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EU Shareholder Rights Directive: Action required for Switzerland?

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Efforts to amend the EU Shareholder Rights Directive have lost momentum. The most recent resolution of an EU institution has been passed more than a year ago by the EU parliament. The Brexit vote in the United Kingdom has cast further doubt on the directive's future design. Nevertheless, efforts to improve the governance of European companies and to strengthen the rights of shareholders will continue and the most recent proposal to amend the directive is likely still indicative of the future form and shape of corporate governance in the EU. Third countries like Switzerland should closely monitor the EU's next steps on the directive, analyze any gaps and decide whether such gaps should be closed.

By Thomas U. Reutter

1) Introduction and Status of Legislation

The Directive 2007/36/EC on the exercise of certain rights of shareholders in listed companies has been adopted in 2007 (publication in the Official Journal on 11 July 2007; hereafter **SRD**). The SRD aims to ensure a certain minimum level of shareholder participation rights and good corporate governance within the EU.

On 9 April 2014 the EU Commission published a proposal to amend the SRD "as regards the encouragement of long-term shareholder engagement" together with an "Impact Assessment" based on consultations and research undertaken. In such assessment, the EU Commission noted the following deficiencies in the corporate governance framework:

1. Insufficient engagement of institutional investors and asset managers in the governance of listed companies;

2. Insufficient link between pay and performance of directors (including executive management);

3. Lack of shareholder oversight on related party transactions;

4. Doubts on the reliability of the advice of proxy advisers;

5. Obstacles to the exercise of shareholder rights (in particular due to the use of intermediaries in cross border situations); and

6. Insufficient quality of corporate governance information.

On 8 July 2015, the EU parliament has adopted a resolution changing the draft amendments presented to it by the Committee on Legal Affairs (JURI Committee), based on the proposal put forward by the Commission on the above perceived governance shortcomings in listed companies (hereafter the **Proposed SRD Amendment**). No further step in legislation has been publicly announced since then. It is likely that the uncertainties surrounding the exit of the United Kingdom (UK) out of the EU have delayed the project. Many of the companies and most of the institutional investors and asset managers addressed by the Proposed SRD Amendment are domiciled in the UK and the legislation would certainly be less effective if not transposed into UK national law. Nevertheless, efforts to improve the governance of European companies and to strengthen the rights of shareholders will continue also without the UK as an EU member.

2) Companies in Scope

As its name indicates, the SRD only addresses the rights of shareholders in companies which have (1) their registered office in a member state of the EU and (2) whose shares are admitted to trading on a regulated market in any such member state (article 1 SRD). In case the country of incorporation or registered office and the country of the trading venue differ within the EU, the country of incorporation is competent to regulate the matters of the SRD. Compare this to the recently enacted Swiss "Minder" legislation (Ordinance against excessive compensation in listed companies; **OaeC**), which bolstered the role of shareholders in corporate governance and in particular in say-on-pay issues. Both legislations are applicable to listed companies only. Moreover, both legislations opt for the registered office (country of incorporation) rather than the country of the listing (trading venue) as the competent country to legislate. However, the EU legislation does not capture any issuer who, although incorporated in any EU member state, is listed outside of the EU. The OaeC, by contrast, is applicable to any Swiss issuer whose shares are listed on a stock exchange anywhere in the world, which may create conflicts with any corporate governance requirements in the country of the listing.

3) Focus on Shareholder Engagement and Related Party Rules

This article focuses on the interaction of listed companies with their shareholders and in particular with shareholders who are institutional investors or asset managers (items 1 and 5 of the above list) and on related party transactions (item 3 above). These appear to be the most relevant from a Swiss perspective for the following reasons: The problem identified as insufficient link between pay and performance (item 2 above) of directors has been addressed under Swiss law with the enactment of the OaeC, which goes beyond the requirements of the Proposed SRD Amendment and requires, *inter alia*, an annual binding vote on the remuneration payable to the board of directors and the executive management. If at all, the EU will consider the say-on-pay lessons

learnt in Switzerland in the forthcoming debate on the SRD rather than the opposite. Although regulation of proxy advisers (item 4 above) is debated topic in Switzerland as well, the substance of the Proposed SRD Amendment is unlikely to have an impact in third countries. It leaves the required code of conduct essentially to the self-regulation of the industry and only imposes certain limited disclosure obligations regarding compliance with the chosen code of conduct. Apart from that, the most relevant proxy advisers for Swiss companies are domiciled outside Switzerland and are difficult to regulate by one single country apart from the US.

4) Shareholder Engagement

In its Impact Assessment, the Commission noted that shareholders had remained too passive in the past and, by behaving in this manner, have insufficiently controlled the board of directors and the managements as their agents. As a result, corporates have allegedly taken excessive risks and management remuneration has been decoupled from company performance. However, both the Commission and the Parliament seem to realize the inherent boundaries of forcing investors to more engagement and have shied away from imposing an obligation to vote. Switzerland, by contrast, has introduced such an obligation, albeit limited to certain Swiss pension funds. The Proposed SRD Amendment is less strict. It either requires institutional investors and asset managers to adopt a so called "Engagement Policy" or give a clear and reasoned explanation as to why no such policy has been adopted ("comply or explain"). In such Engagement Policy, investors would have to describe, *inter alia*, how they integrate shareholder engagement in their investment strategy, how they intend to vote in general and to what extent they intend to retain the services of proxy advisers. The Engagement Policy must also include detailed conflict of interest rules. Once a year, institutional investors and asset managers must publish a document on their website detailing how they have implemented such policy. Pursuant to the principle of "comply or explain", investors may also refrain from such annual publication if they give a reasoned explanation as to why this is the case.

5) Far Reaching Obligations for Institutional Investors

More importantly, pursuant to the Proposed SRD Amendment, institutional investors and asset managers must publicly disclose on their website, for each company in which they hold shares, whether and how they cast their votes in general meetings and provide an explanation for their voting behavior. The "comply or explain" principle does not seem to apply to this far-reaching obligation. It remains to be seen, whether such obligation will be included in the final version of the Proposed SRD Amendment. It is definitely stricter than the corresponding Swiss requirement, which provides for a general obligation for Swiss pension funds to disclose a summary of their voting behavior to their beneficiaries. The Swiss version is more limited in that no public disclosure is required and, except in specific cases, a generic summary will be sufficient.

A far reaching obligation is imposed on institutional investors. Not only must they publicly disclose their investment strategy and how it is aligned with the profile and duration of their liabilities, but also the main arrangements, if any, with any asset manager. The disclosure regarding arrangements with asset managers includes the incentives awarded to the asset managers and their impact on the investment strategy of the institutional investor. This would impose far reaching transparency obligations in arrangements that would otherwise be purely private. The questions may be asked whether risk taking conduct or abuses that happened in the past have been egregious enough to justify a public interest in the disclosure of private transactions as proposed and if so, whether such behavior could be avoided by the proposed disclosure. In any event, Swiss law would significantly deviate from the law of EU member states if the Proposed SRD Amendment would be transposed into national law in its current form.

6) Communication with Shareholders

Shareholder engagement necessitates communication between the issuer and its shareholders. The Proposed SRD Amendment intends to remove obstacles for such a dialogue by allowing listed companies to identify their shareholders. Intermediaries like custodian banks or central security depositories (**CSD**) should be responsible to provide the necessary information about shareholder's identity to the listed companies. Although the Proposed SRD Amendment expressly states that the right to identify shareholders is conferred "taking into account existing national systems", it is unlikely that the current Swiss system for registered shares would comply with the Proposed SRD Amendment. Owners of registered shares of Swiss listed companies are under no obligation to notify the share register and disclose their identity to the company. Although dividends and other financial rights are granted for these shares, they cannot be voted at shareholder meetings (these "unregistered" registered shares are known as so called "Dispo-shares"). The shareholder's custodian bank obviously knows the identity of its client but is not allowed to disclose such information to the company absent consent of the shareholder. A proposed amendment to Swiss corporate law aims to improve the current situation around Dispo-Shares by introducing a so called nominee model in which the custodian bank would be registered as holder of record in lieu of the actual "true" shareholder (See Commentary to an amendment of the Swiss Code of Obligations dated 28 November 2014 item 1.3.3 (*Erläuternder Bericht zur Änderung des Obligationenrechts*)). While this model has certain benefits, it does not involve disclosure of the identity of the beneficial owner of the shares "behind" the nominee to the listed company. If the current regulation in the Proposed SRD Amendment becomes final, Swiss corporate law would therefore significantly deviate from EU legislation.

7) Related Party Rules

As mentioned earlier, the Impact Assessment of the Commission has analyzed shortcomings also in the area of related party transactions. In addition to the ex post disclosure of related party transactions required by applicable accounting standards (in particular IFRS) the Proposed SRD Amendment introduces an ad hoc disclosure requirement for material related party transactions. As a result, companies would have to publicly disclose material transactions with related parties, including the name of the related party, the value of and nature of the transaction, "at the latest at the time of conclusion of the transaction". The announcement must be accompanied by a report "assessing whether or not [the transaction] is on market terms and confirming that [it] is reasonable from the perspective of the company, including minority shareholders…".

The term "related party" has the same meaning as under IFRS (see IAS 24). It includes transactions by the listed company with a board member or any shareholder. The materiality of such a transaction will be left to member states to define subject to some general guidelines set out in the Proposed SRD Amendment. Member states may also exclude transactions entered into in the ordinary course of business and concluded on "normal market terms".

The Proposed SRD Amendment, in its current form, does not require an affirmative vote by shareholders for material related party transactions. The "administrative or supervisory body" of company may as well approve related party transactions provided that procedures are in place that prevent a related party from taking advantage of its position. However, member states may introduce a requirement that material related party transactions will have to be approved by shareholders, in which case the conflicted (related party) shareholder may also vote, provided that the interests of non-related party shareholders are sufficiently protected. The Proposed SRD Amendment has softened significantly the original proposal by the EU Commission and the consent and abstention requirements currently foreseen are not particularly onerous and do not go beyond good corporate practice.

From a Swiss perspective, the main gap to the Proposed SRD Amendment regarding related party transactions is therefore the new ad hoc requirement for material related party transactions and the corresponding report that would have to be established.

8) Conclusion

Efforts to improve the governance of European companies and to strengthen the rights of shareholders will continue after the Brexit vote if the UK and the most recent proposal to amend the Shareholder Rights Directive is likely still indicative of what corporate governance in the EU will look like in the future. Third countries such as Switzerland should closely monitor the EU's next steps on the directive. This article has shown that significant gaps remain between Swiss law and the most recent EU proposal,

which includes far reaching obligations on disclosure of shareholder identity, transparency obligations of institutional investors and related party transactions. If these proposals find their way into the final directive, Switzerland will have to carefully consider whether it is itself poised for fundamental changes to certain concepts it has grown accustomed to in the past decades.

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Bail-in Recognition Clause

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This paper intents to outline the purpose and scope of article 55 of the European Bank Resolution and Recovery Directive, to present, as an example, the Bail-In Recognition Clause suggested by the Loan Market Association, and to discuss the legal nature of such a clause in a Swiss law governed agreement or document.

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1) Introduction

Effective as of 1 January 2016, the European Bank Resolution and Recovery Directive[1] (BRRD) requires financial institutions and certain other in-scope institutions established within the European Economic Area[2] (the EEA Financial Institutions) to include a contractual bail-in recognition clause (the Bail-In Recognition Clause) in certain types of agreements which are not governed by a law of an EEA country (*e.g.*, Swiss law). Pursuant to this clause the counterparties of such EEA Financial Institution acknowledge and agree that liabilities of the EEA Financial Institution may become subject to bail-in.

1 JP Braithwaite, Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council.

2 The EEA (the European Economic Area) consists of the member states of the European Union as well as Iceland, Liechtenstein and Norway.

The intention of this paper is to outline the purpose and scope of article 55 BRRD, to present, as an example, the Bail-In Recognition Clause suggested by the Loan Market Association (LMA), and to discuss the legal nature of such a clause in a Swiss law governed agreement or document.

2) Article 55 BRRD

a) Genesis of BRRD and Implementation into National Law of EEA Countries

On 15 May 2014, the European Parliament and the European Council adopted the BRRD, which became effective on 2 July 2014. The BRRD is part of the European Union's response to the financial crisis; it grants European regulators competences and means to intervene in operations of credit institutions and other investment firms, *i.e.*, the EEA Financial Institutions, to save financially distressed institutions and prevent failure. If an EEA Financial Institution faces failure, the respective resolution authorities now have a comprehensive set of tools to restructure the business of such institution and to minimise negative repercussions by preserving the systemically important functions of the concerned EEA Financial Institution. The lack of such instruments during the financial crisis has been considered to be one of the factors that forced the EEA member states to use taxpayers' money to save certain bank and other financial institutions.

By 1 January 2016, the EEA countries had to implement the BRRD regulations into national law, including the requirements set forth in article 55 BRRD.[3] As there will be different implementing regimes in each EEA country, the details of the Bail-In Recognition Clause may also vary, in particular if an EEA country chooses to exceed the requirements of article 55 BRRD.

b) Writedown and Conversion Powers

BRRD contains wide ranging recovery and resolution powers for EEA resolution authorities to facilitate the rescue of failing EEA Financial Institutions, including the powers for EEA resolution authorities to write-down and/or convert into equity a failing EEA Financial Institution's liabilities. As a matter of law, it is expected that an EEA bank resolution authority's exercise of those write-down and conversion powers will be effective in respect of liabilities under documents governed by the laws of an EEA country, regardless of the terms and conditions of that document.

Under the BRRD, such bail-in and other resolution actions may be imposed on an EEA Financial Institution if it becomes financially distressed and reaches the point of

3 As of the date hereof, Iceland, Liechtenstein and Norway have not yet enacted implementing legislation.

non-viability. The detailed conditions for such resolution actions are listed in articles 32 et seq. BRRD. The resolution powers include, among other things, the competence of the relevant resolution authorities in the respective EEA country to (i) write-down or convert into equity certain liabilities of that institution (Bail-In), and (ii) impose temporary restrictions on early termination rights on the institution's counterparties (Resolution Stay).

A Bail-in or Resolution Stay imposed by an EEA bank resolution authority on a EEA Financial Institution are given cross-border recognition throughout the EEA and, as a consequence, resolution steps under BRRD with regard to agreements subject to a law of an EEA country should take effect in any other EEA country.

However, with regard to agreements governed by laws of a non-EEA country or, for these matters, a third-country (*e.g.*, Switzerland), there is a risk that the effectiveness of a Bail-In or Resolution Stay may be challenged under the laws of the relevant third-country jurisdiction. To mitigate the risk that a creditor of an EEA Financial Institution successfully challenges the application by an EEA bank resolution authority of a Bail-In, article 55 BRRD sets forth that the EEA member states require EEA Financial Institutions established in their jurisdiction to include a Bail-In Recognition Clause in their non-EEA law governed agreements by which the counterparties of these EEA Financial Institutions recognise that any liability of the EEA Financial Institution may become subject to Bail-in, *i.e.*, the write-down or conversion powers of the competent resolution authority. On the other hand, BRRD does not require that the competence of the relevant resolution authorities to order a Resolution Stay is also acknowledged and agreed.

c) Bail-In Recognition Clause

i) General

For lack of statutory regimes giving effect to resolution actions taken by an EEA Bank resolution authority outside EEA jurisdictions, the purpose of such contractual Bail-In Recognition Clauses is to support cross-border enforceability of resolution actions in non-EEA countries. In the absence of statutory or contractual provisions giving effect to such resolution actions, courts may not enforce such resolution actions, *e.g.*, a Bail-In or a Resolution Stay, imposed under foreign resolution regimes where the contract is governed by their domestic law, or would be unlikely to do so sufficiently promptly to meet the needs of an effective resolution.

Therefore, article 55 BRRD requires EEA Financial Institutions[4] to include a Bail-In Recognition Clause in certain non-EEA law governed agreements to which they are a party and under which they can become liable. Pursuant to the Bail-In Recognition Clause, the EEA Financial Institution's counterparties acknowledge that the EEA Financial Institution's obligations under that agreement could become subject to an EEA bank resolution authority's exercise of write-down and conversion powers.

ii) Scope

The article 55 BRRD requirement to include Bail-In Recognition Clauses applies to agreements and documents if:

(1) such agreement or document is governed by a law of a non-EEA country, *e.g.*, Swiss law;

(2) the EEA Financial Institution has, or may have, any liability under the agreement or document (be it a contractual or non-contractual liability); and

(3) the respective agreement or document is only entered into by the EEA Financial Institution after 1 January 2016, or, should it have been entered into earlier, the agreement or document is materially amended or new liabilities arise under the agreement or document after 1 January 2016.

In principle, EEA Financial Institutions have to include Bail-In Recognition Clauses in almost every agreement or document to which they are a party and which is governed by the law of a non-EEA country.

Articles 44 (2) and 55 (1) (b) BRRD only provide for the following exemptions: (i) deposits protected by national guarantee schemes, (ii) deposits that are held for natural persons, and micro, small and medium sized enterprises and which exceed the amount protected by national guarantee schemes, (iii) secured liabilities (including covered bonds and liabilities secured by a charge, pledge, lien or collateral arrangement), (iv) client assets or client money (including assets or money held for UCITS or AIFs) and liabilities arising under fiduciary relationships, (v) liabilities to other regulated EU banks or capital requirement regulated investment firms (CRR investment firms) with an original maturity of less than 7 days, (vi) liabilities to settlement finality systems, their operations or participants, and arising from the participation in such a system, with a

4 The precise scope of the entities subject to article 55 BRRD is beyond the scope of this position paper. The scope is specified in article 1 BRRD and, in broad terms, includes EEA incorporated credit institutions or investment firms and relevant affiliates. EEA branches of non EEA incorporated institutions are not included.

remaining maturity of less than 7 days, (vii) liabilities to employees (except for variable remunerations such as bonuses), (viii) liabilities to commercial trade creditors for goods or services critical to daily operations, (ix) tax and social services liabilities (if these are preferred liabilities under the relevant EEA member state's law), and (x) liabilities in relation to depositor protection schemes.

To further delineate the exemptions listed above, article 55 (3) BRRD required the European Banking Authority (EBA) to publish draft regulatory technical standards on the contractual recognition of write-down and conversion powers (RTS) by no later than 3 July 2015. EBA submitted to the European Commission its final report containing the draft RTS on the last day of this deadline. The RTS, once enacted, will automatically have effect in national law.

On 3 February 2016, the European Commission, based on EBA's draft RTS, published the delegated regulation regarding, among others, the contractual recognition of write-down and conversion powers (Delegated Regulation). At the date hereof, both the RTS and the Delegated Regulation were only available in draft form.

In sum, and subject to the exemptions listed above, article 55 BRRD and the requirement to include a Bail-In Recognition Clause applies to a broad range of non-EEA law governed agreements and documents under which an EEA Financial Institution is or may become liable. The most obvious liabilities are repayment obligations of funds borrowed under any credit- or debt capital market instruments. However, article 55 BRRD also wants to be applied to potential contractual or non-contractual liabilities of EEA Financial Institutions, be it, for instance, in the capacity as lender, underwriter, agent, secured party or beneficiary. In such a capacity an EEA Financial Institution may become liable for breach of lending commitments, confidentiality undertakings, restrictions of creditor actions, administrative obligations, misrepresentations, negligence or other contractual or non-contractual obligations.

The broad scope of application of article 55 BRRD is impracticable and results in uncertainty and potential inconsistencies in application of Bail-In Recognition Clauses and, therefore, the relevant EEA resolution authorities should aim at defining a clear and consistent approach across the EEA countries to provide the EEA Financial Institutions with a clear and workable solution. In particular, the scope of article 55 BRRD should be amended to align it with that agreed at the international level through the Financial Stability Board (FSB). According to the FSB Principles for Cross-border Effectiveness of Resolution Actions, dated 3 November 2015, the scope of application of contractual resolution action recognition clauses should only cover debt instruments.

iii) Terms of Bail-In Recognition Clause

Pursuant to article 44 Delegated Regulation, which specifies the terms of a Bail-In Recognition Clause, such clause shall include:

(1) the acknowledgement and acceptance by each counterparty of an EEA Financial Institution that the liabilities of the EEA Financial Institution may be subject to the exercise of write-down and conversion powers by a resolution authority;

(2) a description of the write-down and conversion powers of each resolution authority in accordance with the applicable national law;

(3) the acknowledgement and acceptance by each counterparty of an EEA Financial Institution that:

  (i) it is bound by the effect of an application of the write-down and conversion powers, including any reduction in the principal amount or outstanding amount due, including any accrued but unpaid interest, in respect of the liability of an EEA Financial Institution, and the conversion of that liability into ordinary shares or other instruments of ownership;

  (ii) the terms of the relevant non-EEA law governed agreement may be varied as necessary to give effect to the exercise by a resolution authority of its write-down or conversion powers and such variations will be binding on the counterparty of the EEA Financial Institution; and

  (iii) ordinary shares or other instruments of ownership may be issued to or conferred on the counterparty of an EEA Financial Institution;

(4) the acknowledgement and acceptance by each counterparty of an EEA Financial Institution that the Bail-In Recognition Clause is exhaustive on the matters described therein to the exclusion of any other agreements, arrangements or understandings between the counterparties relating to the subject matter of the relevant agreements.

Even though the European Commission in its Delegated Regulation sets the parameters for Bail-In Recognition Clauses, it does not provide examples or a template wording for such Bail-In Recognition Clauses.

iv) Legal Opinion

According to article 55 (1) para. 3 BRRD, EEA member states have to ensure that their resolution authorities may require EEA Financial Institutions within their territory to provide them with a legal opinion confirming the enforceability and effectiveness of Bail-In Recognition Clauses.

We understand that such legal opinions should be addressed to the relevant resolution authorities and allow them to rely on the opinion and, therefore, we believe that such opinions would not be the opinions which are customarily rendered as condition precedent document in connection with a financing or other transaction, but that these opinions would rather be specifically requested by a resolution authority, be in the context of a regulatory audit, resolution actions or other circumstances.

3) Bail-In Recognition Clauses in Practice

a) General

Following the adoption of the BRRD, different professional associations have published models or recommended wordings for Bail-In Recognition Clauses, either for EEA Financial Institutions resident in a particular EEA jurisdiction, or for EEA Financial Institutions generally.

For example, the LMA published The Recommended Form of Bail-In Clause and User Guide originally dated 13 January 2016, as amended from time to time and currently available in the version dated 4 August 2016 (LMA Bail-In Guide). The LMA Bail-In Guide provides for a template Bail-In Recognition Clause (the LMA Bail-In Recognition Clause) which contains the mandatory features specified by the RTS and the Delegated Regulation.

b) LMA Bail-In Recognition Clause and EU Bail-In Legislation Schedule

The LMA Bail-In Recognition Clause reads as follows:

> *"[ ] Contractual recognition of bail-in*
>
> *Notwithstanding any other term of any Finance Document[5] or any other agreement, arrangement or understanding between the Parties[6], each Party acknowledges and accepts that any liability of any Party to any other Party under or in connection with*

5 The LMA Facility Agreements contain a definition of "Finance Documents" which encompasses all documents involved in the financing transaction. If the LMA Bail-In Recognition Clause is adapted for use in another document, all references to "Finance Document" should be replaced with the appropriate defined term or description of the relevant documents.

6 The LMA Facility Agreements contain the following definition: "Party" means a party to this Agreement. If the LMA Bail-In Recognition Clause is adapted for use in another document which does not contain such a defined term all references to "Party" or "Parties" should be replaced with the appropriate reference.

the Finance Documents may be subject to Bail-In Action by the relevant Resolution Authority and acknowledges and accepts to be bound by the effect of:[7]

(a) any Bail-In Action in relation to any such liability, including (without limitation):

(i) a reduction, in full or in part, in the principal amount, or outstanding amount due (including any accrued but unpaid interest) in respect of any such liability;

(ii) a conversion of all, or part of, any such liability into shares or other instruments of ownership that may be issued to, or conferred on, it; and

(iii) a cancellation of any such liability; and

(b) a variation of any term of any Finance Document to the extent necessary to give effect to any Bail-In Action in relation to any such liability."

The LMA Bail-In Recognition Clause uses the following definitions:

*""**Bail-In Action**" means the exercise of any Write-down and Conversion Powers.*

*"**Bail-In Legislation**" means:*

(a) in relation to an EEA Member Country which has implemented, or which at any time implements, Article 55 of Directive 2014/59/EU establishing a framework for the recovery and resolution of credit institutions and investment firms[8]*,*

7 In the LMA Facility Agreements express "agreement" between the parties is provided by a general operative clause at the beginning of the facility agreement. If the LMA Bail-In Recognition Clause is adapted for use in another document which does not contain such a general operative clause it should be prefaced with "It is agreed that".

8 LMA facility agreements contain the following interpretative provision: "[any reference to] a provision of law is a reference to that provision as amended or re-enacted." If the LMA Bail-In Recognition Clause is adapted for use in another document which does not contain such a provision this reference to article 55 of Directive 2014/59/EU should be supplemented accordingly.

the relevant implementing law or regulation[9] as described in the EU Bail-In Legislation Schedule from time to time [; and

(b) in relation to any other state, any analogous law or regulation from time to time which requires contractual recognition of any Write-down and Conversion Powers contained in that law or regulation].[10]

"***EEA Member Country**" means any member state of the European Union, Iceland, Liechtenstein and Norway.*

*"**EU Bail-In Legislation Schedule**" means the document described as such and published by the Loan Market Association (or any successor person) from time to time.*

*"**Resolution Authority**" means any body which has authority to exercise any Write-down and Conversion Powers.*

*"**Write-down and Conversion Powers**" means:*

(a) in relation to any Bail-In Legislation described in the EU Bail-In Legislation Schedule from time to time, the powers described as such in relation to that Bail-In Legislation in the EU Bail-In Legislation Schedule[; and

(b) in relation to any other applicable Bail-In Legislation:

(i) any powers under that Bail-In Legislation to cancel, transfer or dilute shares issued by a person that is a bank or investment firm or other financial institution or affiliate of a bank, investment firm or other financial institution, to cancel, reduce, modify or change the form of a liability of such a person or any contract or instrument under which that liability arises, to convert all or part of that liability into shares, securities or obligations of that person or any other person, to provide that any such contract or

9 LMA Facility Agreements contain the following interpretative provision: [any reference to] a "regulation" includes any regulation, rule, official directive, request or guideline (whether or not having the force of law) of any governmental, intergovernmental or supranational body, agency, department or of any regulatory, self-regulatory or other authority or organization. If the LMA Bail-In Recognition Clause is adapted for use in another document which does not contain such a provision all references to "regulation" should be considered and amended appropriately.

10 Paragraph (b) of the definition of "Bail-In Legislation" is optional and is not required for compliance with the article 55 Requirement.

instrument is to have effect as if a right had been exercised under it or to suspend any obligation in respect of that liability or any of the powers under that Bail-In Legislation that are related to or ancillary to any of those powers; and

(ii) any similar or analogous powers under that Bail-In Legislation].[11]"

Since the LMA Bail-In Recognition Clause shall be able to be used in agreements and documents with EEA Financial Institutions from various EEA countries with different Bail-In and Bail-In recognition regimes implemented in their national laws, the LMA Bail-In Recognition Clause refers to the so-called EU Bail-In Legislation Schedule (the EU Bail-In Legislation Schedule). In this schedule jurisdiction specific definitions of "Bail-In Legislations" and "Write-down and Conversion Powers" for every EEA country are set out. By using the EU Bail-In Legislation Schedule it shall be avoided that detailed descriptions of the relevant national implementing regimes would need to be included in the LMA Bail-In Recognition Clause.

The LMA reserves the right to update the EU Bail-In Legislation Schedule from time to time to reflect the enactment of new or amended national implementing regimes. The goal is that the EU Bail-In Legislation Schedule at any time reflects the then current versions national implementing regimes.

4) Bail-In Recogntion Clauses in Swiss Law Governed Agreements and Documents

a) Legal Nature

In a Swiss legal understanding, powers of insolvency authorities (such as EEA bank resolution authorities vested with Bail-In powers) pertain to public law and, consequently, are generally not subject to the discretion of the parties. The personal and geographical scope of (direct) application of official acts based on public law, in turn, is generally governed by the principle of territoriality (limiting the effects of such acts to the territory of the state whose authority enacted them). It appears at least questionable whether such scope is capable of being further defined or altered by way of agreement between private parties actually or potentially concerned by such acts.

As regards powers of foreign insolvency authorities in particular, the Swiss Federal Supreme Court traditionally declined to recognise the purported effects of their exercise where assets or counterparties located in Switzerland were concerned, outside the

11 Paragraph (b) of the definition of "Write-down and Conversion Powers" is optional and is not required for compliance with the Article 55 Requirement.

specific recognition procedures provided by statute (articles 166 ff. Swiss Federal Private International Law Act (PILA); article 37g Banking Act).[12]

Commercial contracts, on the other hand, are governed by the principle of freedom of contract. Both the governing law and their substantive contents may, within the boundaries of statutory law, be determined by the parties as they think fit (article 116 PILA; article 19 (1) Swiss Code of Obligations (CO)). Therefore, nothing prevents the parties to a particular contract from agreeing therein that their respective contractual rights and obligations shall, from time to time, be adjusted in such manner as to "mirror" the stated effect of any act taken by a foreign public authority (such as, for instance, an EEA bank resolution authority) under the public law of its jurisdiction. Such an agreement should, as a matter of Swiss law, generally be valid and effective as a matter of contract between the parties as long as the results do not go beyond what the parties could also have specifically agreed in their contract from the beginning, and that the boundaries of the prohibition of undertakings contrary to public order, common decency and the right of personality (articles 19 *et seq.* CO), including excessive restrictions to the use of a party's freedom (article 27 (2) of the Swiss Civil Code (CC)), are not exceeded.

These prohibitions are, in our view, not generally infringed upon by the mechanism of a Bail-In Recognition Clause (where its terms make it clear that it is purely in the nature described in the preceding paragraph), but could be considered relevant if in a particular instance an EEA bank resolution authority made a use of its Bail-In powers which, from a Swiss perspective, appears arbitrary, discriminatory, inequitable, or in any other manner an abuse of such powers, either in substance (*e.g.*, where arbitrary distinctions would be made between creditors of the same types of claims) or in respect of the procedure in which it is taken.[13]

The conclusion in favour of the enforceability, in principle, of appropriately defined Bail-In Recognition Clauses is supported by the fact that Swiss law itself requires Swiss banks and financial infrastructures to implement a mechanism of contractual recognition of the exercise of (Swiss) insolvency powers of a comparable nature: Pursuant to article 12 (2^{bis}) of the Banking Ordinance, Swiss banks need to "ensure that new contracts or amendments to existing contracts, which are subject to foreign law or provide

12 BGE 137 III 570 ff. E. 3.

13 A comparison may be made with the principle stipulated by the Federal Supreme Court that contractually agreed rights of one party to unilaterally change the contents of a contract, while not generally illicit, must be exercised equitably ("*nach billigem Ermessen*"; BGE 118 II 157 ff., E. 4 (b) (bb)).

for a foreign forum, are only entered into if the counterparty recognizes a stay of termination of contracts pursuant to art. 30a Banking Act", thereby referring to the power of the Swiss Financial Market Supervisory Authority FINMA (**FINMA**) under the Banking Act to suspend contractual termination rights as part of a reconstruction plan (and a similar duty applies to Swiss financial market infrastructures based on article 71 (2) of the Financial Market Infrastructure Act). Although these provisions govern a reciprocal rather than an analogous situation, it would appear inconsistent if Swiss law refused to recognize the effect of a contractual recognition clause where the exercise of foreign insolvency powers is concerned, while itself requiring such clauses to be entered in contracts concluded by Swiss banks to protect the effects of an insolvency power of the FINMA.

b) Drafting Options

Where the proposed wording of a specific proposed Bail-In Recognition Clause is ambiguous as to the nature of the non-EEA party's undertaking in the sense of the distinction described above (*i.e.*, as to whether such party is purporting to submit to a direct application of a potential official act under foreign public law, or is merely consenting to a potential adjustment of rights and obligations as a matter of contract between the parties), Swiss counsel may propose to add clarificatory language to the proposed model language which removes such ambiguity.

Such clarificatory language could, for example, take the following form (as an additional section added at the end of the model clause):

> *"The parties further agree that upon the taking of any Bail-In Action by a relevant Resolution Authority, any liability of a Party to another Party under these [Finance Documents] shall, as a matter of contract as between the Parties, be reduced, converted, cancelled, or suspended (and that any term of this [agreement] shall be varied) in such manner as it is expressed to be pursuant to such Bail-In Action."*

Provided, however, that where an agreement or debt instrument also contains contractual mechanisms for write-down or conversion of creditors' claims upon certain defined triggers outside of resolution (*e.g.*, if the borrower's or the issuer's capital ratio falls below a particular level), it should be clear that this contractual bail-in mechanism is distinct from the exercise of statutory bail-in by an EEA resolution authority and that there may be circumstances where both could apply consecutively.

5) Conclusion

EEA resolution authorities, as well as any other bank resolution authority, must have confidence that the exercise of resolution powers will be legally enforceable in relation to a financial institution's loss-absorbing capital resources. Where agreements or

instruments are governed by non-domestic laws or, as supposed by article 55 BRRD, non-EEA laws, an acceptable level of confidence can only be achieved where there are legal frameworks in place by which resolution actions imposed by the home regulator of an EEA Financial Institution can be recognized in other jurisdictions, such as non-EEA jurisdictions, promptly and with an adequate degree of predictability and certainty. Should there be no statutory regimes in place supporting the cross-border enforceability of such resolution actions, contractual recognition clauses are an adequate means to support the timely and adequate cross-border implementation of resolution actions.

From a Swiss law point of view, the inclusion of a Bail-In Recognition Clause in a Swiss law governed agreement or documents is in line with the principle of freedom of contract and, therefore, nothing seems to prevent the parties to a particular contract from agreeing that their respective contractual rights and obligations shall, from time to time, be adjusted in such manner as to "mirror" the stated effect of any act taken by a foreign public authority (such as, for instance, an EEA bank resolution authority). Subject to general legal reservations, a Bail-In Recognition Clause, should generally be valid and effective as a matter of contract between the parties.

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Revisited Notification Duty for Voting Rights Delegated on a Discretionary Basis

Reference: CapLaw-2016-45

Practical problems arising from the present notification duty for voting rights delegated on a discretionary basis caused FINMA to consult on a revision of this rule. If implemented, those persons who actually decide on how delegated voting rights are exercised will be subject to the notification duty and no longer the persons controlling either directly or indirectly a relevant legal entity to which voting rights were so delegated on a discretionary basis.

By Benjamin Leisinger

1) The Present Rule

Following a Swiss Supreme Court decision in 2013 that the notification duty for qualified participations in listed companies with respect to nominees under the former article 9(2) of the Stock Exchange Ordinance of the Financial Market Supervisory Authority FINMA (FINMA) had no sufficient legal basis in the (former) Stock Exchange Act, the legislator in 2016 explicitly introduced this notification duty in the Financial Market Infrastructure Act (FMIA) itself. The FMIA replaced the Stock Exchange Act in this subject matter of disclosure of shareholdings with respect to companies with registered office in Switzerland whose equity securities are listed in whole or in part in Switzerland, or companies with registered office abroad whose equity securities are mainly listed in whole or in part in Switzerland.

According to article 120(3) FMIA, anyone who has the ***discretionary power to exercise the voting rights*** associated with equity securities in accordance with article 120(1) FMIA is also subject to the notification duty to the listed company and the SIX Swiss Exchange, if the relevant thresholds are reached, fallen short of or exceeded. The implementing rule in article 10(2) of the Financial Market Infrastructure Ordinance of FINMA (FMIO-FINMA) in its current version states that if the voting rights are not exercised directly or indirectly by the beneficial owner, then article 120(3) FMIA applies and whoever has discretionary powers to exercise voting rights is also subject to the notification duty. In the case of legal entities, the person ***directly or indirectly controlling*** these legal entities is deemed to have the discretionary powers to exercise the voting rights delegated to the legal entity.

This present rule had been introduced because, in the consultation process, it was said to be easier to practically implement.

However, since the present rule actually entered into effect on 1 January 2016, practice has shown some ***difficulties in the implementation***. Most importantly, where certain individuals control a financial group but do not actually engage in its operations, there is a ***substantial burden*** on these individuals. This is contrary to the initial legislative intention underlying the implementing rule in the FMIO-FINMA to facilitate compliance with article 120(3) FMIA in practice.

Acknowledging this ***unintended effect***, FINMA now proposed a revised rule: According to the proposal to revise article 10(2) FMIO-FINMA, the party (individual or legal entity) ***actually entrusted with the exercise of the voting rights*** would be subject to an independent notification duty if the thresholds are met. Here, the ***factual circumstances*** are relevant rather than the mere formal delegation of the voting rights to a specific person or entity. For example, according to the explanatory note of FINMA to the proposal, where a certain individual instructs the various asset managers in the financial group or in the asset management firm to whom the voting rights are

formally delegated on how the discretionary voting are to be exercised, this person would be subject the revised notification duty. This may well be a senior manager. At least FINMA clarified that, ***as a general rule*** and if the factual circumstances are not different, ***the legal entity to which the voting rights are delegated on a discretionary basis*** would have to notify and not, *e.g.*, the individual who actually votes on a shareholders' meeting in its capacity as an employee or business organ of the asset managing company.

As to the question of when discretionary voting exists, the explanatory text of FINMA states that where instructions are given by the shareholders (or beneficial owners) and there is no free discretion of the, *e.g.*, asset manager with respect to the exercise of the voting rights, no independent notification duty exists for the qualified participation.

The consultation period for this revision ended on 3 October 2016 and the revised rule ***is expected to enter into effect in the beginning of 2017*** (1 February 2017 was the proposed date). It is, however, also proposed that there will be a ***transitory period*** of three months until when the market participants (in particular asset managers) can notify in accordance with the new system. This transitory period is intended to provide for enough time so that the internal systems and control mechanisms can be adjusted. ***At the latest on the last date of the transitory period*** (30 April 2017 as proposed), the notifications must be made in line with the new rule. This notably applies irrespective of any new transactions.

In light of this development and the (administrative criminal law) ***consequences a breach of the notification duties*** can have, market participants to whom shareholders delegate voting rights on a discretionary basis are well-advised to keep an eye on the final rule and its entry into effect, to adjust their internal systems and reporting accordingly, and to notify the listed company and the SIX Swiss Exchange on the last day of the transitory period at the very latest, if the relevant thresholds of article 120(1) FMIA are met.

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FINMA Revisits Corporate Governance Guidelines for Banks

Reference: CapLaw-2016-46

On 1 November 2016, the Swiss Financial Market Supervisory Authority FINMA (FINMA) announced its publication of a new circular relating to the supervisory requirements for banks, specifically with regards to corporate governance, internal control systems and risk management. At the same time, FINMA published amendments to existing circulars in relation to remuneration schemes and operational risks for institutions. These combined new and modified requirements incorporate the latest international corporate governance standards as well as post-financial crisis risk management conclusions.

By Philippe Weber / Christina Del Vecchio

1) Introduction

On 1 November 2016, FINMA published its new circular 2017/1 entitled "Corporate governance – banks" relating to the supervisory requirements for banks in connection with corporate governance, internal control systems and risk management. The new circular further consolidates the provisions of circular 2008/24 ("Supervision and internal control - banks"), the associated FAQ and requirements defined in other circulars. On the same date, FINMA published amendments to existing circulars in relation to remuneration schemes and operational risks for institutions. These combined new and modified requirements incorporate fundamental international developments in corporate governance as well as risk management conclusions following the global financial crisis. The new circular and the amendments to existing circulars will enter into force on 1 July 2017.

The press release and the accompanying new and amended circulars can be accessed directly on FINMA's website at https://www.finma.ch/de/news/2016/11/20161101-mm-rs-corporate-governance-bei-banken/.

2) Corporate Governance Circular: Overview of Key Provisions

The new FINMA circular follows a principles-based approach to the regulation and oversight of supervised banks and other financial groups (collectively, "institutions"). Furthermore, it expressly recognizes the principle of proportionality in the application of the supervisory requirements. Through a principle-based approach, institutions will have a certain degree of discretion in how to implement the circular's requirements in accordance with the specific needs, business model and risks that each institution's businesses and operations face.

In addition, the circular provides specific guidance on the requirements for corporate governance, internal control systems and risk management, each briefly summarized below. Importantly, the circular does distinguish in certain instances between the requirements that apply to all institutions and those that only apply to larger (e.g. FINMA supervisory categories 1-3, but not 4-5) or systemically relevant institutions. Nevertheless it remains possible in certain circumstances to apply for exemptions from FINMA.

a) Corporate Governance

In essence, the new circular provides for a "checks and balances" approach to the structure of an institution's board of directors and executive management and sets out the division of responsibilities between the board of directors and the executive management in greater detail. The circular also revisits the requirements for board members, setting certain minimum requirements (including with regards to independence, but not with regards to diversity).

FINMA is also separately considering amendments and extensions of the corporate governance disclosure requirements for all banks (FINMA Circular 2016/1 Disclosure – Banks). It is anticipated that this revised circular will be released in December 2016.

b) Internal Control Systems

In the new circular, FINMA further outlines the minimum requirements for the organization of internal control systems at institutions. Furthermore, FINMA notes that effective internal control systems need to focus on both risk management and compliance, each tailored for the respective institution's size and complexity. The new circular also outlines the parameters and requirements for an institution's internal audit function.

c) Risk Management

All supervised institutions will also need to develop a risk management framework that is approved by the institution's board of directors. In addition, all institutions included in FINMA supervisory categories 1 through 3 will need to appoint a chief risk officer that oversees risk management matters. However, the chief risk officer will also be permitted to oversee other non-profit generating functions, such as compliance. While smaller institutions will be permitted to have combined audit and risk committees, larger institutions will need to have separate audit and risk committees.

3) Amendments to existing FINMA Circulars: Remuneration Schemes and Operational Risks

On 1 November 2016, FINMA also noted the amendments to the circulars relating to remuneration schemes (2010/1 FINMA Circular Remuneration Schemes) and the assessment of operational risks at banks (2008/21 FINMA Circular Operational Risks Banks).

The key amendments to the FINMA circular relating to remuneration schemes include (i) the extension of the circular's application in full to banks, securities dealers, financial groups and conglomerates, insurance companies, insurance groups and conglomerates that are subject to Swiss financial market supervision (subject to equity capital thresholds) and (ii) the explicit prohibition of hedging transactions that run counter to the effectiveness of the elements of a firm's remuneration system.

The revisions to the circular addressing operational risks at banks introduces new guidelines on the management of information technology, including client data, and cyber risks and also incorporates principles relating to legal and reputational risks in cross-border financial services. In essence, the amendments are intended to better reflect the diversity of operational risks that the financial services industry currently faces.

4) Outlook and Conclusion

Following the financial crisis, global regulators have revisited the regulation and oversight of financial markets and institutions, paying particular close attention to corporate governance and effective risk management. Indeed, FINMA's most recent contributions announced on 1 November 2016 are consistent with this global effort. Notably, while the circular relating to corporate governance comes into force on 1 July 2017, institutions will, subject to certain exceptions, have a transitional period of one year to comply with newly imposed requirements.

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A (Legal) Perspective on Blockchain

Reference: CapLaw-2016-47

Before the background of the growing importance of financial technologies (FinTech), blockchain technology is gaining more and more of the public spotlight. Given that the existing legal framework has been designed for the traditional financial services industry rather than for technology-based business models, both regulators and legislators are facing the challenge of potentially adapting the existing regulation to the new needs of blockchain providers. In this context, a number of related regulatory and legal issues may arise; they are summarized in a nutshell in the present article.

By Luca Bianchi / Edi Bollinger

1) Introduction

FinTech has received a continuously increasing interest from entrepreneurs, banks, regulators, and legislators. In the past, from a regulatory perspective the attention has frequently been lying on virtual currencies (*e.g.*, bitcoins). In the last three years, however, the focus has shifted from bitcoins to its underlying technology – the blockchain. Blockchain technology may have the potential to disrupt existing financial services business models. Its significance is often compared with revolutionary historical milestones such as the introduction of the internet. Substantial investments by banks and venture capitalists emphasize the hopes that many people in the financial industry have in new blockchain business models.

After giving a short overview on blockchain technology, this article aims to briefly flag some of the related regulatory and legal key issues.

2) A Primer on Blockchain Technology

a) What is a Blockchain?

A blockchain can be described as a digitally distributed, decentralized transaction ledger, which records the assets that are held, and the transactions that are entered into, by investors, thereby allowing the transfer of a broad range of assets or values between parties. A blockchain is composed of numerous blocks that, for their part, store information and consist of the following key components: a message (*e.g.*, a transaction including its content such as instructions or the parties involved), a block header comprising metadata (*e.g.*, reference back to the previous block), a time stamp, and a hash (the entire process broken down into a single number).

For a transaction, blockchain software converts the respective information into a data block and encrypts it. The block is then sent to all participating members of this peer-to-peer network ("miners") who verify the transaction by completing cryptographic computations. The resulting competition – the successful miner may be rewarded with

virtual money – aims to ensure the functioning of this validation process, *i.e.*, of the blockchain technology per se. After every positive validation, which takes only about ten minutes, a new block is added to the front of the other blocks – the blockchain is growing.

Blockchain technology providers aim to benefit from several special characteristics of the blockchain technology:

- By distributing the blockchain across the miners, each of them owns a copy of the entire blockchain. Due to this decentralization, neither the validation nor the authentication or processing of transactions requires central authorities or intermediaries such as traditional banks or securities dealers.

- To verify transactions, *i.e.*, to add new blocks, the technology requires widespread consensus (usually more than 50%) among the miners. This mechanism also aims to increase the security and stability of the system.

- Its continuous growth process shall ensure irrevocability and immutability. Modifications should only be possible to the extent they are foreseen in the blockchain rules.

- The time stamp allows information to be tracked and verified.

- Its encryption allows tracing transactions back to (anonymized) identities but at the same time maintains confidentiality of the content and the participants. Blockchain, however, also provides transparency by enabling access to all previous blocks, *i.e.*, to the complete transaction history.

- Blockchains can be public ("unpermissioned") or private ("permissioned"). Whereas data on the former is fully public and can be read or written by anyone (*e.g.*, bitcoin), permissioned blockchains may only be updated by a limited number of participants who are known in advance.

Finally, a separate note should be made in relation to smart contracts. A smart contract consists of pre-negotiated contract terms that are converted into the code of a programming language. Based on pre-programmed conditions, smart contracts are automatically executed once the defined contractual conditions have been fulfilled. Blockchain technology may be used to record trigger events and to verify the smart contract's execution.

b) Potential to Transform Industries

Presumably, blockchain technology will have its main function in the financial services industry. Besides its application as a validation device, it could be used as a digital ledger for (cross-border) payments, offerings of securities or other assets, as well as

the clearing and settlement of securities or other assets. Blockchain technology may, potentially, also be utilized for more efficient processing of interbank trading, trade financing or the processing of claims or illiquid assets (to the extent permitted by legal form requirements). Hence, blockchain technology is not only expected to speed up work and considerably reduce costs, it could also partially substitute (central) banks, clearing houses, or depositaries.

In addition, there are many other sectors that might profit from blockchain technology. Possible applications range from intellectual property (*e.g.*, music or entertainment), property and real estate, consumer and energy markets to life sciences and healthcare. It goes without saying that governments or agencies may benefit too (with regard to transparency, *e.g.*, regulatory compliance tracking and reporting, or in terms of pensions or e-voting).

3) Key Issues

a) Regulatory Aspects

In Switzerland, the adaption of financial markets regulation to FinTech has entailed several (de)regulatory and legislative developments, of which the possibility of a regulatory sandbox deserves particular mention (see *CapLaw-2016-31*). However, as of today, many blockchain technology-based business models may be subject to supervisory and/or regulatory licensing requirements and approvals:

– The Financial Market Infrastructure Act (FMIA) may request a regulatory license if the specific business comprises either a securities settlement system, a trade depository, a digital payment system, or a transaction registry; certain business models might even be qualified as a stock exchange (and trigger respective licensing duties).

– The Banking Act (BA) can, potentially, apply to virtual currencies-related trading activities. Thus, a banking license may be required for financial intermediation (*e.g.*, accepting virtual currencies from customers or managing virtual currencies-linked accounts).

– Under the Stock Exchanges and Securities Trading Act (SESTA) securities dealers, or blockchain providers that qualify as such, require a regulatory license as well.

– Besides, financial intermediation and the operation of financial market infrastructures fall in the scope of the Anti-Money Laundering Act (AMLA). Also, the duties of care under the revised anti-money laundering (AML)-regulations apply to virtual currencies.

– The Financial Services Act (FIDLEG) – which will enter into force earliest in 2018 – will contain further regulatory requirements and obstacles that are relevant for blockchain providers.

Furthermore, a new FinTech regulation shall be implemented in Switzerland. It will, presumably, comprise specific regulatory amendments, the sandbox, as well as a new FinTech license (see next CapLaw edition for further details).

b) Further (Selected) Legal Issues

Additional legal problems may occur in relation to data protection: Despite the encryption of any data – particularly regarding permissionless blockchains – the risk of tracing identities always remains (*e.g.,* via quantum computing). At the same time, however, anonymity might cause problems for both government authorities and private operators in terms of counterterrorism, Know your Customer (KYC)-rules or AML-regulations.

With regard to dispute resolution the following questions arise. What are the legal implications of coding errors? In case of a breach of contract, may legal redress be sought in court and, if yes, how can contracting parties identify their anonymized counterparty? Which (central) authority is deciding disputes and – given the blockchain's immutability – which (retroactive) implications would jurisdictional or regulatory interventions have (*i.e.*, enforceability)?

Smart contracts are particularly challenging with respect to contract law. Will they be regarded as legally binding without an identified counterparty? Can these contracts be void due to a lack of legal capacity, duress, or misapprehension? Also, with the exception of intermediated securities, the Swiss Code of Obligations (CO) still requires written form to transfer claims or book-entry securities.

4) Conclusion and Outlook

Despite the number of potentially applicable laws, blockchain technology is still not adequately regulated. *Prima facie*, implementing new FinTech regulations appears to be a promising first step in order to increase the attractiveness of Switzerland as a domicile of blockchain companies.

In the long run, however, integrating blockchain technology into an adequate legal and regulatory framework is inevitable. In particular, with regard to the subject of regulation, the type of blockchain is crucial. In a permissioned blockchain system, regulating its proprietor (via legal code) might be easiest. In an unpermissioned system without a formally responsible legal entity, however, responsible authorities might rather regulate the respective business (*e.g.*, exchanges or wallet providers) by applying regulation through technical code, define the blockchain's rules, or, most likely, regulate through a combination of both legal and technical code.

Furthermore, most blockchain transactions involve a certain amount of currency. With regard to the objects of regulation this could be addressed by specifically regulating virtual currencies. Legislators might therefore consider issuing special licenses for companies dealing with virtual currencies. However, legal barriers for blockchain should generally be reduced in order to allow a new and promising industry to further develop.

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30. Forum Financial Market Regulation – Common Ownership, Competition, and Top Management Incentives

Thursday, 1 December 2016, University Zurich, Zurich

http://www.finreg.uzh.ch/dam/jcr:121b4e38-548c-4a46-bf3a-000ae62adfeb/FFEderer30_Invitation.pdf

FinSA and FinIA (FIDLEG und FINIG)

Friday, 2 December 2016, SIX Convention Point, Zurich

https://www.dike.ch/image/data/Veranstaltungen/GesKR_Tagung_FIDLEG_FINIG_2016_Programm.pdf

Zukunft Finanzplatz Schweiz: Wie wird die Schweiz zum Asset Management Platz?

Friday, 13 January 2017, Weiterbildungszentrum Holzweid (WBZ-HSG), St. Gallen

https://hsgalumni.ch/de/finanzplatz/programm-2017/