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Finance for your clients: Harmonisation of Capital Markets

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National Report of Switzerland

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1. **Briefly describe the level of integration of the capital markets at the infra-national, national and supra-national levels.**

Switzerland is not part of the European Union (EU) and therefore, not required to implement the directives and regulations issued by the legislative bodies of the EU. However, in order to maintain the access of its financial market infrastructures, institutions and service providers to the European capital markets, Switzerland strives to keep in pace with European regulatory standards.

In this context, Swiss capital markets regulation has recently undergone the most important revision since the Federal Act on Stock Exchanges and Securities Trading (SESTA) was enacted back in 1995 with the entry into force on 1 January 2016 of the Financial Market Infrastructure Act (FMIA) and its implementing ordinance, the Financial Market Infrastructure Ordinance (FMIO). Further changes concern the National Bank Act and Ordinance and the issue of the new Financial Market Infrastructure Ordinance-FINMA, which contain the implementing regulations for the financial market infrastructures that are under the supervision of the Swiss National Bank (SNB) and the Swiss Financial Markets Supervisory Authority FINMA (such as, for example, securities dealers) respectively.

The goal was to implement rules for financial market infrastructures that are consistent with the current international standards. Therefore, the FMIA and FMIO contain the regulatory requirements for the operation of financial market infrastructures such as stock exchanges, multilateral trading facilities, central counterparties, central securities depositories, transaction registers and payment systems which, in large parts, mimic EU regulations such as EMIR. They also regulate the recognition of foreign financial market infrastructures. In addition, they set out all rules that apply in connection with trading in securities and – for the first time in Switzerland – derivatives for all financial market participants, including the criminal and administrative sanctions on insider trading and market manipulation.

An extensive list of transitional periods is set out in the FMIO with regard to the implementation of the different obligations of the financial market infrastructures, some of which, as the case may be, may be extended in accordance with "foreign legislative developments", read: if the implementation of the relevant EU directives should, for some reason, be delayed.

2. **Which measures have been adopted (or are foreseen) in your jurisdiction to support access to finance by small and medium sized enterprises ("SMEs")? Measures might include (i) supporting venture capital and equity financing; (ii) lowering information barriers; (iii) enhancing access to public markets; (iv) supporting equity financing; (v) facilitating infrastructure investment; and/or (vi) promoting innovative forms of corporate financing.**

In Switzerland, there are next to no direct public subsidies for start-ups or later stage SMEs. One of the rare exceptions on federal level is the Federal Foundation for the Promotion of the Swiss Economy which grants seed money in the form of non-interest bearing loans up to a maximum amount of CHF 150'000.

The Federal government further supports surety cooperatives which grant securities to banks for lending money to certain companies. This measure is mostly limited to certain branches of activity such as e.g. the hotel trade.

Further measures promoting economic activity comprise possible tax relief or exemptions, which are, however, only available for a very small number of ventures. A temporary Federal act offering tax relief to venture capital companies which was adopted in 2000 had a very limited success and expired in 2010.

Another form of direct help that entrepreneurs can expect from the government are certain internet platforms providing forms, templates and checklists for the establishment of a company and the necessary registrations with the competent social security and tax authorities as well as the commercial register.

Some of the cantons of Switzerland have similar tools with which they support the establishment or financing of companies in their territory. Finally, universities, and in particular the Federal polytechnic universities ETH in Zurich and EPFL in Lausanne, may offer further help in the form of incubation centres for spin-offs emerging from these institutions.

However, in almost all cases, these measures are at the full discretion of the involved authorities and schools.

On the legislative level, it should be noted that the draft of a new Federal Act on Financial Services (FinSA) is currently being discussed in the Swiss Parliament. This act, if it passes in its current form, will contain certain exemptions from the obligation to issue a prospectus for public placements of securities. These exemptions would considerably facilitate crowd-investing which is, at the moment, not attractive in Switzerland due to the generally applicable prospectus duties for public placements.

3. **Has your jurisdiction adopted (or are there any trends indicating that may do so in the future) any measures to remove barriers to cross-border investment? Measures could include (i) improving market infrastructure; (ii) fostering convergence of insolvency proceedings; (iii) removing cross-border tax barriers; (iv) strengthening supervisory convergence.**

As set out under question 1 above, it is paramount for Switzerland to keep its legislation in line with foreign capital markets, in particular the European market, in order to keep unrestricted access to this important market for both Swiss financial institutions and Swiss investors willing to invest in these foreign markets. On the other hand, the Swiss rules aim at enabling the access of foreign investors seeking to invest in Switzerland or subscribe in Swiss financial instruments. In all its endeavours, the Swiss Parliament is torn between facilitating investment and protecting other interests. Here are a few examples:

As of 30 June 2015 important changes were made to the legislation surrounding AML-prevention on a corporate law level. The main requirement is that each company must identify the beneficial owners acquiring a controlling stake of 25% or more of the votes in the company. This requirement shall ensure GAFI-conformity of Swiss entities, without which the barriers of privately held Swiss entities to do business abroad may have been restricted going forward. Obviously, at the same time, this requirement might put off investors wishing to remain anonymous.

As mentioned above, strong emphasis is put on creating a similar level of investor protection as in the EU to set the basis for a future potential passporting of services and products into and from Europe. Switzerland is therefore preparing the Federal Act on Financial Services (FinSA) which shall adopt many elements known in Europe as MiFID II-legislation. Whereas under the current regime, the distribution of foreign collective investment schemes in or from Switzerland is subject to a FINMA license, this will no longer be the case under the FinSA. However, all providers of cross-border financial services will then be required to register in Switzerland.

Whereas it is possible for foreigners to invest in Swiss real property used for business purposes, it is, as a general rule, not possible to invest in residential premises. There are exceptions for investments in listed real estate investment companies. However, the Zeitgeist in Switzerland is not favourable for further alleviations of these restrictions. Quite to the contrary: There have been proposals to cancel the existing exemptions as of late and to also include commercial property into the scope of the law.

4. Have specific measures been adopted (or are foreseen) to increase choice and competition in cross-border retail financial services and/or insurance?

Switzerland has traditionally been open for inbound cross-border retail financial services and regulation (if any) mostly targeted Swiss based financial service providers providing outbound cross-border financial services.

For example, Swiss financial intermediaries are subject to strict anti-money laundering regulations requiring them to perform know your customer checks and alert the competent authorities if they suspect funds to be of criminal origin.

Further, Swiss banks have been under harsh criticism from abroad for accepting funds that were not declared to the competent foreign tax authorities. Such behaviour, even if not directly violating Swiss law back then, would now be a reason for FINMA to strongly question the proper conduct requirements applicable to prudentially supervised financial institutions and, since the full implementation of the recommendations of the Groupe d'action financière (GAFI), in effect since 1 January 2016, serious tax offences are deemed to be a predicate crime for money laundering.

From an inbound perspective, it is still relatively easy for foreign financial service providers to access the Swiss market, depending on the kind of services being offered. In most cases, foreign financial service providers only attract the focus of Swiss regulatory authorities when they establish a formal or factual physical presence in Switzerland. Exceptions apply in particular with regard to the distribution of foreign collective investment schemes in Switzerland, which, depending on the targeted investors, need to be approved by FINMA or at least appoint a Swiss representative and paying agent. The distributor itself needs to be authorised in Switzerland or adequately supervised in its home jurisdiction.

As set out in question 3 above, the draft Federal Act on Financial Services (FinSA) will change that insofar as all inbound foreign financial service providers, or more precisely, the individuals working for these providers having direct contact to Swiss customers, will have to register in Switzerland in order to offer/perform their services here. Registration will be subject to certain conditions such as proper training, a professional liability insurance (or other securities) and the attachment to an ombudsperson institution.

5. Capital markets harmonisation aims to facilitate companies' access to finance, particularly for SMEs by promoting more diversified funding channels that are complementary to bank financing. Is non-bank financing significant in your country? Please consider the role of private equity, venture capital, alternative finance, loan-originating funds, etc.

According to the European Private Equity and Venture Capital Association (EVCA), all private equity investments in Swiss portfolio companies in 2014 represented 0.184% of the GDP, which is below European average. When it comes to venture capital investments, Switzerland ranks 5th with investments in

2014 in the amount of 0.031% of the GDP, behind Sweden, Finland, Ireland and the UK.

The comparison may not be wholly compelling, but to put these figures into perspective, according to the business intelligence services provider SNL, the total commitments of the two globally systemically relevant banking groups of Switzerland, UBS and Credit Suisse, represented 325% of the Swiss GDP in 2014.

According to the "Whitebook" of the Swiss Crowdfunding Association, in 2014, CHF 15.8 million were raised by Swiss crowdfunding platforms, making Switzerland a negligible quantity in this sector.

6. While loans traditionally represent the bulk of the banking assets, most financial entities also invest in capital markets. Do financial institutions in your jurisdiction invest highly in the capital markets? Are bonds and equity investments a significant proportion of the assets of financial institutions in your jurisdiction?

Investment banking is not a traditional pillar of Swiss banking. Since the crisis, ever stricter capital requirements (Basel III with a so-called "Swiss finish") pushed banks further away from trading-related activities as it is becoming more and more costly to keep risky assets on balance sheets.

On the other hand, according to the "White Paper" on the future of investment banking issued by the Swiss Finance Institute, banks have been increasingly financing themselves by issuing bonds: Domestic debt has increased from roughly CHF 12 billion in 2004 to about CHF 40 billion in 2014. UBS, Credit Suisse and the Zurich Cantonal Bank underwrite about 60% of all domestic transactions together, and another 30% is underwritten by cantonal banks from other Swiss cantons. Raiffeisen Schweiz Genossenschaft operates about 5% of the market.

7. Harmonisation requires standardisation, particularly in terms of credit information. Is SME credit information easily available in your jurisdiction? Is your jurisdiction adopting any measures to boost availability and standardisation of SME credit information at the national and supra-national levels?

There are a few publicly available sources of information in Switzerland which allow to get a first impression of the financial abilities of a non-listed company:

The register of commerce is on-line and available for free. It lists all relevant corporate information for a high level corporate due diligence such as share capital, company purpose, authorised signatories etc. Certain transactions such as mergers, asset transfers or capital increases are also visible whereas other important information, e.g. the names of the shareholders in a stock corporation is not. Still, it is a useful tool and constantly updated.

The documents underlying any entry in the commercial register are also publicly available. We are talking about the articles of association, deed of incorporation, certain shareholders' and board resolutions in connection with the above mentioned transactions and even merger agreements, subscription forms for new shares etc., but again, some important documents such as SPAs or shareholders' agreements, are not, because they do not have to be handed in to the register.

Further, what would probably be the most important credit information, the financial statements, are not publicly available.

On the other hand, upon documentation of interest, it is possible to obtain excerpts from the debt enforcement and bankruptcy authorities showing if and what debt enforcement proceedings are pending against an individual or a company, which is helpful when it comes to established companies whereas for start-ups it will not be very useful.

It is also possible to obtain information about landowners from the land register, some with and some without documentation of interest. If a company owns land, the excerpt will tell you at what level it is encumbered with mortgages or other charges and liens.

Finally, there is a certain number of non-governmental credit agencies that offer information about the creditworthiness of companies and individuals against payment. They obtain their information on one hand from the evaluation of the above mentioned publicly available sources and on the other hand from certain branch internal sources and registers to which the public has no access.

8. Is there any recent or proposed legislation in your jurisdiction aimed to establish a framework for simple, transparent and standardised securitisation? Examples might include measures (i) to simplify prospectus requirements; (ii) to increase/decrease the information required to be provided to investors before making an investment decision; or (iii) to reduce barriers for smaller firms to access capital markets. If there have been no recent developments, please describe the current situation of securitisation in your jurisdiction.

The above mentioned draft Federal Act on Financial Services (FinSA) intends to create a level playing field for all financial services. As far as securitisation is concerned, FinSA will subject all securities to identical prospectus requirements whereas up to now, there are different requirements for different securities such as shares, bonds and derivatives. This might remind European lawyers of the EU Prospectus Directive and indeed, this part of FinSA is inspired by this directive.

What is more important for companies thinking about acceding the capital markets, the draft FinSA provides for certain exemptions from the onerous prospectus requirements, whereas under the current laws, there are no such exemptions for public placements. If FinSA passes in its proposed form, public placements will be exempt from the prospectus requirement if they:

a) target professional customers only;
b) target less than 150 private customers;
c) target investors acquiring securities in the amount of at least CHF 100'000;
d) have a minimum denomination of CHF 100'000 per unit;
e) do not exceed CHF 100'000 within a subscription period of 12 months.

Whereas the exemptions under letters (b) and (e) will be particularly beneficial for start-ups seeking (crowd-)investors, the exemptions under letters (c) and (d) are based on the rationale that investors that are in a position to invest large amounts will be professional or institutional investors with enough expertise to assess the investment without the help of a prospectus.

FinSA provides that the Federal Council may introduce further exemptions for companies not exceeding certain thresholds in balance sheet totals, turnover and FTEs, and certain kinds of securities. It is to be expected that these exemptions will be in line with European regulations. Once implemented, they would reduce the barriers to accede the capital markets for a huge number of SMEs.

9. In your experience as a banking/capital markets lawyer, have you detected in your jurisdiction any unnecessary regulatory burdens, interactions, inconsistencies and/or rules that have unintended consequences which threaten the ability of the companies to finance themselves?

The existing financial markets legislation in Switzerland has grown over decades, beginning with the Federal Banking Act of 1934. Over the years, new laws introduced prospectus requirements and regulations for securities dealers, stock exchanges, collective investment schemes and book entry securities, to name a few. This un-coordinated development has indeed lead to certain inconsistencies and often, new regulations were passed upon pressure from outside and did sometimes take over foreign rules that were ill-fitted to the Swiss legal landscape.

The remedy proposed by the Swiss legislative bodies is the new financial market architecture based on three new laws that aim to bring Switzerland in line with European financial market laws, create a level playing field for the actors on the financial markets and, at the same time, to improve investor protection. This is the ambitious purpose of the Financial Market Infrastructure Act (FMIA), partially effective since 1 January 2016, the Financial Services Act (FinSA) and the Financial Institutions Act, which are currently discussed by the Swiss Parliament and should become effective at the same time as MiFID II and MIFIR in the EU.

In an ideal world, this new legal framework will eliminate some of the existing inconsistencies. It remains to be seen whether intended and unintended consequences of the new regulations will be beneficial for some or all of the players on the capital markets.

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