

## An introduction to the Swiss legal system

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Switzerland's economy derives half of its revenues from export. It is typically said that Swiss people earn one Swiss franc out of two in a foreign country. Very large multinationals are also headquartered in Switzerland.

This interaction with foreign economies reflects on Swiss legislation. The openness of its economy has prompted Switzerland to build up a sophisticated level of international treaties with its business partners, particularly the European Union, e.g., through the famous bilateral agreements, whereby Switzerland has implemented into Swiss law the four fundamental freedoms of the European Union. This nexus of international treaties adds up to the complexity of Swiss legal system. Despite being a small country of central Europe with little more than 8 million inhabitants, Switzerland is a federal state that includes 26 internal (cantonal) jurisdictions and tax regimes, in addition to federal laws and taxation. The parties carrying out transactions in Switzerland must, thus, take into consideration several levels of legislation and taxation, albeit most of the substantive rules are now set at federal level.

In order to maintain its position as one of the most powerful financial centres in the world, notably for wealth management, Switzerland is positioning itself as a hub for new businesses that are developing innovative financial technology models (so-called fintech). The Swiss Parliament also adopted in June 2018, after long preparatory process and discussions, two new statutes that will reshuffle the regulatory framework applicable to financial services providers, the Swiss Financial Services Act (FinSA) and the Swiss Financial Institutions Act (FinIA). These two statutes were part of a legislative package called FidLeg, that was designed to increase the level of equivalence of Swiss financial regulations up to an equivalent of the EU standards (MiFID, Prospectus Directive, PRIIPS regulation and EMIR). The Swiss Financial Market Infrastructure Act (FMIA), equivalent to EMIR, already came into force on January 1, 2016. Finally, after Switzerland has recognised foreign law trusts and become a signatory to the Hague Convention on the Law Applicable to Trusts and their Recognition, the creation of trusts governed by Swiss law is now envisaged.

### Loan market

The Swiss loan market is increasingly moving to a borrower-friendly context. In a jurisdiction that is traditionally very favourable to lending banks, it is no longer exceptional to see borrowers imposing their own documentation. This does not necessarily improve the quality of the loan documents (especially that of first drafts...), nor shorten the time needed for negotiations between lenders and borrowers, but it is clearly a trend that cannot be ignored.

Recent financings take into consideration environmental

sustainability principles. There is a growing appetite from traditional and new investors for fund raising transactions made in accordance with these principles. This enables Swiss issuers with significant financing needs to expand their target investor base.

### Securitisation

Currently there is no specific legislative framework for securitisation in Switzerland. The relevant legal issues are generally governed by the Swiss Code of Obligations, including with respect to assignments of receivables, transfers of contracts and the formalities relating to the incorporation special purpose vehicles, by the Swiss Civil Code in relation to real estate and collateralisation aspects, and by certain specific laws such as the Consumer Credit Act for leasing and credit card arrangements with private customers. The recognition of the concept of trust under Swiss insolvency laws also facilitates the implementation of transaction structures involving the holding of security through a trustee.

Following a change in the general tax framework a few years ago, the number of public securitisation transactions listed in Switzerland has increased, particularly in the credit card and auto lease sector. Privately-placed securitisations of commodity trade receivables are quite common, as Geneva is a leading centre for commodity trading. Finally, as the Swiss real estate market continues to be very attractive, residential mortgage securitisations are expected to become more frequent.

### FidLeg

Under the current regulatory environment, only banks, securities dealers, insurance companies and institutions managing or distributing collective investment schemes are subject to prudential supervision by the Swiss Financial Market Supervisory Authority (FINMA). Financial intermediaries of significant importance for the wealth and asset management industries are currently regulated under the Swiss Money Laundering Act (MLA) exclusively. The MLA provides for know-your-customer rules and transposes into Swiss law the main recommendations of the Financial Action Task Force on Money Laundering, of which Switzerland is a member. Such financial intermediaries, which include independent investment managers and advisors, are not required to register with the FINMA for MLA purposes; they may seek an affiliation with self-regulatory organisations themselves subject to FINMA supervision. Such financial intermediaries by contrast are not subject to prudential supervision for the services they render to their clients, although they are competing with regulated entities, such as banks and securities dealers, for the similar services they offer to their clients. FidLeg, through the FinSA, the FinIA and their implementing regulations should, therefore, create a level playing

field for Swiss financial services providers. That said, although the obligations, particularly the disclosure duties, to which Swiss financial services institutions will all be subject will be generally identical, the supervisory regime will differ: newly regulated intermediaries will be required to apply for a licence from the FINMA, but the day-to-day supervision will be left to self-regulatory bodies.

In addition, following the coming into force of the FinSA the issuance of Swiss securities will be subject to new prospectus rules and a liability regime closer to the regime prevailing under the Prospectus Directive.

The FinSA and the FinIA are expected to come into force at the beginning of 2020.

### **Fintech**

The Swiss Parliament approved in June 2018 an amendment to the Swiss banking legislation that will result in the creation of a new licence for companies that accept public deposits, but that do not use such deposits to finance investments or credit transactions, provided that such deposits do not bear interest and do not amount to more than CHF100 million in aggregate. Corresponding updates to the banking regulations are in the process of being implemented. This adaptation of the banking regulatory framework had started with the alleviation by the Federal Council (the federal government), in August 2017, of the restrictions applicable to the raising of funds by Swiss enterprises, up to a threshold of CHF1 million, from more than 20 depositors, with a view to facilitating the financing of new businesses from crowdfunding. The ability of Swiss undertakings to hold funds in a settlement account without triggering bank licensing requirements has also been extended through the creation of a 60 days' safe harbor period.

Notwithstanding these regulatory changes, the position of Swiss authorities towards financial innovation reflects the usual neutrality of Switzerland and its laws *vis-à-vis* technological evolution. Hence, the FINMA has taken measures and published guidance indicating that the raising of funds via initial coins offerings remains subject to the traditional legislative framework. If the tokens or other instruments subscribed to by investors under ICOs qualify as securities from a Swiss law perspective, the licensing requirements relating to the entities marketing or underwriting the issuance remain fully applicable, as well as the restrictions to the public offering of securities.

### **Transactions**

Amongst the significant financing transactions made recently on the Swiss market, the Canton of Geneva did in November 2017 the first issuance of green bonds, in accordance with the ICMA Green Bond Principles, by a Swiss public institution on the Swiss market (two separate issues of notes of CHF420 and CHF200 million, respectively).

In addition, Bär & Karrer advised SPS on the placement of CHF300 million senior convertible bonds and on the placement of CHF450 million Tier 1 bonds to fund the acquisition of Notenstein La Roche.