that such vote would be "binding".

As mentioned above, the distinction is more relevant from a perceptional perspective than from the point of view of legal consequences. In our view, the designation as "consultative" is unnecessary and can be omitted.

4) Shareholder resolution as a separate agenda item

In contrast to some other topics discussed herein, the question of whether or not the approval of the non-financial report should be a separate agenda item was hardly discussed prior to this year's AGM season. Most advisors probably assumed that such approval would indeed be a separate agenda item consistent with the ("consultative") shareholder vote on the annual compensation report. However, the pertinent provision in the CO just states that the report on non-financial matters has to be approved by the body responsible for approving the annual account. Therefore, if a report on non-financial matters was part of the narrative and integrated into the annual accounts (e.g. in the management report), which were approved by shareholders' meeting, one could argue that the letter of the law has been complied with. While formally we would share this view, we would not consider it to be best practice. Indeed, even though the legislative materials are silent on the actual intent behind the requirement of a shareholder vote, supposedly shareholders should be enabled to voice their satisfaction or dissatisfaction with the company's ESG policy. This is not possible if the report on non-financial matters is submitted for approval to the shareholder meeting as part of an annual account "package".

Consistent with the foregoing view, the overwhelming majority of listed companies did include the approval of the non-financial report as a separate agenda item. All companies included in the SLI index (apart from those who have not published their AGM invitation yet) have proceeded in this way. Only very few companies have included the approval of their non-financial report in the agenda item regarding approval of the annual accounts. For next year's AGM season, we would expect all listed companies to include a separate item covering non-financial reporting.

5) Rejection of non-financial report; civil liability and criminal sanctions

To our knowledge, even though in some instances proxy advisors recommended to vote against, no report on non-financial matters was rejected by a shareholders during the 2024 AGM season. Hence, the question as to whether the vote – after a rejection – would have to be repeated on the basis of an amended report remained theoretical. Some commentators argue that the report would have to be submitted again for shareholder approval if it is manifestly incomplete or factually wrong. Apart from the fact that a report that is manifestly incomplete will hardly ever be submitted for shareholder approval (in particular in light of the frequently used limited third-party assurance), it is questionable if another shareholder vote is required (and useful). In our view, this depends, in particular, on whether or not substantive legal requirements have been manifestly breached and whether the board of directors could be exposed to liability. In most cases, therefore, we would not anticipate a repeated vote based on an amended report to be necessary.

Aside from the criminal provisions, no provisions regarding liability in connection with non-financial reporting were introduced. Accordingly, any claims for civil liability would have to be based on existing remedies, the directors' liability provisions of articles 754 CO seqq. being the most relevant ones. We are not aware of any claims having been made or threatened against Swiss listed companies or their boards on the basis of this year's non-financial reports.

Article 325ter of the Penal Code (SPC) stipulates criminal liability for anyone who, willfully or negligently, makes false statements in the non-financial report. The same applies if no reporting is made at all. The sanction is a fine of up to CHF 100,000 in case of willful misconduct and up to CHF 50,000 in case of negligence. We are not aware of any criminal proceedings pending or having been initiated based on this year's non-financial reports of Swiss listed companies.

6) Review requirements

Under current Swiss law, the non-financial report does not need to be audited or otherwise independently reviewed. However, given the requirements of the CSRD and the potential changes in Swiss legislation, it appears useful to have the non-financial report (or selected parts thereof) verified (limited assurance) by an independent party, namely the auditors. In particular, it will be easier to defend against allegations of negligent breaches of article 325ter SPC if the non-financial report has been independently verified. Further, at least some investors would like to have some kind of an assurance from a third party as a quality check. Ethos, for example, has stated in its 2024 guidelines that it will issue a vote against a report if such report and/or the relevant indicators are not verified by an independent third party.

Consistent therewith, a slight majority of Swiss listed companies have subjected their reports to some kind of third party review. In most instances, these companies mandated their auditors to provide a limited assurance opinion based on International Standards on Assurance Engagements 3000 (ISAE). This involves a negative statement by the auditor confirming essentially that nothing has come to its attention that certain metrics, KPIs or standards (such as the GRI standard) have not been complied with. Some non-financial reports have also been reviewed by other third parties such as SGS who– absent the constraints of the audit profession –were able to provide certain affirmative statements on compliance with standards such as GRI.

7) Outlook

While the 2024 AGM season has been marked by various formal and procedural topics as far as reporting on non-financial matters is concerned, in 2025 the focus is likely to shift to climate-related substantive topics. Indeed, in 2025 Swiss listed companies will for the first time be required to report on climate-related matters in accordance with the significantly more stringent formal and substantive requirements set forth in the Federal Ordinance on Reporting on Climate Related Matters. This ordinance entered into force in January 2024 and implements the recommendations of the Task Force on Climate-related Financial Disclosures (TCFD) and will apply for next year's reporting season. While the ordinance does not mandate compliance with the TCFD requirements, it states that the Swiss legal requirements (Art. 964b CO) are complied with if these recommendations are followed. Companies subject to reporting requirements, however, may still demonstrate compliance in other ways or by other standards and are still at liberty to explain – which will presumably and hopefully only apply in rare cases – in a reasoned manner why they do not have a policy on climate matters.

In addition, Swiss listed companies will follow closely the consultation process regarding potentially broader corporate sustainability reporting obligations which was opened on 26 June 2024. The proposed amendment, if adopted, would further align Swiss sustainability reporting with the CSRD. It would, inter alia, broaden the scope of the companies subject to sustainability reporting obligations and introduce a mandatory assurance review for the reports.

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L-QIF: New Innovative Swiss Fund Structure in Practice

Reference: CapLaw-2024-37

On 1 March 2024, the revised Collective Investment Schemes Act (CISA) and its implementing ordinance (CISO) came into effect. The key element of the revised CISA is to allow under Swiss law the long awaited possibility to launch, under certain conditions, collective investment schemes for qualified investors in the form of a so-called Limited Qualified Investor Fund (L-QIF). This, by definition, implies that they are operated without approval, authorisation and product supervision of the Swiss Financial Market Supervisory Authority (FINMA).

By François Rayroux

1) Introduction

The very purpose of a L-QIF is to offer both fund promoters and qualified investors a significant flexibility, not only in terms of investment policy and restrictions, but also in terms of market timing. As a counterpart, investors must not only be "qualified" as defined in art. 10(3ter) CISA, but also accept that the product will not and cannot be supervised by FINMA. It is therefore only suitable for such qualified investors, accepting the additional risks linked to the absence of a prudential product supervision by FINMA, or not being bound by applicable investment restrictions, imposing an investment in supervised funds.

The L-QIF in its final form should answer the practical needs of quite different financial sectors in Switzerland. Those sectors are not necessarily correlated. The first experiences seem to show that several sectors, not necessarily used to or acquainted with collective investment schemes, are interested in the L-QIF. These various sectors need to be distinguished:

- First, the Swiss private wealth and institutional asset management industries, which in some instances converge to develop vehicles, mainly for pooling purposes or for less liquid or non-traditional strategies or features, for their mostly sophisticated private or quasi-institutional investors, such as family offices or philanthropic foundations, as well as many significant institutional investors, mainly pension funds and insurance companies. This may allow also to repatriate certain fund structures into Switzerland, which due to certain strict requirements applicable under CISA to regulated funds, namely in case of illiquid investments such as private equity, were as a matter of practice launched in other jurisdictions.

- Second, the L-QiF is here to offer an interface in the form of a Swiss collective investment vehicle between investors and other industry sectors, such as capital markets, i.e. venture capital and private equity structures. Indeed, practice shows that there is not only an investor's interest to invest in these new sectors, but also a strong need for capital and hence investments in Switzerland's strong and innovative industry with many start-ups. Therefore, the L-QIF may also widely serve a national economic purpose. This holds in particular true as Switzerland differs from other more specialised fund jurisdictions, such as Luxembourg and Ireland, as there is in Switzerland an important need for capital from potential private and institutional investors, coupled with important investment needs form local private and institutional investors.

  This industry is developing around existing technology groups as well as sophisticated universities, such as the ETH and the EPFL, leading to growing investment opportunities, in particular in the field of technologies, venture capital, private equity and digital investments, whether linked to the blockchain or the tokenisation of investments (see Federal Council, Dispatch on the Revision of the Modification of the Swiss Collective

Investment Schemes Act (Limited Qualified Investor Fund: L-QIF), 9 August 2020, p. 6 (cit. Dispatch of the Federal Council 2020); Lars Fischer, Tokenization of Private Equity Funds in Switzerland, IMPULSE/Nr. 87, 2023, p. 49-63).

The LQIF has therefore an important potential to satisfy also wider national interests as there is an evident interest of the country as a whole to create structures to support the development of domestic industries as well as start-ups and, hence, to limit the risks of too early transfers of technologies developed in Switzerland abroad at a too early stage due to a lack of sufficient domestic financing vehicles as is often seen today in practice with the sale of innovative start-ups to foreign controlled purchasers.

In the course of the legislative process, certain voices were heard, stating that this new vehicle would be a "blackbox" and only serve the interests of a few, as well as expose the economy as a whole to risks due to the deregulation and the distortion of competition and have a particularly negative impact on the real estate market (Sarah Jungo, Exkurs: Limited Qualified Investors Fund, in: Rayroux/Imbach, Asset Management im neuen regulatorischen Umfeld, Basel 2021, § 684 et seq. (cit. Sarah Jungo, L-QIF); Federal Finance Department, Report on the L-QIF Consultation Process, August 19, 2020, p. 4; SDA/ATS Press Release, Swiss Parliament, December 9, 2021).

Other voices were also heard criticizing certain proposed features of the new law, such as contemplated restrictions on so-called "family funds", which would have also affected the business potential of L-QIFs. Those proposed restrictions could be widely cleared in the final version of the CISO in fruitful, constructive and open discussions with the Swiss Federal Finance Department to the satisfaction of most market participants (see Federal Finance Department, Report on the Consultation on the CISO L-QIF Amendments, 31 January 2024, p. 5 ff (cit. FFD CISO L-QIF Report) and for the critics in the consultation process Sandro Abegglen, Yannick Wettstein, Draft Implementing Provisions on the Limited Qualfied Investor Fund (L-QIF): A Missed Opportunity for Improving the Competitiveness of the Swiss Fund market, CapLaw-2023-14; Janine Müller, L-QIF als SICAV: Aufwind oder Todesstoss für die letzte "grosse Innovation"?, GesKR 2022, p. 235 et seq.).

The L-QIF is a collective investment scheme under Art. 7 CISA, in all respects analogous to other FINMA regulated funds, except for the absence of FINMA authorisation, approval or supervision as well as a substantial deregulation The L-QIF structure will therefore not cure the competitive disadvantages affecting the international distribution of Swiss funds generally. Switzerland is obviously not a typical incorporation jurisdiction for funds to be distributed internationally, mainly for withholding tax reasons and also due to a lack of EU "passporting" for Swiss funds (Sarah Jungo, L-QIF, § 684). It has however a strong presence of very large Swiss institutional funds, mainly as pooling vehicles for pension funds and insurance companies. The L-QIF is evidently likely to enhance the competitivity of Switzerland where the international distribution is not of a primary essence for the choice of a fund structure (See generally Diana Imbach Haumüller, The limited qualified investor fund (L-QIF) – an Innovation for the Swiss Fund and Asset Management Industry, CapLaw-2020-73).

In parallel, several other key changes have been introduced in the CISA/CISO, which may or may not have an impact on L-QIFs, such as more flexible rules for Swiss and foreign Exchange Traded Funds (ETFs) In Art.106 and Art.127b CISO, stricter rules for the management of the liquidity of investments funds in line with international standards (Art. 78a CISA and Art. 108a CISO), the launch of so-called side pockets in case of illiquid assets (Art. 110a CISO) and notably revised rules for the creation of funds targeting only a limited number of investors (Art. 5 CISO), with an impact also on "family funds" (Art. 110a CISO). These other punctual changes In CISA and the CISO cannot be further addressed within the limited scope of this article which focuses on L-QIFs.

The purpose of this article is not to repeat the considerations and analysis which have already been provided in details, namely in CapLaw, by recognized experts on the L-QIF, in particular during the legislative process, but much more for a practical assessment of the L-QIF in practice now that the revised CISA is in force since 1 March 2024 (see for further information to avoid undue repetitions Sarah Jungo, L-QIF, § 684 et seq; Diana Imbach Haumüller, The Limited Qualified Investor Fund (L-QIF) – an innovation for the Swiss fund and asset management industry, CapLaw-2020-73; Sandro Abegglen, Luca Bianchi, New Limited Qualifed Investor Fund (L-QIF) – Innovation and deregulation as Growth Catalyst for the Fund and Asset Management industry in Switzerland, CapLaw-2019-41).

2) Key features of the L-QIF

2.1) Concept: Not an "unregulated", but a "deregulated" collective investment scheme

The L-QIF is defined in Art. 118a CISA as a collective investment scheme governed by Swiss law pursuant to Art. 7 CISA which is offered exclusively to qualified investors and, as a key difference to other collective investment schemes under CISA, with no product authorisation, approval or supervision by FINMA. The absence of FINMA supervision is therefore seen as a key element of the L-QIF and is, as such, not only a right or flexibility, but also an obligation or duty which must be transparently disclosed and declared at registration with the Federal Finance Department and thereafter towards the investors (see below paragraph 2.2.a for further details).

The absence of any product supervision by FINMA being one of the essential elements of a L-QIF (Art. 118a CISA), the prerequisite for a L-QIF to exist is the express declaration to the Federal Finance Department not to be subject to any authorisation or approval requirement of FINMA. This express declaration requires by law that the supervised financial institution in charge of the administration and management of a L-QIF completes and files the formal registration with the Federal Finance Department not later than 14 days after formally taking over the management (Art. 126a(2) and Art. 126g(1) CISO). The formal declaration process includes information on the name, investment strategy, legal form, date as of which the management has been started, contact person of the institutions in charge of the management, name of the auditor, etc. (see www.sif.admin.ch).

This implies in the first instance that L-QIFs are treated as any other Swiss collective investment scheme under the CISA. The L-QIF is sometimes incorrectly referred to as an "unregulated" fund structure, but any L-QIF remains subject to the provisions of CISA and CISO, unless those are expressly disapplied pursuant to the lists set out in Art. 118d CISA and Art. 126f CISO. Also, Art. 126b CISO expressly declares the key rules of the FINMA recognized self-regulation of the Asset Management Association Switzerland AMAS to be applicable (Art. 126b(3) CISO), such as the AMAS Code of Conduct and the guidelines on the Total Expense Ratio (TER). As such, a L-QIF is widely "deregulated", mostly as to the FINMA authorisation, approval and supervision, but not "unregulated".

The eligible legal form for L-QIFs pursuant to Art. 118c CISA is alternatively the one of a contractual fund (FCP) under Art. 25 et seq CISA, or of an investment company with variable capital (SICAV) under Art. 36 et seq CISA, or the one of a limited partnership for collective investments (LP) pursuant to Art. 98 CISA. As a rule, the generally applicable provisions under the CISA for each of these forms apply to L-QIFs, namely as to the governance and the administration of a L-QIF. The CISA and the CISO specify those requirements with additional provisions, tailored to the needs of a L-QIF.

The key legal elements of a L-QIF are identical to those of any other collective investment scheme under Swiss law pursuant to Art. 7 CISA. An L-QIF must therefore at all times meet the characteristic elements of a collective investment scheme under Swiss law, which include the creation of pooled investments as a result of investors contributions, managed based on the principle of the "collectivity" by a third party (principle of the "Fremdverwaltung") in line with the principle of the equal treatment of investors.

This implies that, on the one part, a L-QIF is as such not conceptually a "new" investment product, but rather a new category of collective investment schemes pursuant to Art. 7 CISA (except for the absence of FINMA authorisation, approval or supervision) and that, on the other part, there are, as to the structure, no material "free harbours" as to the structure of L-QIFs. There are, however, significant freedoms granted by the legislator as to the investment policy and drafting of investment restrictions, which clearly render this new fund category appealing.

Based on the foregoing, the general limitations apply as to the number of investors and the management of L-QIFs as any other collective investment schemes, with a few exceptions. In the context of the requirement to have a "collectivity of investors" under Art. 7 CISA, a L-QIF is as a rule to be formed by at least two investors which are as a matter of fact economically separated (Art. 5(1) CISO). Exemptions apply for investors, which are part of the same Group (Art. 5(3) CISO). The general rules under Art. 7(3) CISA apply to create single investors L-QIFs, which may in practice be of relevance, mainly for institutional investors. Also, L-QIFs among investors with economical or family ties are subject to the generally applicable limitations in Art. 5 CISO (see below paragraph 2.3.d).

The revised CISA seeks to reduce the risk of confusion of a L-QIF with FINMA supervised collective investment schemes. Therefore, L-QIFs cannot refer to the fact that they are "funds in transferable securities", or "real estate funds", of "other funds" for traditional or alternative investments, as this would imply a risk of confusion with the FINMA supervised CISA collective investment schemes (Art. 188e para. 3 CISA). L-QIFs must use on the first page of their fund documentation the term "limited qualified investors fund" or "L-QIF" and include a disclaimer to the effect that they are neither FINMA authorised or approved, as do L-QIFs in the form of a SICAV or LP in their business name (Art. 118e(1) and (2) CISA).

2.2) Differences of L-QIFs as compared to FINMA supervised funds

In addition to the specific differences for single investors L-QIFs and the prohibition to sub-delegate the asset management to the single investor, other notable differences apply as compared to FINMA authorised or approved collective investment schemes under CISA, such as:

a) Absence of Product Supervision

The L-QIF being "regulated" under CISA, but being widely "deregulated", in particular as regards investment restrictions, and exempt from any FINMA supervision, authorisation and approval, the regulatory burden to ensure compliance with all applicable laws is by law shifted to the financial institution which is in charge of the "management" and "administration" of the L-QIF (in German "Verwaltung", covering both elements in French of the "administration et gestion"). This financial institution, whether acting as "sponsor" or as provider of "white label services" for L-QIFs, is under Art. 5(6)

CISO subject to an express regulatory responsibility to ensure that at all times the key elements applicable to a L-QIF are fulfilled.

This absence of direct prudential supervision over the L-QIF as an investment product, which is replaced by an "indirect" supervision as a result of the prudential supervision over the institution which under Art. 118a et seq. CISA is formally in charge of the "management" of the L-QIF, implies namely that those financial institutions:

- When acting as fund management company or as asset manager of collective investment schemes, must obtain from FINMA beforehand the approval to include in their governance, in the articles of association and internal regulations the possibility to manage L-QIFs, with a clear definition of the relevant types of L-QIFs and investments in order to satisfy FINMA's general requirements of a fit and proper organisation under Art. 9 FINIA.

- Must assume the responsibility to monitor that the regulatory requirements applicable to a collective investment scheme under Art. 7 CISA are at all times met (Art. 5(6) CISO), including the specific requirements applicable to L-QIFs in the form of an FCP (Art. 118g CISA) or of a SICAV or an LP (Art. 118 h CISA).

- While the introduction of formal procedures within the institution is not anymore required in the final version of the CISO, implement appropriate processes within its internal control system (ICS) for the permanent supervision of the compliance with the key elements of Art. 7 CISA in relation to Art. 118a CISA and Art. 5(6) CISO (FFD CISO L-QIF Report, p. 13).

- Immediately notify FINMA, the custodian as well as the auditors in case the key requirements for a L-QIF are not any more met and, in case of other violations, inform also the investors and see to it that those obligations are complied with and, if not, liquidate the L-QIF (Art. 126h CISO).

The "indirect" prudential supervision by FINMA implies that L-QIFs in the form of FCPs and SICAVs must be administered and managed by a fund management company supervised by FINMA (Art. 118g CISA, Art. 118h CISA). For contractual funds, the set-up is in essence similar to the one of a FINMA approved contractual fund: It is up to the Fund Management Company, having title on the assets of the L-QIF, to assume the administration and asset management for the contractual structure in line with Art. 25(1) CISA, with of course a potential delegation of the asset management function to an eligible asset manager (Art. 118 g CISA).

Art. 118h obliges a L-QIF SICAV to delegate in all circumstances the administration, which includes the asset management decision, to one and the same fund management company. The concept of the "administration" is in the meantime well established in practice for FINMA approved SICAVs and will, as such, also apply to L-QIF SICAVs in line with Art. 50(2) CISO (Dispatch of the Federal Council 2020, p. 6914). The mandatory delegation of the "administration" of the L-QIF SICAV to one and the only fund management company precludes L-QIF SICAVs in the form of a so-called "self-managed SICAV", which is provided for in practice under the CISA for FINMA supervised SICAVs (Art. 36(5) CISA), but as a matter of practice exceptional in Switzerland, is not possible.

The situation is more ambiguous for a L-QIF LP, where the administration must also be delegated to a fund management company, but with a less defined concept of the "administration". A L-QIF LP must also delegate the administration and asset management to a licensed asset manager of collective investment schemes or any financial institution subject to a stronger FINMA supervision. In many cases, for example where the asset manager of collective investment schemes does not have the required substance, a delegation to a fund management company will be involved, with a possible on-delegation to an asset manager. While the administration includes the "Geschäftsführung" for the L-QIF LP, which needs to be delegated by the GP, the Dispatch of the Federal Council seems to imply that there are fewer tasks to be delegated as compared to the SICAV and, hence, potentially a greater flexibility which remains to be confirmed in practice (Dispatch of the Federal Council 2020, p. 6914 and 6915).

No mandatory delegation applies in case the GP is supervised by FINMA as a bank, insurance company, securities house, Fund Management Company or manager of collective investment schemes (Art. 118h(4) CISA). Also, in this case, that GP can operate several L-QIF LPs, and not only one L_QIF LP as is generally the rule (Art. 98 para. 2 CISA). The delegation arrangements must be disclosed in the Articles of Association or in the fund contract.

This means in practice that, for the operation of a L-QIF:

– A Fund Management Company is always involved in case of a L-QIF FCP or SICAV, and also often in case of a LP, with the exceptional situation where the GP is entitled to perform the administration and asset management or directly delegates the asset management and administration to an asset manager of collective investment schemes (which however must have the appropriate organisation to perform both the administration and the asset management for the specific L-QIF in light of the given investment strategy).

– The mandatory delegation of the "administration" of a L-QIF imposes on the delegated "administrative agent", with varying standards for SICAVs and L-QIF LPs, specific governance, organisation and process requirements with qualified personnel and sufficient know-how in light of the specific investment strategy pursued.

- Before launching a L-QIF and unless the relevant institutions have already launched L-QIFs with similar investment policies and features, each such institution must obtain from FINMA an approval for the implementation within its organisation of the relevant organisation, tailored to the specific type of L-QIF, in particular as regards compliance and risk management, including persons with a suitable know how, for the relevant investment strategy pursued by the L-QIF.

- The requirement to have a fit and proper organisation on the level of the entity in charge of the management of the L-QIF may have an impact on the time to market of the L-QIF. In many cases, the entity in charge of the "administration" will on-delegate the asset management to a delegated asset manager, which must be licensed as manager of collective investment schemes pursuant to Art. 24 FINIA or to a foreign asset manager of collective investment schemes subject to an adequate supervision in its home jurisdiction with whom FINMA has entered into a Memorandum of Understanding on the Exchange of Information if the other jurisdiction so requires (Art. 118(2)(b) CISA).

- Finally, the Parliament has resolved that a direct or indirect delegation of the asset management function to an asset manager within the meaning of Art. 17 FINIA, which as such is prudentially supervised in line with international standards, but to a lesser extent as compared to a manager of collective investment schemes meeting EU MIFID or AIFMD standards, would not be sufficient to balance the absence of prudential FINMA supervision over L-QIFs and, hence, is not permitted (Dispatch of the Federal Council 2020, section. 4.1.2.2).

The obligations of the custodian under Art. 72 CISA, in particular as to the safekeeping of the assets in custody and its control function, where applicable, remain *a minima* unchanged as compared to a FINMA supervised fund, with potentially additional controls given the lack of direct supervision or in light of the relevant asset classes. The role of a custodian of a L-QIF FCP or SICAV is of essence. Custodians of L-QIFs will accordingly need to implement the necessary governance, substance and processes, with qualified personal, and seek a FINMA authorisation to evidence that it meets all required fit and proper requirements under Art. 72 CISA and Art. 102 CISO as well as Art. 53 FINIO (Dispatch of the Federal Council 2020, 6902, section 4.1.2.2).

b) Investment Policy and Restrictions

The investment policies and investment restrictions of L-QIFs are intended to be very liberal and include beyond traditional assets, infrastructure investments and usual alternative investments, any form of digital assets as well as venture capital and private equity investments. Ultimately, it will for the financial institution managing the L-QIF to adopt the appropriate governance and processes as well as personnel to cope with the general FINMA fit and proper requirements under the FinIA, including as to compliance, risk management and the new strict liquidity management provisions imposed under Art. 78a CISA and Art.108a CISO (FFD CISO L-QIF Report, p. 49)

The CISA investment restrictions for supervised collective investment schemes are widely disapplied (Art. 118 d CISA and Art. 126 f CISO and 126p CISO). It would have been contrary to the votes in Parliament, concerned that the L-QIF as a financial product would be a "blackbox", not to provide any investment restrictions (See above Paragraph 1). For example, in case of open-ended L-QIFs, the redemption right cannot be limited for periods exceeding 5 years and, moreover, only where the underlying assets have a limited marketability or valuation (Art. 126m(1) CISO), which limits the possibility to launch open-ended L-QIFs (FCPs or SICAVs) for illiquid investment strategies, opening the door to L-QIF LPs for a wide number of illiquid strategies in alternative, private equity, venture capital or infrastructure investments (SDA/ATS News, 9 June 2021). Conversely, it is in our view not possible to launch a closed-ended L-QIF LP with highly liquid assets as this would be in contradiction with the very principles of Art. 7 CISA which applies also to L-QIFs.

Also, selective stricter rules applicable to L-QIFs as compared to FINMA approved funds have been introduced to serve a macro-economic purpose: The general limitations as to the exposure of L-QIFs is intended from a macro-economic perspective to seek to control potential negative impacts in case of a crisis should L-QIFs be materially exposed to counterparties and proceed to e.g. margin calls against third party banks (FFD CISO L-QIF Report, p. 49). Therefore, express limitations by analogy to those applicable under Art. 100 para. 2 CISO for regulated FCPs and SICAVs, apply to L-QIFS on leverage (50 percent of the NAV), collaterization (100 percent of the NAV) and exposure (600 percent).

Interestingly, this implies that a promotor, wishing to launch a fund with more flexible investment restrictions, could chose not to opt for a L-QIF, but rather to launch a FINMA authorised collective investment scheme (most likely for qualified investors), which could as a rule be derogated by FINMA if the L-QIF was a regulated fund (Art. 101 CISO).

The competitive advantage of a L-QIF, also from an international perspective, is the very flexible possibility to invest in a variety of assets with very liberal investment restrictions. A L-QIF in the form of a FCP or of a SICAV must pursuant to Art. 126(2) CISO set out investment restrictions. There is no need to integrate typical investment restrictions, which would apply for FINMA supervised funds, unless there is an investor's request to this effect. The investment restrictions are as indicated widely disapplied, but the fund documentations of a L-QIF must set out, as the case may be without many details, what investment restrictions are to be complied with by the L-QIF. A "silent fund documentation" is not admissible, but the CISA remains very open how to do so and in what details, in a manner which seems to be extremely liberal as compared to other jurisdictions, including Luxembourg (FFD CISO L-QIF Report, p. 7).

While the L-QIF itself will not be subject to FINMA's prudential supervision and as a consequence FINMA has no authority to issue regulations which will apply to L-QIFs, certain provisions of the CISO-FINMA on specific technical details are expressly declared to be binding on L-QIFs (Art. 126p(3) and 4 CISO), such as for derivatives, securities lending or repo transactions as well as for accounting principles. This allows by contrast to earlier drafts of the CISO also for L-QIFs the use of the so-called Value-at-Risk method for derivatives, subject however to specific audit requirements (Art. 126z octies (3)(c) CISO).

Master-feeder-structures are only permitted, where the L-QIF master-feeder-fund invests in other L-QIFs, but not in regulated CISA funds (art. 126s CISO) (FFD CISO L-QIF Report, p. 36). This limitation is justified in the eyes of the legislator by the concern to avoid circumventions of law. It will most likely render L-QIFs master feeder structures irrelevant in practice.

"Side pockets", while most likely being a key element for the management of the liquidity of Swiss collective investment schemes, will not be permitted for L-QIFs. Art. 110a CISO introduces, namely as a result of certain recent global events as well as past experiences during the 2008-2007 financial crisis, the possibility to create so-called "side pockets". This will require that the Swiss fund regulations of FINMA supervised funds expressly provide in advance for the possibility to issue side pockets for illiquid investments and, once an illiquidity event occurs, that FINMA authorizes the issue of those side pockets with a corresponding publication to the attention of the investors. It is unfortunate that this flexibility, which serves investors protection, is not available for L-QIFs, but L-QIFs may at least provide in their documentation to apply a "gating" in case of important redemptions (Art. 126m CISO).

c) Application of other Swiss laws to L-QIFs

L-QIFs remain subject to the generally applicable Swiss law as well as, where applicable, also to laws of foreign jurisdictions in case of a distribution to investors outside Switzerland (noting that L-QIFs are obviously not eligible for a passporting within the EU by contrast to their EU counterparts, such as the RAIF).

The "distribution" of L-QIFs follows the general rules imposed under FinSA and CISA to any Swiss or foreign collective investment scheme, including as to the rules of conduct and of organisation pursuant to Art. 7 et seq. FinSA where a financial service is performed, in particular a "purchase and sale" pursuant to Art. 3(c)(1) FinSA. The same applies as regards an "offer" (Art. 3(g) FinSA) or an "advertisement" (Art. 68 FinSA) for a L-QIF, except for the obligation to issue a prospectus which is generally disapplied under Art. 50(1) FINSA. A key information document under FinSA is only required in the exceptional circumstances where a Private Client under FinSA is treated as qualified investor under Art. 10(3ter) CISA (i.e. in case the exemption for discretionary asset management agreements pursuant to Art. 58(2) FinSA does not apply), such as in case of a permanent advisory arrangement.

Also, the provisions of the Anti-Money Laundering Act (AMLA) as well as, in respect of funds with real estate investments, the provisions regarding the acquisition of real estate by persons abroad (so-called "Lex Koller"), remain applicable as for any other Swiss fund. As regards the AMLA, the general rules applicable to the Fund Management Company and the custodian apply in case of an FCP and, in case a L-QIF SICAV or L-QIF LP delegate the administration and management to an eligible financial institution under Art. 118h(1), (2) and (4) CISA. In this case, that a delegated administrator and management is in charge of the AML obligations and the L-QIF SICAV and L-QIF LP itself are exempted from the AMLA (Art. 2(4)(e) AMLA).

L-QIFs are treated from a Swiss federal, cantonal and communal direct or indirect tax perspective as any other collective investment scheme in Switzerland, including as to the "tax transparency" of the structure and the application of Swiss indirect taxes such as Swiss withholding taxes on dividends as well as VAT and issuance or transfer stamp duties (in respect to which however wide exemptions apply)(see namely Art. 10(2) FDTA, Art. 49(2) FDTA, Art. 71 FDTA, Art. 4(1)(c) WHTA, Art. 5(1)(b) WHTA etc.)

d) Eligible Investors

Eligible investors must pursuant to Art. 188a CISA be qualified investors under Art.10(3) and (3ter) CISA. For the wealth management industry, this renders the L-QIF appealing, as "qualified investors" include also private clients covered by discretionary asset management agreements or advisory arrangement with eligible financial institutions. Similarly, Swiss law now expressly clarifies that the L-QIF is an eligible structure for institutional investors (see below paragraph 2.3.c). Restrictions apply for so-called "opting-out professional investors" within the meaning of Art. 5(2) FinSA, in respect to which we refer to paragraph 2.3.e below.

e) Audit requirements

The absence of prudential product supervision triggers additional audit requirements over L-QIFs. Those audit requirements are, as a matter of principle, tailored based on the audit requirements applicable to FINMA supervised collective investment schemes (Art. 118i CISA), but it is up to the Federal Council, due to the lack of competence of FINMA, to regulate the details and the object of the audit (Art. 118i(5) CISA). The provisions of Art. 118z sexies CISO therefore replace the corresponding provisions for FINMA supervised investment funds in the CISO-FINMA.

As a concept, L-QIFs are, by analogy to FINMA supervised funds, the object of financial audits in addition of an "additional audit". As there is no FINMA supervision, this audit is not referred to as a "prudential audit", as would apply for FINMA supervised collective investment schemes. As a matter of content and approach, the audit points are however similar to those which would be covered in a prudential audit, addressed to FINMA (see FFDA CIS-L-QIF Report, p. 40 et seq.).

The financial audit of a L-QIF covers the points applicable to any audit pursuant to Art. 89(1)(a)-(h) and Art. 90 CISA. The revised CISA and CISO do not expressly exempt L-QIFs from the establishment of a semi-annual audit report, but it would seem contradictory not to do so as FINMA supervised funds for qualified investors may request an exemption to this effect. The fact that semi-annual reports are not required for L-QIFs derives in our view from Art. 118l CISA, which only refers to the annual report and furthermore is based on Art. 126z quarter CISO, which also refers to the generally applicable accounting principles for the establishment of the accounts, which provides for strong arguments that an L-QIF shall be treated as any collective investment scheme reserved under the CISA exclusively for qualified investors. Otherwise, this would result in the awkward situation where an L-QIF would be subject stricter audit requirements as compared to FINMA supervised funds or collective investment schemes.

The "additional audit", which conceptually is the equivalent of a prudential audit, has the object to verify the continuing existence of all key elements of an audit (as defined in Art. 118a CISA) as well as the verification of the reporting of data pursuant to Art. 118f CISA (Art. 126z octies(1) CISO). The "additional audit" must be performed every two years, but in the first year after launch of the L-QIF, certain key documents must be covered by the audit, such as the fund documentation, the content of the fund regulations and the application of the valuation of derivatives (Art. 118z octies(2) and (3) CISO). After the time limit for compliance with the investment restrictions (Art. 126q(3) CISO), the "additional audit" must also verify the compliance with investment restrictions. This audit point will, as a rule, be performed two years after launch (Art. 126z octies(4) CISO).

The audit reports are edited in the form of an audit report on the annual accounts (Art. 118i(2) CISA) and, in addition, a short form report on the audit of the L-QIF and another short form report on the "additional audit". The short form audit must confirm compliance with the legal and regulatory obligations. Should the audit firm note material divergences with the legal provisions or deficiencies, there must be an express notice of reservation in the prudential audit report of the institution in charge of the management of the L-QIF, which is to be notified to FINMA.

A non-compliance with the key characteristics of a L-QIF, as set-out in Art. 118a(1) CISA, are always defined to be material and triggering a formal "notice of reservation".

2.3) Possible L-QIF structures

a) Practical implications for the launch of a L-QIF

There are a number of practical implications resulting from the decision to launch a L-QIF as compared to a FINMA approved collective investment scheme. The first is that the "time to market" for a L-QIF is likely to be shorter than for a FINMA supervised fund, but that the same "time to market" has to take into account the prior authorisation by FINMA of the relevant financial institution to operate a L-QIF in the legal form and with the investment strategy which is specifically proposed in the case at hand.

Furthermore, the lack of FINMA authorisation, approval and supervision regime is expected to trigger in practice enhanced due diligence requirements by the financial institutions launching L-QIFs to meet the increased responsibility for ensuring the L-QIFs compliance with CISA as well as strict audit requirements (See paragraph 2.2. e above). Indeed, after the launch of a L-QIF, Art. 5(6) CISO expressly imposes an obligation to verify on an ongoing basis that the legal requirements applicable to a collective investment scheme under Art. 7 CISA are complied with. In this context, the Explanatory Report of the Federal Finance Department states that this includes an obligation to monitor that the requirement of a "collective investment" always be complied with for Swiss funds, including L-QIFs. This would seem to preclude collective investment schemes – whether in the form of a L-QIF or regulated fund – with only one investor, unless the specific conditions for a "single investor fund" are complied with.

This will be formally verified in the context of the so-called "additional audit" (Art. 126z octies(1)(a) CISO) and violations will automatically lead to a formal notice of reservation in the institution's Long Form Report addressed to FINMA pursuant to Art. 126z tredecies, para. 2 CISO). In practice, this will often imply a "pre-clearance" of the L-QIF documentation and structure before launch by the competent audit firm in order to limit the risks of such formal notices of reservation, at least for the "additional audit" which is required to be performed after launch.

Finally, in essence, the costs for launching a L-QIF should therefore overall not be materially lower than the costs for operating a FINMA regulated fund (with the exception of the costs for the FINMA authorisation).

b) Transformations and Reorganisations

A potential for L-QIFs will certainly be the repatriation of e.g. private funds currently incorporated abroad as, for example in the field of private equity or infrastructure, no suitable form of FINMA approved collective investment schemes under CISA is available. A potential might also exist for currently FINMA supervised collective investment schemes to "opt out of the FINMA supervision and become a L-QIF. A L-QIF not being the object of any direct supervision from FINMA, it seems a logical consequence that L-QIFs cannot be reorganized or restructured into or with a FINMA supervised collective investment scheme (Art. 126e CISO). This being said, while formal restrictions and procedures apply, the transformation of a FINMA supervised collective investment scheme into a L-QIF is possible (Art. 118b CISA in relation to Art. 126c and 126d CISO). Similarly, the transformation of a L-QIF into a FINMA supervised collective investment scheme should be possible as soon as all regulatory requirements under CISA are met. This applies also for L-QIFs which initially were launched as supervised collective investment schemes and thereafter decided to again become subject to a direct FINMA supervision (FFD CISO Report p.26). Similarly, while, as a rule, the reorganisation of a L-QIF into a supervised collective investment scheme is not permitted, such a reorganisation or merger should be admissible once the transformation of the L-QIF in a FINMA supervised collective investment scheme has been completed.

c) Institutional investors

The L-QIF may be of key interest for major institutional investors, such as insurance companies or pension funds, for the purpose of the "pooling" of the assets. As such, L-QIFs can be launched specifically for pension funds or insurance companies or, if structured as a L-QIF FCP or L-QIF SICAV, as an umbrella with L-QIFs for several institutional investors, tailored to their individual needs, or by contrast to Investment Foundations (*Anlagestiftungen*) commingled (tax exempt) asset of pension funds with (taxed) tied asset of insurance companies.

Of note, a L-QIF can be launched in the form of a so-called "single-investors fund". Despite strong requests form the asset management industry to allow also for single investor L-QIFs the sub-delegation of the management to the single investor pursuant to Art. 7(4) CISA, has for what seems to be good reasons not being provided in case of L-QIFs, mainly for investor's protection reasons towards Swiss pension funds and also considering that, to the extent the financial institution launching the vehicle has to be prudentially supervised, a sub-delegation to a non-supervised single investor fund would substantially weaken this alternative means to provide for an indirect protection of the interests of the investors, which is a key element of the I-QIF (Dispatch of the Federal Council 2020, p. 6984).

Finally, it is of essence to note that the L-QIF as well as comparable international collective investment schemes, such as RAIFs, are admitted as eligible investments within the meaning of Art. 56(1) BVV2, which corresponds in several years to an interpretation in practice, but is key for investments by investment foundations in

L-QIFs. While no amendment to the BVV2 was necessary, the relevant ordinance for investment foundations was specified in Art. 29(3)(p) and Art. 30(3), (3bis) and (3ter) ASV.

d) Private wealth structures

L-QIFs may be a suitable structure for a fund management company to launch flexible umbrella funds for a multi-family office or wealth managers in order to offer L-QIFs in line with the portfolio strategies applicable by each such wealth managers and/or client categories, typically in the form of an open-ended L-QIF, whether as a contractual fund or as a L-QIF SICAV. In this context, it is noteworthy to remind that the definition of "qualified investors" under Art. 10(3ter) CISA also includes private clients under FinSA, which have entered into a written advisory agreement or asset management agreement with an eligible institution. For those qualified investors, where for the rest all suitability requirements are met, a so-called "Base Information Sheet" under FinSA may be required case of an advisory agreement, but not in case of discretionary asset management agreements where an exemption applies (Art. 58(2) FinSA).

Following intense debates in the legislative process, the initially proposed restriction for so-called "family funds" has not been introduced in the final version of Art. 5 CISO. This means that members of the same family could meet as long as the characteristic elements of a collective investment scheme pursuant to Art. 7 CISA are at all time met, in particular the requirement of "collectivity" and of the *"Fremdverwaltung"* (see paragraph 2.1.a above). This would preclude L-QIFs, as for any other collective investment scheme in Switzerland, launched for a single undivided estate or by one single person for estate planning purposes only. Where the requirement of a "collectivity" of investors is met, a L-QIF may be open for persons with strong relationships, including family members (where for example the family members are clearly independent both, in terms of experience and decision making, for example to formulate subscription or redemption requests on their own without the collaboration of other investors). Similarly, investors of a LQIF, whatever its form, may not under the principle of the *"Fremdverwaltung"* pursuant to Art. 7 CISA exercise an influence on the management of the L-QIF. Finally, the equality of treatment required under Art. 7(1), last sentence, CISA among investors is of essence, potentially precluding a widely predominant influence of one single investor (See FFD CISO L-QIF Report, p. 5, 13 and 14; FINMA Communications 16 (2010), p. 4).

e) Real Estate L-QIFs

L-QIFs are likely to trigger a material interest among investors for real estate funds. For L-QIFs investing directly in real estate, private clients under FinSA covered by a discretionary asset management or advisory agreement, as well as opting-out professional investors pursuant to Art. 5(2) FinSA as well as private investment structures, even if professionally managed within the meaning of Art. 4(3)(i) FInSA, are expressly excluded as investors (Art. 118a(1)(b) CISA). This restriction is politically motivated and based on fears during the legislative process of circumvention of L-QIF real estate structures for mere tax reasons. It is generally considered that, without this restriction, the L-QIF project and the revised CISA would have not passed the votes in Parliament. (see *e.g.* Debates in the Swiss Parliament, Council of States, AB 2021 S 530/BO 2021 ES 530).

Despite this limitation in terms of potential investors, L-QIFs as real estate funds may, for other institutional and professional investors, such as pension funds, provide for an alternative to other collective investment schemes structures. Indeed, the permitted leverage is up to 50% of the net asset value (Art. 126v CISO) and there are also more flexible rules in terms of risk diversification (Art. 126w CISO), acquisition of co-ownership (Art. 126u CISO) as well as the acquisition of real estate without authorisation to build or which are not yet equipped (Art. 126t(3) CISO). While specific provisions apply to transactions with so-called "close persons", those are relatively flexible in nature in the final version of the CISO (Art. 126i CISO). Additional restrictions apply to L-QIFs with real estate investments, namely as regards diversification rules (e.g. minimum number of real estate to be defined), the limitation of leverage to finance the real estate portfolio (max. 50%) as well as transactions with so-called "close persons".

f) Illiquid investments (Alternative assets, infrastructure, venture capital and private equity as well digital investments)

L-QIFs might be an appropriate form for alternative or infrastructure portfolios with illiquid investments if launched as L-QIF LPs, but not as open-ended structures (i.e. L-QIF as contractual fund or L-QIF SICAV) due to the restricted limitation of redemption rights introduced by the Parliament to limit the investor's exposure for political reasons under Art. 126m para. 1 CISO (see *e.g.* Debates in the Swiss Parliament, Council of States, AB 2021 S 531/BO 2021 ES 531). For alternative or infrastructure investments, an L-QIF in the form of a LP might even in many cases be more appealing than a FINMA authorised LPs.

FINMA supervised collective investment schemes may gain exposures to digital investments, but due to the current investment restrictions imposed by law under the CISA mostly through transferable securities or by reference to a digital index. By contrast to other unregulated listed products at SIX or BX, such as ETCs, the current Swiss legal framework would not allow to launch FINMA supervised collective investment schemes pursuant to Art. 7 CISA through direct investments in digital assets are in essence "transferable securities". Therefore, the L-QIF is expected to open wide possibilities for L-QIFs, both in terms of structure, such as through the tokenisation of their shares or units, and investment policy, allowing investment in tokens, digital investments or more generally for any investment through the blockchain.

Financial institutions assuming the administration and asset management for such l-QIFs with digital features or exposure will need to have the necessary governance, substance and processes to provide for the required risk management, compliance and, including for the custodian, AML framework for such digital investments. This being said, the L-QIF will certainly open material working hypothesis for the highly sophisticated Swiss digital industry (see LARS A. FISCHER, Tokenization of private equity funds in Switzerland, Impulse zur praxisorientierten Rechtswirtschaft, Band/Nr. 87, p. 49-63; THOMAS JUTZI, DAMIAN SIERADZKI, Geltungsbereich des Kollektivanlagerechts, Bern, 2022, p. 171; Report of the Federal Council "The legal basis for *distributed ledger-technology* and blockchain in Switzerland, Bern, 14 December 2018, p. 132-138).

3) Conclusions

The introduction of the L-QIF as new non FINMA supervised collective investment schemes for qualified investors, which is not "unregulated" but widely "deregulated", as well as of certain new key provisions in the CISO, certainly strengthens Switzerland as one of the leading asset management centres. The L-QIF as a typical asset management instrument already triggers a substantial interest among various actors beyond traditional asset managers to other actors of the Swiss capital markets industry, mainly for the launch of alternative investment strategies, in particular to finance venture capital investments, as well as of infrastructure funds, digital assets portfolios or funds with real estate investment, or as a pooling vehicle for institutional investors with additional flexibility as compared to regulated funds. The L-QIF may, for the financing of venture capital, serve a key role to help maintaining in Switzerland a certain number of key start-ups or companies, which are developing in Switzerland's strong industry for innovative technologies and thereby serve national interests. First projects are already being considered by the industry, not only for institutional investors, but also as a vehicle for sophisticated private investors.

In this context, it is in our view important to note that the efforts by the Federal Finance Department of the revised CISA and CISO to provide for a legal basis for the launch of this new category of collective investment schemes, has resulted in a well-balanced and efficient legal framework. The legislative process has been, in some instances, tainted with political interventions on all sides, which has caused challenges for the drafting of the new legislation in a manner, which would satisfy all involved parties. The end result is clearly in the interest of a Swiss financial market place as a whole.

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Developments in Swiss Takeover Law

Reference: CapLaw-2024-38

The past twelve months saw some significant developments in Swiss takeover law. Notably, the Takeover Board clarified the requirements for restructuring exceptions and examined cases involving the risk of a takeover obligation as a result of capital increases. Additionally, it addressed acting in concert scenarios and a special situation in which a competition law clearance condition is allowed without the necessity that conditions imposed by the authorities constitute a material adverse change. Important rulings were made on no-shop provisions in transaction agreements and on various remuneration questions, such as bonus payments, retention agreements, accelerated vesting, lifting of lock-ups and the like. These decisions reinforce the Takeover Board's evolving stance on ensuring fair practices and transparency in corporate takeovers.

By Matthias Courvoisier

The last twelve months were relatively active, resulting in several noteworthy developments:

Restructuring Exception: In the GAM Holding AG matter decided on 19 April 2024, the Takeover Board had the opportunity to summarize the requirements for a restructuring exception under Article 136(1)(e) FinMIA (TOB decision 871/01 of 19 April 2024, in the matter of GAM Holding AG, para. 8 et seqq.). The first requirement is the need for restructuring, described as a weakness of the applicant threatening its existence or entailing the risk of not being able to continue as a going concern. There is no need for an underbalance, over-indebtedness, or insolvency. The second requirement is that the measure to be taken is suitable for the restructuring, meaning that the restructuring measures selected must be reasonably likely to ensure the continued existence of the applicant in the normal course of events. Any measure that serves to remedy an inherent weakness in an economically distressed company that threatens its existence and restores its earning power is considered suitable. However, there is no requirement for a guarantee of the long-term success of the restructuring measure. If it is shown that the continuation of business operations is at risk, it is generally assumed that the measures taken by the general meeting to improve the current financial situation are appropriate. The third condition is the requirement of subsidiarity, meaning it is necessary in the specific situation that finding an investor without an exemption would be almost impossible. This requires a relatively broad examination of various financing options, preferably with the help of an investment bank or another suitable financial advisor. The Takeover Board is entitled to impose conditions and obligations, mainly the obligation to sell off part of the shares after some time. However, it appears that the Takeover Board becomes reluctant to impose such conditions or obligations if the investor clearly states that they will not invest if such conditions or obligations are imposed.

Opting-out: There were two interesting decisions dealing with opting-out. In the first matter (TOB decision 863/01 of 14 February 2024, in the matter of Swiss Steel Holding AG, para. 20 et seqq.), Swiss Steel wanted to introduce an opting-out provision in its articles of incorporation that would have stipulated that shareholders who exceed the offer threshold in the course of a specific capital increase do not have to submit a mandatory offer. The TOB concluded that all three major shareholders should not be allowed to vote on this matter together with the minority. The main reason given was that (at least) one of the three major shareholders, as explained by the company in its application, would have to provide the financing. As a result, all of them had an interest in the opting-out clause. It is irrelevant that those large shareholders who do not exceed the threshold have no interest in the opting-out provision, as the provision favors each of the large shareholders. In the second matter (TOB decision 843/01 of 3 May 2023, in the matter of Von Roll Holding AG), Altana AG requested the determination of the validity of the opting-out provision in the articles of association of Von Roll Holding AG. Von Roll Holding AG had stipulated in its articles of association that purchasers of shares are exempt from the obligation to make a public takeover offer. Altana AG intended to acquire 100% of the outstanding shares of Von Roll Holding AG under certain conditions. The Takeover Board concluded that the opting-out clause was legally valid. In particular, the Takeover Board noted that the general meeting that decided on the introduction of the opting-out took place before 11 October 2012, and that it was therefore sufficient that information about the general nature of the opting-out provision was only provided at that meeting. Today, this would not be sufficient anymore.

Absence and Exemption from the Duty to Make an Offer: There are again two relevant decisions concerning this topic. The first decision (TOB decision 869/01 of 25 March 2024, in the matter of Meyer Burger Technology Ltd, para. 7, 15) dealt with the problem in the capital increase that the number of shares entered in the commercial register is relevant for calculating the 33 1/3% threshold, but new shares are issued in the event of a capital increase and are created before the number of existing shares has been registered in the commercial register. This can lead to a shareholder exceeding the 33 1/3% threshold in the short term. This can be dealt with in an exception request. However, it is also possible that the resolution on the issue of the new shares provides that the newly issued shares only become entitled to vote and receive dividends once the capital increase has been entered in the commercial register. In this case, in the opinion of the Takeover Board, the voting rights only arise originally with the entry in the commercial register and thus parallel to the increase in the total number of shares in the commercial register. In the same decision, the Takeover Board decided that commitment letters that only relate to the acquisition of shares by the respective investor in the context of the capital increase and provide for lock-up and standstill undertakings do not constitute acting in concert because these agreements do not objectively enable joint control of the company concerned by these investors. Therefore, there was no formation of a group of shareholders subject to a mandatory offer duty.

In the second matter (TOB decision 858/01 of 1 November 2023, in the matter of VT5 Acquisition Company AG), the Takeover Board had to deal with a request regarding the non-existence of an obligation to make an offer and, in case of a rejection of this request, the granting of an exemption from the obligation to make an offer in the context of the planned corporate takeover known as the De-SPAC transaction with the R&S Group. The Takeover Board found that the signing of commitment letters by shareholders of VT5 holding more that the threshold of 33 1/3% leads to the formation of a group subject to an obligation to make an offer. The main reason was that not only investment and lock-up commitments were necessary but also the obligation to not divest within the De-SPAC and further duties. There is nevertheless a certain development in the practice of the takeover board from the VT5 decision to the Meyer Burger decision cited above. The Takeover Board ultimately granted an exemption from the obligation to make an offer on the grounds that a De-SPAC is a special structure and that the De-SPAC granted exit rights for shareholders in the context of the mandatory buyback offer, which corresponds to the usual protective mechanisms in the event of a change of control.

Acting in Concert: In the first (TOB decision 872/01 of 30 May 2024, in the matter of Lalique Group AG, para. 7) of two relevant decisions dealing with the topic, the bidder concluded non-tender agreements with other significant shareholders. Since there was no further coordination among those shareholders regarding the offer, the TOB decided that this alone does not constitute acting in concert.

In the second decision (TOB decision 864/01 of 12 February 2024, in the matter of Aluflexpack AG, para. 44 et seq.), the TOB held that the usual obligations of sellers between signing and closing of a purchase agreement between major shareholders and the offeror do not lead to acting in concert between the shareholders and the offeror. This even holds true if there is an obligation of these shareholders to elect certain persons to the board of directors (see TOB decision 864/02 of 27 March 2024, in the matter of Aluflexpack AG, para. 11).

Competition Condition: Normally, an offer condition requiring competition law clearance must provide that it is satisfied if measures required by the competition authorities do not exceed the thresholds accepted for MAC conditions. The TOB has allowed an exception to this rule if the offer is made by a portfolio company of a fund, but the measure would affect persons who are not held by this fund but, for example, by sister funds. The reason for this decision is that otherwise there could be a breach of fiduciary duties towards the other funds (TOB Decision 864/01 of 12 February 2024, in the matter of Aluflexpack AG, para. 18).

No-shop Provisions in Transaction Agreements: The provision in the transaction agreement stipulated that the target company may only negotiate with or provide information to third parties if their offer is likely to be more favorable for the shareholders. The Takeover Board considered this to be too narrow and therefore inadmissible under takeover laws because the board of directors can also give preference to an offer in the interests of other stakeholders (TOB decision 864/02 of 27 March 2024, in the matter of Aluflexpack AG, para. 36).

Remunerations: There were a number of decisions (TOB decision 864/02 of 27 March 2024, in the matter of Aluflexpack AG; TOB decision 846/02 of 4 August 2023, in the matter of Von Roll Holding AG; TOB decision 849/02 of 15 August 2023, in the matter of Schaffner Holding AG; TOB decision 849/04 of 6 November 2023, in the matter of Schaffner Holding AG) dealing with remuneration questions in the context of takeovers and notably the best price rule and the minimum price rule. In essence, the following was clarified:

1. **Payments of Bonuses Before the Offer**: The Takeover Board decided that payments do not violate the best price rule if they are made prior to the conclusion of a potential purchase agreement between the main shareholder and the offeror and prior to the publication of a pre-announcement or a prospectus for a possible offer.

2. **Retention Agreements and Additional Work Compensation Agreements**: The Takeover Board decided that the best price rule and the minimum price rule do not apply to retention agreements and additional work compensation agreements entered into before the start of the offer (but after the offeror contacted the company) and which were not dependent on the offer.

3. **Accelerated Vesting**: Accelerated vesting in a share plan is not subject to the best price rule because it is not an acquisition of equity securities of the target company.

4. **Determination of the Achievement Level in a Share Plan**: The determination of achievement level was considered by the Takeover Board to not be subject to the best price rule for the same reason.

5. **Settlement in Cash Instead of Shares**: According to the Takeover Board, such settlement is not subject to the best price rule either for the same reason.

6. **Settlement of a Phantom Option Plan**: The Takeover Board was of the opinion that the best price rule does not apply because there is no acquisition of equity securities or derivatives.

7. **Removal of a Lock-up Period for Certain Shares**: The TOB decided that the best price rule does not apply because no acquisition of equity securities or derivatives takes place.

These decisions are remarkable to the extent they are justified by the fact that there is no purchase and sale of equity securities. That is of course the case; however, it is hard to understand why for example a change in terms of an option could never be regarded as subject to the minimum or the best price rule. A change in terms can always be construed as an exchange of one option against the other or a sale of old and purchase of new options. Nevertheless, the above decisions are certainly correct in their outcome, particularly because all of the transactions were apparently done at arm's length terms.

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UBS Group AG Issues SGD 500 Million Tier 1 Capital Notes with an Equity Conversion Feature

Reference: CapLaw-2024-39

On 24 June 2024, UBS Group AG completed its offering of SGD 500 million 5.600 per cent. Tier 1 Capital Notes, which are redeemable at the option of UBS Group AG for the first time on 21 December 2029. The Notes are "high trigger" regulatory capital instruments that are eligible to fulfil UBS Group AG's Swiss going concern requirements. Upon occurrence of a "Trigger Event" or a "Viability Event", the Notes will be converted into ordinary shares of UBS Group AG in accordance with their terms.

Viseca's Placement of Bonds

Reference: CapLaw-2024-40

On 17 June 2024, Viseca placed CHF 165 million 1.65% senior bonds due 2028. The bonds were issued by Viseca Payment Services AG. Zürcher Kantonalbank, Raiffeisen Schweiz Genossenschaft and UBS acted as Joint Lead Managers.

Novartis Issues CHF 2.2 billion Bonds

Reference: CapLaw-2024-41

On 19 June 2024, Novartis AG placed CHF bonds in the aggregate principal amount of CHF 2.2 billion in five tranches, with maturity dates ranging from 2027 to 2049. UBS, BNP Paribas (Suisse) SA and Deutsche Bank Aktiengesellschaft acted as Joint Lead Managers and Zürcher Kantonalbank acted as Co-Manager in this transaction.

Barry Callebaut's Issuance of CHF and EUR Bonds

Reference: CapLaw-2024-42

On 17 May 2024 and 14 June 2024, respectively, Barry Callebaut issued CHF and EUR Bonds. Specifically, Barry Callebaut placed CHF 730 million bonds in the Swiss market on 17 May 2024 and issued EUR bonds in the amount of EUR 700 million on 14 June 2024. The issuances were made to achieve greater financial flexibility against the backdrop of the volatile cocoa bean price market environment.

Warteck Invest Rights Offering

Reference: CapLaw-2024-43

On 3 June 2024, Warteck Invest launched its CHF 94.7 million capital increase by way of a rights offering. In the rights offering Warteck Invest shareholders were allocated subscription rights in proportion to their shareholdings in Warteck Invest. Shares not taken up by Warteck Invest shareholders were subsequently sold to investors in a share placement. Warteck Invest has issued 61,875 registered shares with a par value of CHF 10.00 each leading to gross proceeds in an amount of approximately CHF 94.7 million. The proceeds raised from the capital increase will be used to support the execution of Warteck Invest's growth strategy and the realisation of its development projects.

St. Galler Kantonalbank's CHF 200 Million Tier 2 Bond Issuance

Reference: CapLaw-2024-44

On 30 May 2024, St.Galler Kantonalbank AG (SGKB) successfully issued CHF 200 million 2.4% Tier 2 bonds due 2034. Zürcher Kantonalbank acted as Sole Lead Manager and SGKB as Co-Manager.

UBS Group AG's Issuance of Fixed Rate/Fixed Rate Callable Senior Notes under its Senior Debt Programme

Reference: CapLaw-2024-45

On 22 May 2024, UBS Group AG completed its issuance of CHF 335 million in aggregate principal amount of Fixed Rate/Fixed Rate Senior Notes due May 2030. Previously, on 13 May 2024, UBS Group AG completed its issuance of USD 1.75 billion in aggregate principal amount of Fixed Rate/Fixed Rate Callable Senior Notes due September 2030 under its Senior Debt Programme. The Notes are bail-inable (TLAC) bonds that are eligible to count towards UBS Group AG's Swiss gone concern requirement.

UBS Switzerland AG's Issuance of EUR 1.75 billion Covered Bonds

Reference: CapLaw-2024-46

On 21 May 2024, UBS Switzerland AG successfully completed its issuance of Covered Bonds under the program in an aggregate principal amount of EUR 1.75 billion, consisting of EUR 1 billion Floating Rate Covered Bonds due April 2027 and EUR 750 million 3.146% Covered Bonds due June 2031. The Covered Bonds are governed by Swiss law and are listed on SIX Swiss Exchange. The Covered Bonds are indirectly backed by a portfolio of mortgages from UBS Switzerland AG's domestic mortgage pool.

ADC Therapeutics Share Offering

Reference: CapLaw-2024-47

On 6 May 2024, NYSE-listed ADC Therapeutics SA, a commercial-stage biotechnology company based in Lausanne, Switzerland, announced that it had agreed to sell, by way of an underwritten offering, 13.4 million of its common shares as well as pre-funded warrants to purchase 8.1 million common shares to raise aggregate gross proceeds of approx. USD 105 million.

Roche's Issuance of EUR 1.5 Billion Bonds

Reference: CapLaw-2024-48

On 3 May 2024, Roche Finance Europe B.V. issued EUR 1.5 billion Bonds guaranteed by Roche Holding Ltd. Banco Santander S.A., BNP Paribas and UniCredit Bank GmbH acted as joint lead managers. The bonds will be listed on the SIX Swiss Exchange and have been admitted to trading on the Open Market (Freiverkehr) of the Frankfurt Stock Exchange. The transaction consists of a EUR 650 million tranche due May 2030 and a EUR 850 million tranche due May 2044.

Avolta's Issuance of EUR 500 Million Bonds

Reference: CapLaw-2024-49

On 18 April 2024, Dufry One B.V. issued EUR 500 m Bonds guaranteed by Avolta AG and certain of its subsidiaries. BNP Paribas, BofA Securities Europe S.A., HSBC Continental Europe S.A., ING Bank N.V., Intesa Sanpaolo S.p.A. and UniCredit Bank GmbH acted as joint global coordinators.

CPH's Spin-Off of its Paper Manufacturing Business

Reference: CapLaw-2024-50

SIX-listed CPH Chemie + Papier Holding AG (CPH) has carried out a separation of its paper manufacturing business and related real estate in Perlen from its chemistry and packaging activities by way of spin-off and admission of the newly formed Perlen Industrieholding AG for trading on the off-exchange platforms OTC-X and LPZ-X. The purpose of the spin-off is to create two focused companies each being able to successfully pursue their own specific strategy: the SIX Swiss Exchange-listed, globally active and growth-oriented CPH (newly called CPH Group AG) with its chemistry (Zeochem) and packaging (Perlen Packaging) divisions; and off-exchange Perlen Industrieholding AG, in which are bundled the paper manufacturing business (Perlen Papier AG) and the real-estate assets of the Perlen industrial site. The spin-off was effected by way of capital reduction and distribution in kind as approved at an extraordinary shareholders meeting of CPH on 20 June 2024, pursuant to which shareholders received one share in the newly formed Perlen Industrieholding AG for each CPH share.

Blockchain Law (Blockchain-Recht, DLT-Gesetzgebung: Neuste Entwicklungen und Praxis)

Tuesday, 3 September 2024, Lakeside, Zurich

https://www.eiz.uzh.ch/EIZ/web/eiz/event/Blockchain2024.aspx

27th Conference on Mergers & Acquisitions (27. Zürcher Konferenz Mergers & Acquisitions)

Tuesday, 10 September 2024, Lakeside, Zurich

https://www.eiz.uzh.ch/EIZ/web/eiz/event/TagungMA2024.aspx

12th Conference on Anti-Money Laundering (12. Zürcher Tagung zur Geldwäschereibekämpfung)

Tuesday, 1 October 2024, Lakeside, Zurich

https://www.eiz.uzh.ch/EIZ/web/eiz/event/GwG2024.aspx

Conflicts of Interest: Law & Best Practice (Interessenkonflikte: Recht & Best Practice, Aktuelle Rechtsfragen rund um Verwaltungsrat und Geschäftsleitung)

Tuesday, 1 October 2024, Metropol, Zurich

https://www.eiz.uzh.ch/EIZ/web/eiz/event/Interessenkonflikte2024.aspx

11th Conference on Internal and Regulatory Investigations (11. Tagung zu internen und regulatorischen Untersuchungen)

Wednesday, 30 October 2024, Metropol, Zurich

https://www.eiz.uzh.ch/EIZ/web/eiz/event/IntRegUntersuchungen2024.aspx

11th Conference on Compliance in the Financial Services Sector (11. Tagung zur Compliance im Finanzdienstleistungsbereich)

Tuesday, 12 November 2024, Lakeside, Zurich

https://www.eiz.uzh.ch/EIZ/web/eiz/event/ComplianceFinanz2024.aspx

18th Conference on Asset Management (18. Tagung zur Vermögensverwaltung)

Wednesday, 20 November 2024, Metropol, Zurich

https://www.eiz.uzh.ch/EIZ/web/eiz/event/Vermoegensverwaltung2024.aspx

Capital Markets – Law and Transactions XX (Kapitalmarkt – Recht und Transaktionen XX)

Wednesday, 27 November 2024, Metropol, Zurich

https://www.eiz.uzh.ch/EIZ/web/eiz/event/Kapitalmarkt2024.aspx

St. Gall Conference on Financial Markets Regulation (St.Galler Tagung zur Finanzmarktregulierung)

Thursday, 28 November 2024, Zürich Marriott Hotel, Zurich

https://lam.unisg.ch/tagung/finanzmarktregulierung