CapLaw
SWISS CAPITAL MARKETS LAW

NEWSLETTER NO. 4/2026

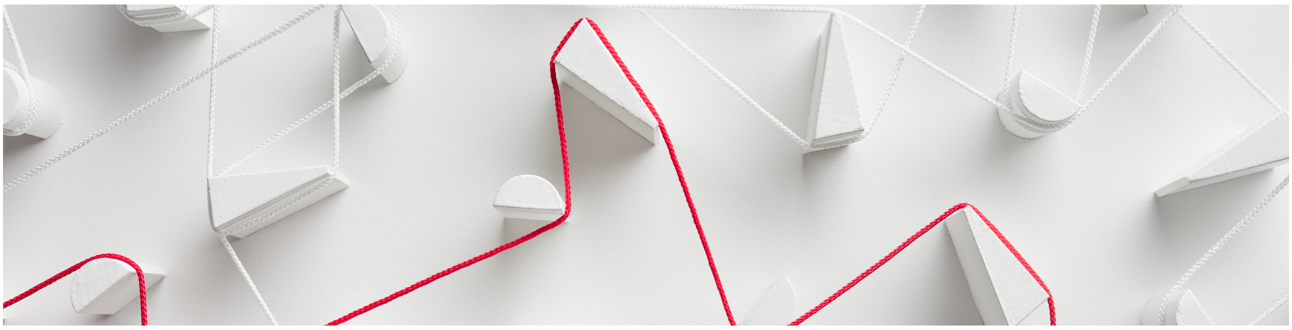
FINSA *(FIDLEG)*

SECURITIES

REGULATORY

NEWS | DEALS & CASES

EVENTS



FINSA CONDUCT OBLIGATIONS: FINMA'S RECENT ENFORCEMENT ACTIVITY

Reference: CapLaw-2026-56

FINMA has intensified its enforcement of the conduct obligations governing individual financial services under the Financial Services Act (FinSA). The publicly communicated conclusions of two recent enforcement proceedings are good examples of interventions by the regulator under the FinSA conduct regime. Accompanied by FINMA Guidance 03/2026, which highlights recurring risk patterns, these cases signal that the conduct obligations are now firmly on FINMA's enforcement radar.

By Patrick Schärli / Laura Wälchli

1) FINMA Guidance 03/2026: A Growing Number of Escalation Cases

In its Guidance 03/2026, published on 3 June 2026, FINMA reported a sharp increase in escalated cases of deficiencies identified at portfolio managers licensed under article 17 of the Financial Institutions Act (FinIA). In 2025, supervisory organizations (*Aufsichtsorganisationen*, AO) escalated 34 cases to FINMA, up from 23 cases in 2024 and 4 cases in 2023. An additional 34 escalations were triggered by third-party reports (compared to 11 in 2024 and 5 in 2023). In total, FINMA opened 68 supervisory cases in 2025. To put this number of supervisory actions in context: As of end 2025, FINMA had granted licenses to 1,664 portfolio managers and trustees, of which 97 had already exited supervision.

The identified deficiencies were often severe and required intensive investigation by FINMA. In the most serious cases, client assets in the two- to three-digit million Swiss franc range were at stake, and losses in some instances affected retirement savings. FINMA identified recurring risk patterns, including the use of complex, high-risk or illiquid products, such as foreign funds without equivalent supervision, actively managed certificates (AMCs), and securities issued by foreign, unregulated issuance or structuring vehicles, in portfolios of private clients, without adequate suitability assessments, risk disclosure or management of conflicts of interest.

2) Legal Framework: Conduct Obligations Under FinSA

The conduct obligations applicable to financial service providers when rendering financial services are set out in the FinSA and the Financial Services Ordinance (FinSO), and – with respect to supervised institutions – further specified by the FINMA Circular 2025/2 on conduct obligations under FinSA/FinSO. In the context of individual portfolio management, two sets of conduct obligations are of particular relevance: Suitability assessment and the management of conflicts of interest.

a) Suitability Assessment

When providing portfolio management services or ongoing advisory relationships, financial service providers must obtain information on the client's financial situation (including regular income, assets and current and future financial obligations), investment objectives (including time horizon, purpose, risk appetite and any investment restrictions) and knowledge and experience (article 12 FinSA). On the basis of this information, a risk profile must be established for each client, against which an investment strategy is to be defined (article 17 (3) FinSO). The financial instruments employed must be suitable in light of the client's risk profile and the agreed investment strategy.

b) Management of Conflicts of Interest

Financial service providers must, as a matter of principle, avoid conflicts of interest or ensure that any disadvantage to clients resulting from such conflicts is ruled out (article 25 (1) FinSA). Where conflicts of interest cannot be avoided, they must be disclosed to the client (article 26 (1) FinSO). As part of these conflicts of interest rules, portfolio managers must inform their clients whether the product selection covers only in-house or also third-party instruments (article 10 FinSO). Financial service providers must implement a selection process for the financial instruments used; such selection process must be based on industry-standard, objectified criteria (article 24–28 FinSO). The use of in-house products must not be incentivized through specific remuneration arrangements for the persons involved in providing the financial services (article 25 (e) FinSO).

In addition, the risk management of a portfolio manager must cover its entire business activity and be organized so as to identify, assess, manage and monitor all material risks (article 12 (4) of the Financial Institutions Ordinance (FinIO)). This includes the risks to which the assets under management and any products managed by the portfolio manager are or could be exposed, such as concentration, liquidity, valuation and conflict-of-interest risks.

3) FINMA's Observations from Recent Enforcement Actions

Based on the escalation cases analyzed in its Guidance 03/2026, FINMA identified several recurring patterns of deficiencies:

- **Inadequate suitability assessments**: FINMA found that portfolio managers invested in complex, high-risk or illiquid products without sufficiently examining whether the risk-increasing characteristics of these products corresponded to the financial needs and risk appetite of their clients; cases also included excessive investments in such type of products. Moreover, in some cases, clients were insufficiently informed about portfolio developments and performance. FINMA emphasizes that it expects that financial service providers pay particular attention to suitability considerations when using high-risk, complex or illiquid financial instruments in the portfolios of retail clients.
- **Deficient management of conflicts of interest**: In cases involving in-house products, arrangements to avoid conflicts of interest were found to be inadequate. Specific

deficiencies included non-transparent double fee structures, remuneration incentives favoring the use of proprietary products, a lack of diversification in clear contradiction to clients' risk profiles and the absence of product selection processes based on objectified and customary criteria.

- **Outsourcing of control functions**: FINMA observed that smaller institutions frequently outsourced risk management and compliance functions to external, non-licensed service providers. In the escalated cases, this outsourcing often resulted in standardized rather than individualized controls, leading to unclear responsibilities and control gaps. Additionally, product or business risks were often not sufficiently considered.
- **Shortcomings in due diligence and risk management**: Specifically with respect to risk management, FINMA expects financial service providers to carry out a risk-based due diligence on the relevant products. In this context, FINMA noted that in case of unsupervised products or products without equivalent supervision, warning signs such as the absence of audited financial information, outstanding audit opinions, changes in or termination of the audit firm, or the lack of other reliable information on the structure, valuation or liquidity could be indications of increased risk.

While FINMA's Guidance 03/2026 focused on portfolio managers, FINMA noted that it has observed similar patterns among managers of collective assets and other supervised financial institutions.

4) Two FINMA Enforcement Proceedings in Detail

Two recent and published enforcement proceedings illustrate how FINMA applies the FinSA conduct obligations in practice. Both cases involved a systematic prioritization of the portfolio managers' own financial interests over those of their clients and severe violations of the obligations regarding suitability assessments and conflicts of interest.

a) Wendelspiess Partners AG

On 3 June 2026, FINMA published a media release announcing the conclusion of enforcement proceedings against Wendelspiess Partners AG (in liquidation) and two individuals. The proceedings had been initiated in early 2025 following a report by the competent AO, which had identified indications that clients of Wendelspiess Partners were invested in a non-Swiss fund that the firm had itself established and managed since 2021 and that was experiencing significant liquidity problems.

The investigation revealed that the fund predominantly invested in an investment company domiciled in the Canton of Zug and in companies affiliated with it, and also extended loans to these entities. Wendelspiess Partners itself and several of its officers held interests in the fund. These personal interconnections gave rise to conflicts of interest about which clients were not or only insufficiently informed, constituting a severe violation of the obligations regarding conflicts of interest under FinSA.

Furthermore, FINMA concluded that the fund was insufficiently diversified, leading to a significant concentration of risk. The over 400 clients of Wendelspiess Partners, whose financial knowledge was mostly assessed as moderate to low and who largely regarded themselves as risk-averse, were not adequately informed about the risks of investing in the fund. The investigation further showed that the suitability assessment, *i.e.*, whether an investment in the fund was appropriate for the respective client, was entirely omitted. Notwithstanding this, virtually all client assets were unilaterally invested in the fund. The fund's assets under management amounted to over CHF 83 million at the end of 2024, and it now faces a total loss.

FINMA concluded that the interests of clients were systematically subordinated to the firm's own interests. It imposed multi-year industry bans on two responsible individuals and revoked the license of Wendelspiess Partners.

b) Swiss Fund Management AG and BZ Berater Zentrum AG

On 29 June 2026, FINMA announced the conclusion of enforcement proceedings against Swiss Fund Management AG (in liquidation) (SFM) and BZ Berater Zentrum AG (BZ), as well as an individual, for severe violations of the FinSA conduct rules. The proceedings had been initiated in 2024 following a supervisory on-site inspection at SFM, during which FINMA identified indications that the funds managed by SFM and the portfolio management clients of BZ held high proportions of illiquid bonds primarily intended to finance foreign real estate development projects.

The investigation revealed that the bond issuers were all interconnected. Investor funds amounting to approximately CHF 200 million were invested directly or indirectly through the funds in illiquid bonds of doubtful value. The bonds were issued by related, non-operationally active entities that immediately transferred the proceeds, contrary to advertising promises and without collateral, to real estate investment companies controlled by persons involved in the scheme. Parts of the bond proceeds were also used to acquire participations and finance the operations of further entities, including SFM and BZ themselves. Due to the close interconnections, the persons involved could dispose of the bond funds largely without restriction and, in part, arranged personal loans in the double-digit millions.

During the investigation period, BZ managed approximately 2,000 portfolio management mandates. FINMA concluded that SFM and BZ had, among other things, severely violated their obligations to avoid conflicts of interest and resulting disadvantages for clients. Investor assets were invested, driven by the firms' own financial interests, in an undiversified manner in proprietary products that did not match the investors' risk profiles and contradicted the stated investment purpose, constituting a severe violation of the suitability and appropriateness assessment requirements under FinSA.

FINMA revoked SFM's license as a fund management company and appointed the investigating agent as liquidator. BZ's application for a license as portfolio manager was denied, requiring BZ to cease its asset management business within 30 days. A multi-year industry ban was imposed on a responsible individual. In addition, FINMA ordered the disgorgement of unlawfully obtained placement commissions in the millions of Swiss francs, accrued since the entry into force of the FinSA conduct rules. Approximately 150 persons have since initiated mediation proceedings against BZ through the competent ombudsman's office.

5) Conclusion and Outlook

The two enforcement proceedings and the recently released Guidance 03/2026 confirm that FinSA conduct obligations have arrived in FINMA's enforcement practice. Less than three years after most portfolio managers obtained their FinIA licenses, the regulator has demonstrated its willingness to intervene decisively where the conduct rules are disregarded. The severity of the sanctions imposed (license revocations, multi-year industry bans and disgorgement of profits) underscores the consequences of non-compliance.

At the same time, the cases illustrate a broader challenge inherent in the FinSA conduct framework. The obligations regarding suitability assessments and conflicts of interest are formulated in relatively open-ended terms, relying on general principles rather than prescriptive rules. Through its enforcement proceedings, FINMA has begun to fill these principles with concrete substance, providing the market with initial guidance on where the boundaries lie. In particular, the cases make clear that the use of in-house products requires robust conflict-of-interest frameworks, that suitability assessments must not be a mere formality, and that the outsourcing of compliance and risk management functions does not diminish the institution's own responsibility. That said, Swiss law neither provides for *per se* prohibitions of distribution of complex products to retail clients or use of such products in portfolio management mandates nor do the Swiss rules mandate target market assessments or similar measures. Navigating the broad permissiveness of Swiss law as to the type of instruments used on the one hand and the conduct rules and risk management requirements on the other hand is a key challenge faced by portfolio managers.

However, the two published enforcement proceedings concern particularly severe instances of misconduct and are not representative of standard industry practice. While the conduct and risk management standards articulated in these proceedings are undoubtedly important, FINMA should also exercise restraint in extrapolating from such extreme cases when issuing regulatory guidance or circulars of general application. The well-established principle that "hard cases make bad law" equally applies in the regulatory context: disproportionately prescriptive requirements derived from outlier cases risk imposing undue burdens on the broader industry without a commensurate supervisory benefit.

Given the continued steep increase in escalation cases, from 9 in 2023 to 34 in 2024 and 68 in 2025, further enforcement proceedings can be expected. Portfolio managers, particularly smaller firms that rely on outsourced compliance functions, are well-advised to critically review their processes in light of recent enforcement action and the standards articulated by FINMA.

Patrick Schärli (patrick.schaerli@lenzstaehelin.com)
Laura Wälchli (laura.waelchli@lenzstaehelin.com)

KAPITALMARKTRECHT IM FOKUS 2026 – CONFERENCE REPORT 19 AUGUST 2026, SIX CONVENTIONPOINT, ZURICH

Reference: CapLaw-2026-57

On 19 August 2026, practitioners, academics and market participants convened at SIX ConventionPoint in Zurich for Kapitalmarktrecht im Fokus 2026. Under the Title "Clarity or Room for Interpretation? Challenges in Interpreting Bond Terms and Conditions" (*Klarheit oder Auslegungsspielraum? Herausforderungen bei der Interpretation von Anleihensbedingungen*), the conference examined how standardized bond terms should be interpreted, the interaction between contractual provisions and regulatory requirements and the significance of prospectuses, risk factors and changing market practice. Particular attention was paid to regulatory capital instruments and the Point of Non-Viability (PONV), against the background of the write-down of Credit Suisse AT1 instruments and the related decision of the Swiss Federal Administrative Court. The conference combined doctrinal analysis, a comparison with the European resolution framework and practical perspectives from issuers, banks, counsels and other advisers.

By Sandro Fehlmann / Benjamin Leisinger / Nina Reiser

1) Introduction

Sandro Fehlmann (Advestra) welcomed the participants and introduced the central question of the conference: should bond terms be treated as ordinary bilateral contractual arrangements, in which the parties' actual or tacit intentions take precedence, or as standardized capital-markets instruments that must have the same meaning for every investor?

This question has considerable practical importance. Bonds are commonly publicly offered and listed on exchanges and then held and traded by an anonymous and changing group of investors. The original subscribers may sell their instruments in the secondary market, and subsequent investors will generally have had no access to negotiations or discussions between the issuer, the lead managers or any relevant supervisory authority, where applicable. At the same time, certain bonds – in particular regulatory capital instruments – are designed to perform a specific supervisory function and must be interpreted against a complex statutory and regulatory background.

The discussion was framed by the recent litigation concerning the write-down of Credit Suisse AT1 instruments in connection with the takeover by UBS. While the Swiss Federal Administrative Court appears to give priority to the subjective interpretation, legal scholarship and practice clearly favor the objective interpretation of bond terms – not least for reasons of market certainty and tradability. The protection of individual investors should be achieved not so much through subjective interpretation as through efficient price formation. The Swiss Federal Administrative Court's approach raised broader questions about the interpretation of standardized bond documentation, including the relevance of the parties' subjective intentions, the status of the prospectus and its risk factors and the relationship between private-law contractual rights and FINMA's public-law powers.

2) Dogmatic Foundations for Interpreting Bond Terms and Conditions

Nina Reiser (University of St. Gallen) began by examining the legal characteristics of bonds and their terms and conditions. A bond is generally understood as a large loan divided into individual amounts and issued subject to uniform conditions. Although each bondholder has a separate legal relationship with the issuer, the relevant rights and obligations are based on the same standardized terms and conditions.

Several features distinguish bond terms from individually negotiated contracts. They are designed for a large and changing group of investors, support fungibility and secondary-market trading, ordinarily have a long duration and can be difficult to amend. For certain amendments, substantial bondholder majorities may be required. These features make bond terms comparable, in some respects, to general terms and conditions (AGB) rather than to a conventional bilateral agreement.

The presentation indeed also considered whether bond terms should be treated in the same manner as general terms and conditions (AGB). However, while bond documentation is possibly pre-formulated (i.e. based on a previous transaction or precedent and/or aligned with market standards) and used for multiple contractual relationships, the traditional justification for a special review of general terms and conditions (AGB) is less persuasive in the capital-markets context. Institutional investors and lead managers frequently influence the structure, pricing and content of an instrument. In addition, the market can respond to unattractive or unusual terms through pricing or by declining to participate in an issuance. Accordingly, doctrines developed for general terms and conditions (AGB), including the unusualness rule, should not be applied to bond terms. The ambiguity rule may have a limited role, but only after the ordinary interpretative methodology has failed to produce a sufficiently clear result.

The central proposition of the presentation was that bond terms should generally be interpreted objectively and consistently for all investors. Fungibility and legal certainty require identical provisions to have the same meaning irrespective of the identity or individual understanding of a particular holder. This is especially important for regulatory capital instruments: their regulatory classification and loss-absorption function cannot reasonably depend on the subjective understanding of individual investors.

The appropriate benchmark is therefore not an unidentified original investor, but a professional market participant with the expertise reasonably required to understand the instrument, its economic characteristics and its regulatory setting. This capital-markets-oriented standard would take account of the expectations of a knowledgeable investor purchasing and trading the instrument in the relevant market.

The wording of the terms and conditions remains the starting point, but should not be the exclusive consideration. The systematic context, purpose and function of the relevant provision, the structure of the instrument and its regulatory environment may also be relevant. In the case of AT1 instruments, for example, their qualification as regulatory capital and their intended loss-absorption function form part of the context in which the contractual provisions must be understood.

At the same time, purposive interpretation has limits. Courts should not use interpretation or supplementation to introduce new obligations that have no sufficient basis in the instrument. The objective is to determine the meaning of the existing bargain, not to rewrite the product retrospectively.

The LIBOR-to-SARON transition provided a practical example. A purely literal application of legacy benchmark provisions could have produced commercially irrational outcomes, including the unintended conversion of floating-rate instruments into fixed-rate instruments. A coordinated and market-oriented approach instead sought to preserve the economic function reasonably contemplated when the instruments were issued.

3) Determining PONV for Regulatory Capital Instruments in the EU

Holger Hartenfels (Freshfields) then discussed the criteria for determining the Point of Non-Viability for regulatory capital instruments under the European framework.

AT1 instruments are intended to absorb losses while a bank remains a going concern. They are perpetual, subordinated instruments that are senior only to common equity tier 1 capital (CET1) within the relevant loss-absorption hierarchy. Coupon payments may generally be cancelled at the issuer's discretion without this constituting an event of default, and redemption is subject to regulatory conditions and approval.

The discussion highlighted a possible divergence between the market perception and the regulatory function of AT1 instruments. Investors may focus primarily on their debt characteristics and comparatively attractive coupons. From a regulatory perspective, however, the instruments are expressly designed to absorb losses before ordinary insolvency and, where necessary, in connection with supervisory or resolution measures.

In the European framework, a distinction must be drawn between a contractual capital trigger and PONV. A contractual trigger is ordinarily linked to a specified CET1 ratio and is therefore relatively objective and capable of mathematical determination. PONV, however, forms part of a broader recovery and resolution framework and may require a more complex assessment of the institution's viability and available alternatives.

Under the European resolution framework, intervention generally requires a determination that the institution is "failing or likely to fail", that there is no reasonable prospect that alternative private-sector or supervisory measures would prevent the failure within a reasonable period and that resolution action is necessary in the public interest.

An institution may be failing or likely to fail for reasons extending beyond conventional insolvency. Relevant factors can include an inability to meet capital or authorization requirements, serious governance or risk-management failures and repeated regulatory breaches. A breach of a capital buffer does not automatically establish PONV, but it can result in distribution restrictions, supervisory intervention and, in more serious cases, contribute to a finding that the institution is failing or likely to fail.

The European framework coordinates regulatory capital requirements with the statutory recovery and resolution regime. Resolution authorities have a range of possible tools, including bail-in, a transfer of assets or liabilities, a sale of the institution or the use of a bridge institution. The choice of tool depends on the institution's circumstances, the protection of critical functions and the public-interest assessment.

The bail-in hierarchy generally follows the relevant insolvency ranking. The "no creditor worse off" principle provides an important safeguard: creditors should not suffer greater losses in resolution than they would have incurred in the applicable insolvency counterfactual. Where that safeguard is infringed, the affected creditor may have a compensation claim under the relevant resolution framework.

The write-down of Credit Suisse AT1 instruments attracted particular attention because shareholders received UBS shares while the AT1 instruments were written down in full. European authorities responded by emphasizing that, within the European framework, common equity would generally absorb losses before AT1 instruments. The discussion nevertheless cautioned that the legal and economic application of the creditor hierarchy is more nuanced than a simple chronological rule and depends on the particular resolution strategy and insolvency situation.

The session also addressed whether a comparable crisis could have been handled differently under the European regime. A range of tools could in principle have been considered, including a bridge bank, a transfer to another institution or a combination of transfer and bail-in. Whether any such strategy would be feasible would depend on factors such as the continuity of critical functions, licensing requirements and access to financial-market infrastructure.

The European experience showed that the contractual features of AT1 instruments cannot be analyzed in isolation. The principal loss-absorption risk may arise from statutory resolution powers rather than from the contractual capital trigger. Investors and advisers must therefore understand both the instrument and the broader statutory regime in which it operates.

4) Changing Market Practice: Who Says It Cannot Be Done?

Manuel Gadient (UBS) provided a market perspective, examining how established practices in international Swiss bond issuances evolve and how structures once considered impracticable can become accepted.

Market practice is established to allow for standardization and to support efficiency. A proven practice reduces execution risk for issuers, lead managers, trading desks and investors. Market practice represents the commercially optimal route within the boundaries of what's legally permissible.

Change generally begins when a market participant challenges an established assumption and is willing to assume the execution risk of a new approach. If the transaction succeeds, it provides a precedent and reduces the perceived risk for subsequent issuers and intermediaries.

The presentation discussed three developments in particular.

First, EUR-denominated bonds subject to Swiss withholding tax had long been regarded as commercially unattractive or impracticable. UBS challenged this assumption in connection with its covered bond programme. The successful placement demonstrated that Swiss withholding tax did not necessarily prevent international distribution or materially impair pricing. Other Swiss issuers subsequently followed suite.

The experience also demonstrated the importance of clear investor communication. Where a structure differs materially from the customary market model, the relevant feature needs to be highlighted clearly when addressing investors.

Second, English law has traditionally been the standard governing law for EUR-denominated bonds. Swiss law has, however, become increasingly accepted for international issuances, first among Swiss financial institutions and subsequently among corporate issuers. This development indicates that the choice of English law is not a set requirement of the market, provided investors and intermediaries are comfortable with the chosen legal framework.

Third, the use of SIX Swiss Exchange in connection with EUR-denominated bond transactions has increased. This development reflects growing acceptance of alternative, unregulated listing and trading venues (including MTFs) and may offer practical advantages to Swiss issuers.

The broader lesson was that "market practice" is not necessarily synonymous with a legal requirement. It may instead reflect a historically successful solution that market participants continue to use because the perceived risks of change outweigh the anticipated benefits. Legal advisers and banks can help to develop practice by identifying which assumptions are truly required and which can be reconsidered.

Successful innovation nevertheless requires engagement throughout the value chain. Issuers, lead managers, trading desks, sales teams and investors must understand the proposed structure and its consequences. A legal analysis alone will not establish a new market practice; the structure must also be executable, marketable and clearly explained.

5) Panel Discussion: Interpretation, Prospectus Disclosure and Regulatory Discretion

The panel discussion was moderated by Benjamin Leisinger (Homburger) and brought together Marc Bussmann (Julius Baer), Vanessa Isler (Zurich Insurance), Markus Pfenninger (Walder Wyss) and Sten Rasmussen (Zürcher Kantonalbank).

The panel broadly supported an objective interpretation of bond terms. Uniform interpretation is essential for fungibility and secondary-market trading. A subjective approach based on discussions between the original issuer, lead manager and regulator would be difficult to apply to investors acquiring the instrument later, who were neither involved in nor aware of those discussions.

Bond terms were described as "pre-negotiated" rather than simply imposed. Standard provisions frequently reflect a lengthy process involving issuers, banks, legal advisers, investors and, for regulatory capital instruments, supervisory authorities. This market process further clearly distinguishes bond terms from conventional consumer-facing general terms and conditions (AGBs).

The panel also discussed the role of FINMA. FINMA does not negotiate bond terms as a representative of investors. FINMA's statutory mandate is to protect financial market customers and policyholders as well as to ensure the proper functioning of the financial markets in Switzerland. Hence, its function is to assess compliance with statutory and supervisory requirements and, where applicable, whether the instrument qualifies for regulatory capital treatment. An interpretation based on a supposed common subjective intention of the issuer, lead manager and FINMA would therefore be problematic, particularly for subsequent investors.

A distinction must also be drawn between private-law and public-law discretion. A calculation agent or independent expert may be authorized under the terms to determine a benchmark replacement, make calculations or apply an established market convention. Such authority derives from the contractual mandate. FINMA's powers, by contrast, derive from public law and remain subject to the legal requirements governing the proper exercise of administrative discretion.

a) The Role of the Prospectus and Risk Factors

A significant portion of the panel was devoted to the relationship between the bond terms and the prospectus. The bond terms define the issuer's and bondholders' substantive rights and obligations. The prospectus primarily performs a disclosure function and forms the basis for potential prospectus liability. It should not be used to create additional contractual obligations or contradict the operative terms.

Nevertheless, the prospectus and its risk factors may provide relevant interpretative context. They can explain the instrument's commercial and regulatory purpose, the economic consequences of particular provisions, the meaning attributed to technical concepts and the risks that professional investors were expressly instructed to consider.

The panel was critical of an approach that disregards the prospectus altogether when interpreting complex regulatory capital instruments. A prospectus is not merely ancillary marketing material; it reflects a statutory pre-contractual disclosure obligation and forms part of the information made available to investors.

This is particularly relevant for secondary-market investors. In practice, issuers may continue to make the bond terms available on their websites while removing the full historic prospectus after a certain period. The panel noted that continued access to the original prospectus – or at least the risk factors — may nevertheless be important for understanding the instrument's disclosure and regulatory context.

Risk factors have particular importance for AT1 and bail-in instruments. They may explain coupon cancellation, subordination, contractual write-down or conversion, statutory intervention powers and the relationship between capital requirements, contractual triggers and resolution measures. However, risk factors should not substitute for clear operative drafting. A fundamental product feature or statutory consequence should not be obscured by describing it merely as an investment risk.

The panel also rejected a rigid numerical limit on risk factors. The risks associated with an issuer and instrument vary and cannot meaningfully be reduced to an arbitrary maximum. A fixed limit could result in the exclusion of a material risk or increase litigation concerning the ranking of risks. The preferable approach is a disciplined, issuer-specific review that removes outdated or boilerplate disclosure and focuses on risks that are material to the investment decision.

b) Objective and Functional Interpretation in Practice

The panel considered several examples in which a literal reading could fail to reflect the commercial purpose of the instrument.

The LIBOR-to-SARON transition again demonstrated the importance of interpreting legacy provisions in a way that preserved the intended floating-rate function. Similar issues can arise with zero-floor provisions and negative interest rates, particularly where a bond, loan and related hedge do not operate as a fully integrated contractual package.

A further example concerned a merger in the insurance sector and an event-of-default provision referring to mergers, reorganizations or similar transactions. Although the wording required careful analysis, the transaction was structured as an absorption merger and did not materially impair the bondholders' position. The continued trading price of the bond was considered as possible supporting evidence that the market did not view the transaction as an adverse event, although the panel acknowledged the risk of relying on subsequent market movements with the benefit of hindsight.

c) Delegation and Flexibility

The panel generally accepted that certain technical questions can appropriately be delegated to a calculation agent or independent expert. Examples include benchmark replacement, compounding, rounding and adjustments to payment dates. The delegate should have appropriate expertise and apply a recognized market standard.

Some degree of flexibility is unavoidable for perpetual or long-dated instruments. Regulation, supervisory expectations and market conventions may change in ways that cannot be fully anticipated at issuance. Drafting that attempts to prescribe every possible future outcome may itself create uncertainty or become unworkable.

The challenge is to preserve necessary flexibility without conferring unstructured discretion. The documentation should distinguish technical determinations from legal or regulatory decisions and should specify the relevant decision-maker's mandate, standard and process.

d) Contractual and Statutory PONV Mechanisms

The panel returned to the distinction between contractual triggers and statutory resolution powers. For bail-in instruments, the substantive loss-absorption mechanism may be established primarily by statute, with the terms containing an acknowledgement that the instrument is subject to the relevant regime.

Statutory regulation may reduce disputes over the subjective intention behind a PONV clause, but it cannot eliminate every uncertainty. Questions will remain concerning supervisory discretion, proportionality, the selection of the appropriate crisis-management tool and the interaction between the statutory regime, contractual documentation and investor disclosure.

The panel also considered whether elements of the Swiss insurance framework, under which FINMA determines the relevant trigger and bondholders acknowledge the regulatory mechanism, might provide a model for banking instruments. No definitive conclusion was reached.

6) Key Take-Aways

The key take-aways from the panel discussion could be summarized as follows:

– Bond terms should generally be interpreted objectively and consistently for all holders, taking account of their standardized nature, fungibility and secondary-market function. The protection of individual investors should be achieved not so much through subjective interpretation as through efficient price formation in the secondary-market.

– For complex capital-markets instruments, the appropriate interpretative benchmark is a knowledgeable professional investor familiar with the relevant product and regulatory environment.

– Wording remains the starting point, but the systematic context, commercial purpose and regulatory function of the instrument may also be relevant.

– Doctrines developed for general terms and conditions (AGB) should not be applied mechanically to bond terms that reflect professional market input.

– The prospectus and risk factors should not override the bond terms or create new contractual obligations, but may provide important interpretative context.

– Contractual capital triggers must be distinguished clearly from statutory PONV and resolution mechanisms. Documentation should explain their respective conditions, consequences and decision-makers.

- Risk factors should be material, issuer-specific and consistent with the operative terms. They should not be used as a substitute for clear product descriptions or contractual drafting.
- Technical decisions may appropriately be delegated to calculation agents or independent experts, but their mandate, expertise and applicable standard should be clearly defined.
- Perpetual and long-dated instruments require sufficient flexibility to accommodate changes in regulation and market practice, while unstructured discretion should be avoided.
- The LIBOR-to-SARON transition demonstrates that coordinated, market-oriented solutions can preserve the commercial function of existing instruments despite unforeseen developments.

Sandro Fehlmann concluded the conference before participants continued the discussion during the lunch.

The views and opinions expressed during the presentations and panel discussion were those of the respective speakers and do not necessarily reflect the views or positions of any entities they represent.

Sandro Fehlmann (sandro.fehlmann@advestra.ch)
Benjamin Leisinger (benjamin.leisinger@homburger.ch)
Nina Reiser (nina.reiser@unisg.ch)

EHRA CLARIFIES REGISTRATION PRACTICE FOR CONDITIONAL CAPITAL WITHIN AND OUTSIDE THE CAPITAL BAND

Reference: CapLaw-2026-58

In a practice note dated 27 August 2026, the Federal Commercial Register Office (EHRA) clarified the registration practice applicable where a company's articles of association provide for conditional capital both within a capital band and outside the capital band. This article sets out the resulting registration practice.

By Samuel Hochstrasser

1) Background

Since the entry into force of the corporate law revision on 1 January 2023, conditional capital is also possible within the framework of a capital band ("conditional capital within the capital band", article 653t(1) no. 9 Swiss Code of Obligations (CO)). It remains possible to include conditional capital outside the capital band ("conditional capital outside the capital band", article 653 et seq. CO). Under article 653a(1) CO, the nominal amount by which the share capital may be conditionally increased may not exceed half of the share capital registered in the commercial register. In this context, the question arises whether a cumulation in the articles of association of the possibility of conditional capital within the capital band up to the maximum size of the capital band and of conditional capital outside the capital band up to the maximum amount under article 653a paragraph 1 CO is permissible, or whether this would impermissibly exceed the maximum amount of conditional capital under article 653a paragraph 1 CO.

Because the commercial register authorities' power of review over questions of substantive law is limited, EHRA concludes that the cumulation of conditional capital within and outside the capital band does not clearly and unambiguously contravene applicable law and rests on an interpretation of the law. The commercial register authorities' power of review must therefore be considered limited in this respect, leaving the question of permissibility to the civil courts. The practice note sets out the latest registration practice.

2) Registration Practice of the Commercial Register Authorities

a) Conditional Capital Within the Capital Band

Even where the articles of association already provide for conditional capital outside the capital band, at the maximum amount under article 653a(1) CO or otherwise, EHRA will register conditional capital within the capital band.

b) Conditional Capital Outside the Capital Band

A company whose articles of association already provide for a capital band containing conditional capital cannot - due to the limited power of review of the commercial register authorities - be prevented from additionally registering conditional capital outside the capital band, if applicable up to the maximum amount under article 653a(1) CO. Due to their limited power of review, the commercial register authorities do not have to examine whether conditional capital within the capital band would reduce the permissible maximum amount of conditional capital outside the capital band (regardless of whether option or conversion rights have already been issued or not).

c) Lapse of the Capital Band with Conditional Capital

Where a capital band containing conditional capital lapses, for example upon an ordinary capital increase, while option or conversion rights remain outstanding under the conditional capital within the capital band, that conditional capital must survive as conditional capital outside the capital band to protect the rights of the holders of option and conversion rights, notwithstanding the absence of an explicit statutory basis for such survival. The disclosures in the articles of association pursuant to article 653t(1) no. 9 CO may not be deleted for transparency reasons; if it had been integrated into the authorization clause, a new provision on the conditional capital must be added to the articles of association upon deletion of that clause.

Following such conversion, the company may hold, side by side, a pre-existing conditional capital at the maximum amount under article 653a CO and a (new) conditional capital originally created via the capital band, up to the former upper limit of the band under article 653s(2) CO. Because that new conditional capital remains identified in the register as having been created via the capital band, EHRA will not object to its registration for breach of article 653a CO; conversely, on a later registration of conditional capital outside the capital band, a conditional capital created via the capital band need not be counted towards the article 653a CO maximum. Cancelling or amending the provision on conditional capital created via a capital band requires, as for ordinary conditional capital, confirmation by a licensed auditor (article 653u(5) CO in conjunction with article 653i(2) CO).

Deletion of the capital band with conditional capital, without any survival of conditional capital created via the band, will likewise be registered upon submission of a report by a licensed auditor confirming that the conversion or option rights have lapsed, that none were ever granted, or that all holders have waived their exercise (article 653u(5) CO in conjunction with article 653i(2) CO).

3) Practical Significance and Judicial Review

The EHRA practice note provides registration certainty, but not substantive-law certainty. It establishes that commercial register authorities will not refuse registration merely because a company's articles of association provide for conditional capital both within and outside a capital band, even where the aggregate theoretical conditional increase capacity exceeds one-half of the registered share capital.

The practice note does not, however, resolve whether such structures ultimately comply with article 653a(1) CO as a matter of substantive corporate law. In the event of a dispute, that question remains subject to review by the civil courts.

For companies, and in particular listed companies using convertible bonds, employee participation plans or other equity-linked instruments, the practice note is nevertheless of practical importance. It provides a clear registration path for maintaining flexibility in the use of conditional capital within and outside a capital band and for preserving outstanding option and conversion rights when a capital band lapses, while expressly leaving the underlying substantive-law question open.

Samuel Hochstrasser (samuel.hochstrasser@nkf.ch)

SWISS ADVISERS SUBJECT TO THE SWISS ANTI-MONEY LAUNDERING ACT: SCOPE AND DUTIES

Reference: CapLaw-2026-59

Effective 1 October 2026, the revised Swiss Anti-Money Laundering Act will extend Switzerland's anti-money laundering framework to advisers participating professionally in covered transactions. Lawyers, notaries, fiduciaries, accountants, tax advisers, M&A advisers and other professionals may become subject to due-diligence, organizational and certain reporting requirements under the AML framework even if they do not execute financial transactions themselves. This article summarizes the new regime, its principal exemptions and its consequences for professional advisers.

By Alexander Wherlock / Benjamin Leisinger

1) A New Regulatory Perimeter

The revision of the Anti-Money Laundering Act (AMLA) represents a fundamental change in Switzerland's approach to combating money laundering and terrorist financing. For the first time, professionals who do not necessarily carry out financial transactions, but who only advise on and, therefore, provide a causal contribution in relation to certain covered legal transactions, will be subject to the revised AMLA and the regulatory duties set out thereunder.

Together with the revised AMLA, the revised Anti-Money Laundering Ordinance (AMLO), setting out the pertaining implementing provisions, will enter into force on 1 October 2026.

The reform reflects the international standards of the Financial Action Task Force (FATF), which require the regulation of certain designated non-financial businesses and professions. Previous evaluations of Switzerland by the FATF repeatedly identified shortcomings of the Swiss AML-framework in this area. The new provisions are therefore intended to prevent professional advisers from being used to establish opaque legal structures, conceal beneficial ownership or facilitate unlawful financial transactions.

The legislation takes an activity-based rather than profession-based approach. Under article 2(3bis) of the revised AMLA, an adviser is a natural person or legal entity that on a professional basis assists third parties with financial transactions in connection with covered legal transactions. Accordingly, the determining factor is not the adviser's professional title but the nature of the services performed. The new AML-regime may apply to lawyers, notaries, auditors, accountants, fiduciaries, tax advisers, M&A advisers, management consultants and certain family offices.

The statutory list sets forth five principal categories of covered legal transactions. First, it includes the purchase and sale of real estate. Second, it covers the formation or establishment of non-operating legal entities (*nicht operative Rechtseinheiten / entité juridique non opérationnelle*) domiciled in Switzerland and, irrespective of their operating or non-operating nature, legal entities (*Rechtseinheiten*) domiciled abroad. Third, it applies to the management and administration of non-operating legal entities. This may include bookkeeping, control and certain accounting activities (to the extent such advisory services do not qualify as regulated audit services supervised by the Federal Audit Oversight Authority). Pure corporate-governance or general boardroom advice should generally remain outside the scope of the revised AMLA if it is not related to a financial transaction. The mere exercising of a mandate as a member of a corporate body, e.g. as a managing partner, protector of a trust or a member of the board of directors, does not constitute "advisory activity" in legal or accounting matters within the meaning of article 2(3bis) revised AMLA and is therefore not subject to the revised AMLA, even if the member of the board of directors or the managing partner is a lawyer or an accountant. It should, however, be noted that in FINMA's practice (cf. FINMA-Circular 11/1 "Activities as a Financial Intermediary under the Anti-Money Laundering Act", N 100 et seq.) the activities of the corporate bodies of shell companies (*Sitzgesellschaften*) are considered financial intermediary activities subject to AMLA, provided they are carried out in a fiduciary capacity – that is, on the instructions of the beneficial owner. Fourth, the regime covers contributions (*Einlagen*) to and distributions by non-operating legal entities. This includes advice relating to capitalization (equity) and the distribution of profits or other assets. By contrast, the temporary raising of funds through repayable debt, such as loans or bonds, should generally not fall within this category of covered transactions – as such transactions do not qualify as contributions (*Einlagen*). Fifth, the revised AMLA applies to the purchase or sale of legal entities by a non-operating legal entity. This will in certain (but not all) constellations capture the planning and implementation of M&A transactions in which a (new) non-operating acquisition vehicle acts as purchaser, regardless of whether the target itself conducts an operating business.

The concept of a "non-operating legal entity" (article 2a(6) revised AMLA) is deliberately broader than the traditional concept of a domiciliary or shell company (*Sitzgesellschaft*). It may include special-purpose vehicles and mere passive holding companies whose only activity consists of holding investments (*passive Holdinggesellschaften, deren einzige Tätigkeit das Halten von Beteiligungen ist*, cf. Federal Department of Finance (FDF), Explanatory Report of 12 June 2026). Non-operating legal entities are legal persons, companies, institutions, foundations, trusts, fiduciary entities, and similar entities that are neither (i) established or maintained for operational purposes nor (ii) established or maintained for supporting the operating activities of a company or a group. Whenever a company, including an intermediate-holding company, supports the operating activities of a company or a group in some verifiable form or manner, it should not be deemed non-operational. Pursuant to industry guidance published by EXPERTsuisse (*Neue Praxishilfe zu den GwG-Sorgfaltspflichten für Beraterinnen und Berater*, September 2026), holding companies that hold a participation in at least one operating company and whose main purpose is not the management of third party funds, should not be deemed to qualify as a "non-operating legal entity" within the meaning of the revised AMLA. Following this argument, certain acquisition vehicles in the context of private equity structures may, therefore, not fall into the scope of the revised AMLA. This is specifically true if such acquisition vehicles – after closing (the definition of a "non-operating legal entity" allows for a certain forward-looking element due to the inclusion of "established […] for supporting") – perform a role in advising the management of the acquired company in order to increase such company's value or otherwise support the operational activities of the target. However, due to the broad concept introduced under the revised AMLA, distinguishing an operating from a non-operating entity is likely to raise practical questions.

Article 2(3ter) revised AMLA also covers persons as advisers who on a professional basis provide addresses or premises as the domicile or registered office of a legal entity for more than six months.

The determining factor resulting in the application of the revised AMLA is the adviser's "participation" (*mitwirken*) in a covered transaction. Under article 12d of the revised AMLO, advice constitutes participation if it causally contributes to a covered legal transaction. The term is broad and may encompass transaction structuring, contract drafting, negotiations, tax planning and corporate-law advice. Ultimately, the transaction does not have to be completed for the advisory services to be in scope of the revised AMLA. Participation in the planning or preparation of the transaction is sufficient according to the FDF's Explanatory Report of 12 June 2026. In this context it should be noted that the sell-side advisers of an M&A transaction may not become subject to the AMLA, even where the acquisitions is conducted by a non-operating entity, to the extent that the sell-side advisers did not participate in the structuring of the buy-side acquisition structure.

Nevertheless, an adviser must exercise some formative influence over a concrete covered transaction. A mere peripheral involvement or general legal advice without a recognizable connection to a specific covered transaction is not sufficient. The decisive point should be whether the nexus to a concrete covered transaction was recognizable when the advice was provided. Firms should document when such a nexus first became apparent. Difficult questions may arise during pitches, preliminary discussions and fee estimates that already contain structuring proposals. In the authors' view, this cannot be a relevant causal contribution because prior to being mandated it is not rendered as advice.

Several activities are expressly excluded from the revised AMLA. Because the advice must be provided to a third party, in-house advice to an employer and intra-group advice are not covered (article 2(3)(a) revised AMLO). Properly integrated auxiliary persons acting under the responsibility and control of an adviser are likewise not independently subject to the regime (article 2(3)(b) revised AMLO). Multi-family offices may be covered, whereas there are numerous arguments for treating a single-family office and any advice in relation to structures controlled by it comparably to an intra-group structure which is exempt from the AMLA.

Further exclusions apply to specified low-risk transactions. These include certain transfers under family, matrimonial, inheritance or gift law; transfers of real estate or legal entities valued below CHF 5 million where all payments pass through Swiss financial intermediaries subject to AMLA; purchases of owner-occupied residential property; and certain agricultural or land-consolidation transactions. Activities as a corporate body of an operating entity and certain activities for Swiss charitable foundations or operating associations are also excluded. Pure notarization without additional advisory services is not subject to AMLA, but related advice on structuring, taxation or corporate law may remove the benefit of that exclusion. For attorneys and notaries

(*Anwältinnen und Anwälte sowie Notarinnen und Notare*), litigation and legal representation in judicial, criminal, administrative and arbitration proceedings are fully excluded, including advice regarding the preparation and conduct of such proceedings, the clarification of the facts, the assessment of litigation risks, the prevention of such proceedings, and the enforcement of the outcomes of the proceedings.

An adviser must act on a professional basis (*berufsmässig*) to become subject to the legislation. Under article 12f(1) revised AMLO, this generally means an independent economic activity intended to generate continuing income. Professional activity is conclusively established if any one of the following thresholds are exceeded: gross revenue of more than CHF 50,000 from covered activities during a calendar year; advice to more than 20 clients or participation in more than 20 legal transactions during a calendar year; when exercising the due diligence required under the circumstances, the adviser must assume that their advice concerns third-party assets that exceed CHF 5 million at any given time; or where the adviser must assume, when exercising the due diligence required under the circumstances, that their advice relates to financial transactions whose total volume exceeds CHF 2 million per calendar year. The thresholds are alternatives. Moreover, remaining below all four thresholds does not exclude professional activity if the general definition is otherwise satisfied.

2) Due Diligence, Organization and Reporting

Under article 8b revised AMLA, advisers must identify their clients and establish and verify the identity of the beneficial owner. They must also determine the subject and purpose of the transaction or service requested by the customer, and the background and purpose of a transaction or service if this is justified in light of the high risks posed by the transaction, the service, or the customer, and document their inquiries so that they can be understood by a knowledgeable third party.

Where a client, transaction or service presents increased risks, enhanced inquiries specified by the applicable self-regulatory organization (SRO) are required. Relevant risk indicators may include complex structures without an apparent economic purpose, connections to high-risk jurisdictions, politically exposed persons, unusually large transaction volumes, mandates accepted without personal contact and implausible information concerning business activities or the source of wealth.

Depending on the circumstances, enhanced due diligence may involve obtaining further information from the client or beneficial owner, consulting reliable public sources and databases, and requesting information from third parties. The adviser must evaluate the plausibility of the information obtained and document the results. The precise procedures, including simplified and enhanced procedures based on the pertaining risk categorization, will be specified in the regulations of the relevant SRO.

These obligations must be performed when the adviser begins the covered activity (see above at 1) on the open question of pitches, preliminary discussions and fee estimates). In the authors' view the obligations arise at the latest when the nexus with a concrete covered transaction and the adviser's role therein becomes recognizable. There is no transition period for substantive compliance. Advisers carrying out relevant activities must comply from 1 October 2026, including in relation to existing mandates that continue beyond that date.

Article 8d revised AMLA also requires appropriate organizational measures to prevent money laundering, terrorist financing and violations or coercive measures under the Embargo Act. The organization must be proportionate to the nature, size and risk profile of the adviser's practice.

In practical terms, firms should establish written policies governing mandate opening, risk classification, ongoing monitoring, suspicious circumstances and internal escalation. The mandate-opening process should determine whether the proposed services are covered, identify the client and beneficial owner, assess risk and record the results. The implemented on-boarding documentation should include identification records, beneficial-ownership information, risk assessments, enhanced inquiries and decisions to continue or terminate a mandate.

Personnel involved in covered advisory services must receive adequate and recurring training. Organizations should designate a person or function responsible for AMLA compliance and establish appropriate internal controls, with the degree of formalization depending on the size, organization and risk profile of the adviser's practice. Although particular tasks may be delegated, responsibility for proper compliance remains with the adviser.

Article 9(1ter) revised AMLA generally requires an adviser to report to the Money Laundering Reporting Office Switzerland without delay if the adviser knows or has a well-founded suspicion that relevant assets are connected with money laundering, originate from a felony or qualified tax offense, are controlled by a criminal or terrorist organization or are intended to finance terrorism. The obligation also applies if an adviser terminates negotiations because of such a suspicion. An adviser therefore cannot necessarily avoid reporting merely by withdrawing before accepting the mandate. The adviser may not disclose the report to the affected person or third parties and must provide information requested by the reporting office, subject to the applicable professional-secrecy protections.

The position of attorneys and notaries is notably different. Under article 9(2) revised AMLA, an attorney or notary is required to submit a suspicious activity report only if two cumulative conditions are satisfied: the professional executes a financial transaction in the name or for the account of the client, and the relevant information is not protected by professional secrecy under article 321 of the Swiss Criminal Code. Consequently, attorneys and notaries providing purely advisory services will generally not be required to submit a suspicious activity report. Even where they execute a transaction, professional secrecy may preclude reporting. The same limitation applies to requests from the reporting office for protected information. Compliance controls involving attorneys and notaries must also be conducted by professional peers and structured to protect privileged client information.

An adviser who files a suspicious activity report may terminate the business relationship at any time under article 9b(2bis) revised AMLA. Unlike a financial intermediary, an adviser is not required to observe the statutory waiting period following a report before terminating the business relationship. The prohibition on informing the client about the report nevertheless continues to apply.

3) SRO Membership and Consequences of Non-Compliance

Advisers subject to the new regime must join an SRO under article 14(1) revised AMLA. Membership requires appropriate internal regulations and organization, a good reputation and assurance of compliance from the adviser, its management and its qualified participants. SROs may specialize in particular professions or activities and may establish additional admission requirements.

Advisers already conducting covered activities on 1 October 2026 must apply for SRO membership by 1 December 2026; whereas no new business relationships may be entered into prior to the admission to the SRO. This two-month period applies only to the membership application. The due-diligence, organizational and reporting requirements apply immediately from 1 October 2026.

The SRO will conduct ongoing risk-based supervision and may impose corrective measures and sanctions. Periodic audits conducted by the SRO of attorneys and notaries must respect professional secrecy and be conducted by appropriately qualified peers. Ordinary reviews focus on systems, policies and processes without accessing privileged mandate information. Access to such information is permitted only if there are concrete indications of a violation and the professional-secrecy safeguards are observed.

Providing covered services without SRO membership is punishable under article 44 of the Financial Market Supervision Act. A breach of the reporting obligation is punishable under article 37 AMLA by a fine of up to CHF 500,000 if committed intentionally and CHF 150,000 if committed negligently. SROs may impose warnings, reprimands and contractual penalties under a harmonized sanctions framework.

An adviser who knowingly assists with a transaction involving criminal proceeds may also face prosecution for complicity in money laundering or participation in the underlying offense. Formal compliance with the AMLA does not provide a safe harbor against criminal liability.

4) Assessment

In the authors' view, the broad wording of some of the definitions and advisory activities subject to the revised AMLA will lead to considerable need for clarification in practice. There were also quite significant changes made to the – even broader and more vague – initial text proposed by the Swiss Federal Council. Unfortunately, there is very little evidence of the reasoning behind these changes; albeit due to their effect of limiting the scope of application of the AMLA, these changes are very welcome from a practical perspective. All these factors combined with the short period of time prior to its entry into effect resulted in quite some challenges for advisers during the summer of 2026.

According to information published by certain SROs, the questions regarding the definition of activities that give rise to a mandatory membership requirement do not fall within the jurisdiction of the SROs and a corresponding body of case law has not yet been established. To mitigate this, the SROs are currently working with the State Secretariat for International Finance (SIF) to develop guidance on membership requirements. Such guidance is more than welcome and hopefully clarifies some of the difficult questions that advisers currently have to answer themselves.

Alexander Wherlock (alexander.wherlock@homburger.ch)
Benjamin Leisinger (benjamin.leisinger@homburger.ch)

THE IMPACT OF ARTICLE 21C CRD VI ON SWISS BANKS' LOAN PORTFOLIOS

Reference: CapLaw-2026-60

Effective as of 11 January 2027, CRD VI introduces an EU-wide restriction on third-country institutions' cross-border lending activities. Under the new article 21c CRD VI, Swiss banks may no longer extend loans, provide guarantees, or make credit commitments to EU-domiciled borrowers without an authorized subsidiary or branch in the relevant member state. The prohibition covers all corporate finance activities with an EU nexus, including syndicated credit facilities.

By Jürg Frick

1) TCB Requirement – EU Market Access Becomes More Restrictive

Effective as of 11 January 2027, the EU market access for third-country banks, including Swiss banks, and certain large third-country broker-dealers becomes more restrictive. Subject to certain exemptions and a narrow grandfathering regime, third-country financial institutions will only be allowed to render core banking services, including lending and certain other financing services, to clients in an EU Member State or another EEA country through a licensed EU subsidiary or, according to the new article 21c CRD VI, through a locally licensed branch (the Third-Country Branch Requirement or TCB Requirement).

Since Switzerland is neither an EU Member State nor an EEA country and since no equivalence decision or bilateral arrangement exists between Switzerland and the EU in the field covered by article 21c CRD VI, Swiss banks qualify as third-country institutions and, therefore, are subject to the TCB Requirement. This requirement relates to so-called core banking services rendered on a cross border basis, namely, among other things, taking deposits, lending, financial leasing, and granting guarantees and assuming other commitments (Annex I CRD). "Lending", in particular, is further defined as including consumer credit, credit agreements relating to immovable property, factoring with and without recourse, and trade finance (including forfaiting).

Since CRD VI is a directive, each EU Member State and EEA country has to implement the CRD VI requirements in its local law and thereby transpose the policy objectives in its own national law. This transposition aims at harmonizing the regulation of cross-border banking services, including, in particular, the TCB Requirement.

For the time being, the regulation of cross-border lending is not harmonized among EU countries. Luxembourg and Ireland, for instance, are quite liberal and do not require any local license or registration. Other countries such as, for instance, France or Italy already now have banking monopoly rules which effectively prohibit cross-border lending by third-country lenders. The new regime introduced by article 21c CRD VI will be particularly disruptive in permissive jurisdictions which also have a much higher volume of cross-border lending today than other more restrictive countries.

For branches of third-country institutions which already exist today and which are licensed or authorized under national laws, the competent authorities may review and validate such authorizations and assess compliance with the new CRD VI rules. Should the requirements of the new regime not be met, then a new license would be required. In Germany, for instance, BaFin has already initiated the re-licensing process, signaling that the administrative transformation will extend beyond a technical adjustment.

The TCB Requirement is expected to render existing national exemptions obsolete. Swiss banks that have relied on such national exemptions should expect the loss of this market access path. For example, under the German transposition, it will no longer be possible to obtain an exemption. Existing exemptions under Section 2(5) D-KWG will be reviewed and, where relating to core banking business, no longer be granted.

2) Establishment of an EU Branch

Should Swiss banks not already have a licensed subsidiary in an EU Member State or another EEA country, then they will have to establish a third-country branch (TCB) in each EU Member State and EEA country in which they intend to render core banking services.

Such branch is not a separate legal entity but an establishment of the Swiss head office. The regulatory requirements applicable to a TCB are less onerous than for subsidiaries, however, the non-availability of passporting rights for branches means that a branch in one EU Member State cannot provide core banking services to clients in other EU Member States or EEA countries. If the EU lending activities are concentrated in one single jurisdiction, then the branch model may be a proportionate and efficient solution. Otherwise, the cost of maintaining several branches must be weighed against the passporting advantage of a subsidiary.

According to article 48c (3 et seq.) CRD VI, authorization for TCB requires, among other things, a business plan as well as satisfaction of minimum regulatory requirements and the authorization and supervision of the applied-for activities in the home country. Business is limited to the authorizing EU Member State.

Furthermore, article 48a CRD VI introduces a risk-based classification. Class 1 branches (booked assets ≥ EUR 5 billion or retail deposits above a specified threshold) face stringent requirements due to higher systemic risks. Class 2 branches, posing no significant risk to stability, face lighter obligations. According to article 48e et seq. CRD VI, Class 1 branches must maintain own funds of 2.5% of average liabilities over the preceding three years, min. EUR 10 million, while Class 2 branches must maintain 0.5%, min. EUR 5 million. Both classes must hold liquidity sufficient to cover outflows over at least thirty days, Class 1 branches may further need to comply with CRR liquidity requirements.

3) Exemptions from TCB Requirement

a) Subsidiary

Should a Swiss bank have substantial business in various EU Member States, it may be preferable and more efficient to establish an EU subsidiary. A subsidiary is a separate legal entity incorporated under the laws of the host EU Member State and once authorized as a credit institution, qualifies for passporting rights under the EU single market framework. This allows broad access to clients in all EU Member States, but the subsidiary must comply with the entirety of the prudential requirements, including CRR capital and liquidity requirements, governance standards, resolution planning, and reporting obligations.

b) Exemptions Pursuant to Article 21c CRD VI

Should a Swiss bank not (yet) have a licensed subsidiary in an EU Member State and should it only render limited banking services in specific EU Member States or other EEA countries, it may still not have to establish a TCB, provided it can benefit from one of the following exemptions provided for by article 21c(2) CRD VI:

i. Intra-group Exemption

Banking services provided within the same corporate group are exempt. This is particularly relevant to treasury or cash management companies providing banking, lending or other financing services to other members of the same group (article 21c(2)(c) CRD VI).

ii. Interbank Exemption

Transactions between credit institutions are also not captured (article 21c(2)(b) CRD VI).

iii. MiFID II Ancillary Services

Services under Annex I, Section A of MiFID II as well as ancillary services do not trigger the TCB Requirement (article 21c(6) CRD VI). This covers, for instance, the reception, transmission, and execution of orders on behalf of clients as well as dealing on own account, portfolio management and underwriting. Lending does not fall within this exemption and whether granting credit to enable an investor to carry out a securities transaction qualifies as an ancillary service remains uncertain.

iv. Reverse Solicitation

Swiss banks may rely on the reverse solicitation exemption to continue providing cross-border services (article 21c(2)(a) CRD VI). The advantage is that no TCB in the EU is required and no additional regulatory burden arises. However, the scope for business development is constrained, *i.e.*, the bank may not market its services, solicit new clients, and offer products other than those specifically requested by the client.

The exact scope of the reverse solicitation exemption is unclear and therefore the relevance of this exemption for syndicated lending or other financing transactions may be limited. If a third-party arranger, being an investment advisory firm or the mandated lead arranger invites a Swiss bank to participate in the syndicate, it remains questionable whether the reverse solicitation exemption is applicable. Should the arranger not act on behalf of the borrower, but as opposing party under the credit agreement, then the exemption is not expected to be available. In any case, each transaction conducted under this exemption must be assessed on its specific facts and should be supported by robust compliance infrastructure, policies restricting marketing activity and record-keeping systems evidencing client initiative.

4) Grandfathering

a) Principle

Article 21c (5) provides transitional relief: The provision states that "*in order to preserve clients' acquired rights under existing contracts, the [TCB Requirement] shall be without prejudice to existing contracts that were entered into before 11 July 2026*".

The purpose of this grandfathering provision is to preserve the acquired rights of EU borrowers under such pre-existing contracts also after 11 July 2026, and, in particular, even if the relevant third-country bank or other financial institution which renders the respective banking or lending services under the relevant pre-existing contract may either not comply with the TCB Requirement or not benefit from any exemption granted under CRD VI.

The grandfathering protection applies to individual contracts only and not to the broader client relationship between a third-country bank or other financial institution and a client being resident or domiciled in an EU Member State or any other EEA country. In other words, the grandfathering applies with regard to a specific pre-existing contract until maturity or termination of that contract and its does not extend to other contracts, agreements or arrangements with the same client.

b) Effect of Break Events or Lifecycle Events

The grandfathering explicitly applies to "existing contracts" entered into before 11 July 2026. However, since only "acquired rights under existing contracts" shall be protected, it is questionable whether and to what extent a so-called break event or lifecycle event threatens such grandfathering.

In its practical guidance of May 2026, the Loan Market Association (LMA) discusses several so-called break events or lifecycle events and their respective effect on grandfathered contracts or agreements. The LMA criticizes that article 21c CRD VI neither defines the term "acquired rights" nor "existing contracts" and that it is also silent on what constitutes a break event or a lifecycle event.

However, since only rights which have been acquired before 11 July 2026 shall be protected, it seems clear to us that any amendments or restatements of pre-existing contracts which add new rights or materially alter or amend existing rights may result in the grandfathering falling away and the TCB Requirement being triggered. Such lifecycle events may be amendments which, for instance, add additional facilities or tranches to a credit agreement, increase commitments under an existing facility or extend the maturity, provided, in each case, that such rights or commitments have not already been embedded in the pre-existing contract and they do not require any further consent or approval from any party to the agreement. Relevant lifecycle events are also the accession of new borrowers to an agreement, except in cases where such additional borrowers have already been pre-approved under the pre-existing agreement. Adding new lenders, be it in the context of an increase or a transfer of a commitment would most likely also qualify as a lifecycle event which triggers the TCB Requirement.

Lifecycle events that in our view do not trigger the TCB Requirement are, for instance, mere editorial, technical or economically immaterial amendments of an agreement as well as drawdowns, selections of interest periods, the exercise of unilateral contractual rights of the borrower, or waivers of covenant breaches or the decrease of a credit line, the reduction of certain borrower's rights or the partial termination of an agreement.

Whether break events or life-cycle events which materially alter acquired rights under an existing contract may still benefit from the reverse solicitation exemption if such event has been caused and the relevant amendment has been requested by a borrower without prior solicitation from any of the banks, also remains to be seen.

c) Structural Solutions to Stay Out-of-Scope

Going forward, Swiss banks and other third-country institutions within the meaning of article 21c CRD VI which do neither satisfy the TCB Requirement nor benefit from one of the exemptions set out above, will only be allowed to participate in financings which do not have an EU nexus. Should such Swiss banks or other third-country institutions still participate in a financing of a group with borrowers within an EU Member State or another EEA country, then different tranches or facilities may have to be considered, i.e., tranches or facilities which are available for EU/EEA borrowers and tranches or facilities which are only available for third-country borrowers.

In any case, the additional borrower accession mechanism may have to consider the consequences of allowing EU borrowers to accede to a credit agreement in case third-country banks are acting as lenders and such banks neither comply with the TCB Requirement nor do they benefit from one of the exemptions set out in article 21c CRD VI.

5) Conclusion

Article 21c CRD VI will require Swiss banks to reassess both their existing EU loan portfolios and the manner in which they originate and participate in new EU-related financings. From 11 January 2027, the provision of lending, guarantee and commitment services to EU or EEA clients will, absent a licensed subsidiary or an authorised local branch, generally no longer be permissible. The available exemptions are narrow and should not be treated as a scalable substitute for an EU establishment; reverse solicitation in particular requires a fact-specific analysis and robust evidence of the client's exclusive initiative.

Banks should therefore identify affected contracts and jurisdictions well before the new regime becomes applicable, preserve the benefit of grandfathering where available, and subject amendments, extensions, transfers and other lifecycle events to a targeted Article 21c assessment.

Their preferred long-term operating model will depend on the geographical footprint and volume of EU business: a branch may be suitable for activity concentrated in one jurisdiction, whereas a subsidiary may be more appropriate where passporting across several Member States is required. Where no EU establishment is envisaged, future financing documentation should be structured to ring-fence EU borrowers and to restrict accession mechanics accordingly. The remaining interpretative and national implementation questions warrant continued monitoring.

Jürg Frick (juerg.frick@homburger.ch)

DocMorris Finance B.V.'s Issuance of CHF 96.8 Million Senior Guaranteed Convertible Bonds Due 2031 and Concurrent Repurchase of Outstanding Convertible Bonds Due 2028

Reference: CapLaw-2026-61

On 11 September 2026, DocMorris Finance B.V., a directly wholly-owned subsidiary of DocMorris AG (SIX: DOCM), successfully completed the private placement of CHF 96.8 million 1.5 per cent. senior unsecured convertible bonds due 16 March 2031, unconditionally and irrevocably guaranteed by DocMorris AG and convertible into existing and/or newly issued registered shares of DocMorris AG. Concurrently with the new issuance, DocMorris AG completed the full repurchase of its outstanding 3.0 per cent. convertible bonds due August 2028 with a nominal amount of CHF 49.6 million through privately negotiated bilateral transactions. The repurchased bonds will be cancelled.

The transaction reduced the number of shares underlying the outstanding convertible bonds from 7.6 million to 7.0 million at a substantially higher conversion price, while extending the maturity profile and reducing the coupon from 3.0 per cent. to 1.5 per cent. per annum. The conversion premium was set at 32.5 per cent. over the reference share price, resulting in an initial conversion price of CHF 13.83. The offering was significantly oversubscribed. Settlement occurred on 16 September 2026.

BofA Securities and UBS Europe SE acted as Global Coordinators and Joint Bookrunners.

UBS Group AG's Issuance of EUR 2 Billion Fixed Rate/Fixed Rate Callable Senior Notes

Reference: CapLaw-2026-62

On 8 September 2026, UBS Group AG successfully completed its issuance of EUR 2 billion in aggregate principal amount of 4.521 per cent. Fixed Rate/Fixed Rate Callable Senior Notes due 2037 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 capital requirement.

The Notes are governed by Swiss law, and the Notes have been provisionally admitted to trading, and application will be made for definitive admission to trading and listing of the Notes, on the SIX Swiss Exchange. The Notes were issued in two separate tranches (EUR 1.75 billion and EUR 250 million, respectively), which were consolidated and form a single series as from 9 September 2026.

UBS Group AG's Issuance of GBP 1 Billion Fixed Rate/Fixed Rate Callable Senior Notes

Reference: CapLaw-2026-63

On 8 September 2026, UBS Group AG successfully completed its issuance of GBP 1 billion in aggregate principal amount of 5.697 per cent. Fixed Rate/Fixed Rate Callable Senior Notes due 2032 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 capital requirement.

The Notes are governed by Swiss law, and the Notes have been provisionally admitted to trading, and application will be made for definitive admission to trading and listing of the Notes, on the SIX Swiss Exchange.

Raiffeisen Schweiz Genossenschaft's Issuance of EUR 500 Million Bail-In Bond

Reference: CapLaw-2026-64

On 4 September 2026, Raiffeisen Schweiz Genossenschaft successfully completed its issuance of EUR 500 million 4.255 per cent. bail-in bonds due 2034. The bonds are eligible to count towards Raiffeisen Switzerland's gone concern capital requirement. The bond are traded on SIX Swiss Exchange and settlement occurred on 14 September 2026. Deutsche Bank, DZ Bank, J.P. Morgan, Morgan Stanley, UBS and Raiffeisen Schweiz Genossenschaft acted as Joint Lead Managers for this issuance.

Alcon's Issuance of EUR 500 Million Guaranteed Notes

Reference: CapLaw-2026-65

On 2 September 2026, Alcon Finance Corporation successfully completed its issuance of EUR 500 million 3.875 per cent. Guaranteed Notes due 2033, which are unconditionally and irrevocably guaranteed by Alcon Inc.

UBS AG's Establishment of its Panda Bond Program and its Inaugural Issuance Thereunder

Reference: CapLaw-2026-66

On 27 August 2026, UBS AG successfully completed its inaugural Panda Bond issuance. The RMB 2 billion 5-year bonds were issued with a coupon rate of 1.78%, representing (as of August 27, 2026) both the lowest coupon rate and the tightest spread over China Development Bank benchmark achieved for a 5-year Panda Bond issued by a foreign financial institution. It also marked the first Panda Bond issuance by a Swiss financial institution in China. The offering of the bonds in the Chinese interbank bond market was approved by the People's Bank of China.

Swisscom's Placement of EUR 500 Million Hybrid Capital Bonds

Reference: CapLaw-2026-67

On 27 August 2026, Swisscom successfully placed inaugural hybrid capital bonds (fixed rate resettable capital securities) with a total principal amount of EUR 500 million. The bonds were issued by Swisscom Finance B.V. and guaranteed by Swisscom AG. The hybrid bonds were placed into the European institutional fixed income investor base with Deutsche Bank acting as Sole Global Coordinator and Structuring Agent and BBVA, BNP PARIBAS, BofA Securities, Deutsche Bank and UBS as joint lead managers. The new securities will be listed on the Luxembourg Stock Exchange.

Sika's Placement of EUR 1 Billion Hybrid Capital Bond

Reference: CapLaw-2026-68

On 26 August 2026, Sika, a globally leading specialty chemicals company, successfully placed an inaugural hybrid capital bond (fixed rate resettable subordinated debt) with a total amount of EUR 1 billion split into two EUR 500 million tranches. The hybrid bonds were placed into the European institutional fixed income investor base with Citigroup acting as Global Coordinator and BofA Securities, Citigroup, and UBS Investment Bank as active bookrunners. The new securities will be listed on the regulated market of Euronext Dublin.

UBS Group AG's Issuance of CHF 550 Million Fixed Rate/Fixed Rate Callable Senior Notes

Reference: CapLaw-2026-69

On 12 August 2026, UBS Group AG successfully completed its issuance of CHF 285 million in aggregate principal amount of 1.4911 per cent. Fixed Rate/Fixed Rate Callable Senior Notes due February 2035 and CHF 265 million in aggregate principal amount of 1.125 per cent. Fixed Rate/Fixed Rate Callable Senior Notes due August 2031 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 capital requirement.

The Notes are governed by Swiss law, and the Notes have been provisionally admitted to trading, and application will be made for definitive admission to trading and listing of the Notes, on the SIX Swiss Exchange.

UBS AG's Section 3(a)(2) Offering of its USD 2 Billion Senior Notes

Reference: CapLaw-2026-70

On 7 August 2026, UBS AG, acting through its Stamford branch, successfully completed its issuance of USD 1.25 billion in aggregate principal amount of 5.053% Fixed-to-Floating Rate Senior Notes due 2032 and USD 750 million Floating Rate Senior Notes due 2029 under its medium-term notes program. The notes were offered and sold in reliance on (i) an exemption from registration provided by Section 3(a)(2) of the U.S. Securities Act of 1933, as amended, and (ii) Section 16.6 of Part 16 of the regulations of the Office of the Comptroller of the Currency.

Cembra Money Bank AG's CHF 52 Million Accelerated Bookbuilding Equity Raise

Reference: CapLaw-2026-71

On 27 July 2026, Cembra Monday Bank AG successfully raised CHF 52 million in equity through an accelerated bookbuilding process by placing 601'801 treasury shares. The net proceeds from the offering are expected to partly finance the acquisition price of the substantial part of Santander's Swiss auto financing business.

Samsung Biologics's All-Cash Public Tender Offer to Acquire PolyPeptide Group AG

Reference: CapLaw-2026-72

On 20 July 2026, PolyPeptide Group AG (SIX: PPGN), a specialized global Contract Development & Manufacturing Organization (CDMO) for peptide-based active pharmaceutical ingredients, and Samsung Biologics Co., Ltd. announced that they have entered into a transaction agreement under which Samsung Biologics agreed to make an all-cash public tender offer to acquire all publicly held registered shares of PolyPeptide for CHF 44.31 per share. The offer values PolyPeptide's equity at approximately CHF 1.46 billion. Samsung Biologics published its pre-announcement of the offer today. PolyPeptide's largest individual shareholder, owning a stake of approximately 55.65% (excluding treasury shares), has committed to tender all of its shares into the offer.

The offer is subject to the satisfaction of customary offer conditions, including a minimum acceptance rate of 66.67% on a fully diluted share count basis and the receipt of regulatory approvals in certain jurisdictions.

Salt's High-Yield Bond Offering and Repricing of a Term Loan Facility

Reference: CapLaw-2026-73

On 6 July 2026, Salt, a Swiss telecommunications provider, launched a comprehensive refinancing which consisted of (i) a high yield bond offering of CHF 205 million aggregate principal amount of 2.500% senior secured notes due 2031, (ii) the repricing of a new EUR 855 million term loan facility B4 and (iii) a private placement of EUR 30 million aggregate principal amount of 4.500% senior secured notes due 2030.

The notes were issued by NJJ Continental S.A. and guaranteed by NJJ Continental Holding S.A. as well as Salt Mobile SA. The CHF denominated notes are expected to be admitted to trading and listed on SIX Swiss Exchange. The proceeds from the financing, together with cash on balance sheet, were used to fully redeem Salt's existing 5.250% senior secured notes due 2028, prepay existing term loans and pay certain fees and expenses in connection with the transactions.

UBS Group AG's Issuance of JPY 110 Billion Fixed Rate/Fixed Rate Callable Senior Notes

Reference: CapLaw-2026-74

On 2 July 2026, UBS Group AG successfully completed its issuance of JPY 65.6 billion in aggregate principal amount of 2.362 per cent. Fixed Rate/Fixed Rate Callable Senior Notes due July 2030, JPY 35.6 billion in aggregate principal amount of 2.759 per cent. Fixed Rate/Fixed Rate Callable Senior Notes due July 2032, and JPY 8.8 billion in aggregate principal amount of 3.427 per cent. Fixed Rate/Fixed Rate Callable Senior Notes due July 2037 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 capital requirement.

The Notes are governed by Swiss law, and the Notes have been provisionally admitted to trading, and application will be made for definitive admission to trading and listing of the Notes, on the SIX Swiss Exchange.

Monitchem Holdco 3 S.A.'s Issuance of EUR 625 Million Senior Secured Notes

Reference: CapLaw-2026-75

On 2 July 2026, Monitchem Holdco 3 S.A. successfully completed its issuance of EUR 625 million 8.00 per cent. Senior Secured Notes due 2031. The Notes are guaranteed by various subsidiaries of the issuer, including CABB AG.

The Notes are governed by New York law and are listed on the Official List of The International Stock Exchange.

Asset Management XIX
(Vermögensverwaltung XIX)

Thursday, 1 October 2026, Metropol, Zurich

https://www.eiz.uzh.ch/product/19-tagung-zur-vermoegensverwaltung/

14th Zurich Conference on Combating Money Laundering
(14. Zürcher Tagung zur Geldwäschereibekämpfung)

Wednesday, 21 October 2026, Lakeside, Zurich

https://www.eiz.uzh.ch/product/29-zuercher-konferenz-mergers-acquisitions/

13th Conference on Compliance in the Financial Services Sector
(13. Tagung zur Compliance im Finanzdienstleistungsbereich)

Tuesday, 17 November 2026, Lakeside, Zurich

https://www.eiz.uzh.ch/product/13-tagung-zur-compliance-im-finanzdienstleistungsbereich/

St. Gallen Conference on Financial Market Regulation
(St. Galler Tagung zur Finanzmarktregulierung)

Tuesday, 17 November 2026, Zürich Marriott Hotel, Zurich

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