Non-public offerings in Switzerland – an endangered species?

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Introduction

If everything goes according to plan, on 1 January 2020 Switzerland will have successfully overhauled its financial market legislation with the entry into force of the Financial Services Act (FinSA) and the Financial Institutions Act.**(1)**

An important element of the overhaul is the introduction of a new comprehensive and harmonised prospectus regime, which aims to create a level playing field for all types of financial instrument (eg, shares, bonds and structured products) and with international standards – in particular, the applicable EU prospectus regime that itself was also the subject of a revision with the enactment of the Prospectus Regulation on 14 June 2017, coming into full effect across the European Union from 21 July 2019.

The new Swiss prospectus regime will usher in a new era in Swiss capital market regulation. In addition to harmonising disclosure requirements for different types of securities and the codification of the duty to publish a prospectus for primary and secondary public offerings, it will introduce the concept of *ex ante* prospectus approval.

With the introduction of the new prospectus regime, Switzerland is also aiming to introduce a modern private placement regime modelled on the EU regime that so far has been codified only in a fragmented manner in Switzerland. However, this article draws attention to a technical detail that could prove to have a significant impact. Provocatively put, the question remains as to whether non-public offerings as a species will survive in Switzerland.

New legislation

The new Swiss prospectus regime resembles –to a large extent – the EU prospectus regime. According to the new Swiss rules, an offeror will have to publish a prospectus in the case of:

- a public offering of securities in Switzerland; or
- an admission to trading of securities on a Swiss trading venue.

FinSA will provide for various exemptions from the duty to publish a prospectus in the case of a public offering, including an exemption where an offer is addressed to fewer than 500 investors. This exemption reflects the exemption set out in Article 1(4)(b) of the Prospectus Regulation, though it provides for a lower threshold of 150 investors. The exemptions is usually referred to as the 'private placement' exemption. However, the way that the exemption is drafted both in the Prospectus Regulation and in FinSA suggests that a private placement is also made by way of a public offering (ie, if the offer were non-public, no exemption would be required).

This seems counterintuitive and begs the question of whether, with the introduction of the new legisaltion, the bar for qualifying an offer as public should be lower, as under the existing regime, why would a private placement exemption be necessary if private placements as such do not trigger the duty to publish a prospectus? These considerations are supported by the legislature's comments in the new law's explanatory report, which state that the requirements to assume the existence of a public offer are low.**(2)** It even states that an offer to a selected circle of persons would constitute a public offer (in clear contrast to Article 3(4) of the draft Financial Services Ordinance, which defines a 'public offer' as an offer addressed to an unlimited number of persons).

Interestingly, a similar debate is ongoing among European scholars and practitioners concerning the new Prospectus Regulation. As Alain Pietrancosta and Alexis Marraud des Grottes have pointed out, the regime under the Prospectus Regulation is different from the one under the Prospectus Directive. They rightly highlight that Article 3 of the Prospectus Directive sets out that the duty to publish a prospectus does not apply to:

> *[offers] of securities (i) intended solely for "qualified investors", (ii) to fewer than 150 persons, (iii) to investors acquiring securities for a total amount of at least €100,000, and/or offers of securities of a nominal unit value at least equal to €100,000. Moreover, an issuer may still draw up a prospectus in accordance with the Prospectus Directive when securities are "offered to the public".***(3)**

Further, Article 4 of the Prospectus Directive sets out certain exemptions from the obligation to publish a prospectus for "offers to the public", with no mention of the private placement exemption. While the Prospectus Regulation also set outs that placements to 150 investors will not be subject to the obligation to publish a prospectus, the provision in Article 1(4) is technically drafted as an exemption to the duty to publish a prospectus in the context of a public offering. In other words, the drafting of the private placement exemption suggests that private placements also constitute public offerings.

Pietrancosta and Marraud des Grottes point to the fact that there is some ambiguity under the existing regime and provide an overview of the different ways that EU member states have implemented the Prospectus Directive. Notably, France, Germany, Italy, Belgium, Spain and Portugal appear to clearly distinguish between public offerings and private placements, while others such as the United Kingdom take a slightly different stance.**(4)**They further underscore that, due to the self-executing character of the Prospectus Regulation, it would have been even more important to have the correct interpretation clearly expressed.

Why is the discussion in the European Union relevant for Switzerland? The answer is simple: it accords with a longstanding practice, which the Swiss also describe as 'autonomous alignment'. Basically, autonomous alignment is the voluntary adaption of foreign (predominantly EU) law with the aim of keeping the discrepancies with the relevant foreign legislation as low as possible. The same technique was applied with respect to prospectus regulation. The Swiss legislator has in substance mirrored the EU regime (ie, the Prospectus Regulation). Consequently, the Swiss legislator also included the 'private placement' exemption as an exemption to the duty to publish a prospectus in connection with a public offer, rather than as a clarification that the prospectus requirement does not apply to private placements.

Further, in its explanatory report the Swiss legislature commented that when determining whether an offer qualifies as public, it is advisable to confirm positively without applying stringent requirements. In other words, the existence of a public offer should be assumed relatively easily.**(5)** The main reason for a broad interpretation may lie in the fact that the 'private placement' exemption is relevant only in the context of a public offering.

However, in practice, such interpretation would ultimately result in an extinction of non-public offerings in Switzerland, which was clearly not the intention of the legislative project. Rather, the way in which FinSA was drafted reflects the alignment of international standards, which were subject to a change that does not seem to have been discussed or – due to its subtleness – is likely to have escaped the attention of commentators.**(6)**

However, the autonomous alignment of EU law should not result in a narrowing of the scope of non-public offerings in Switzerland. The new legislation and the draft of its implementing ordinance provide a legal definition of public offerings and state that they are aimed at an unlimited number of persons.

Therefore, FinSA itself provides for a clear distinction between mere offerings which do not result in a duty to publish a prospectus and public offerings which, subject to exemptions, require the publication of a prospectus.

Given that the change from the Prospectus Directive to the Prospectus Regulation is subtle and highly technical – and for that reason seems to have escaped commentators' attention – the Swiss legislature appears to have copy and pasted language without any considerable pause for thought.**(7)**

Non-public offerings

Therefore, non-public offerings must be saved from extinction and retain their place in the Swiss capital market. Qualitative criteria will be required to assess whether an offer is made to a limited circle of persons and, therefore, qualifies as private or public. Indications of a private offer include:

- a hand-picked selection of investors (eg, in connection with an accelerated book building); or
- a close relationship with a limited circle of persons (eg, holders of registered shares in a privately held company).

Quantitative criteria should in principle not play a decisive role, given that the 'private placement' exemption (structured as an exemption in the context of public offerings) provides for a quantitative limitation. The exemption would make no sense from a legislative standpoint if it were non-public because it is limited in quantitative terms. Nevertheless, if a circle of persons can be determined to be limited only on an abstract level (eg, where an offer is made to thousands of employees of a multinational group of companies), the offer will technically also be limited, but the sheer number of addressees will mean that the offer can no longer be deemed to be non-public.

Comment

The new legal framework in Switzerland should be interpreted in a manner that ensures the survival of the 'non-public offering' species. Based on the way that the law is drafted, the scope for non-public offerings has not been narrowed; rather, quite the opposite is true as the new law will actually broaden the scope for prospectus-free offerings – be it due to the non-applicability of the duty to publish a prospectus in the context of non-public offerings or the (new) availability of exemptions from the requirement to publish a prospectus in the context of public offerings.

In any event, offerors and advisers should be fully aware of the technical and admittedly subtle distinction and carefully consider the type of offer that they intend to make, whether it be a non-public offer with no duty to publish a prospectus in the first place or a public offer which benefits from the exemption, in which case compliance with the pre-requisites of the exemption will be crucial.

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Endnotes

(1) Currently, market participants and scholars are waiting for the ordinances implementing these acts to be published. The public consultation has already been completed, results are currently being analysed by the legislature and the final text is expected to be published in October 2019.

(2)See FIDLEV, FINIV, AOV, *Erläuternder Bericht zur Eröffnung des Vernehmlassungsverfahrens*, 19.

(3) Alain Pietrancosta and Alexis Marraud des Grottes, "Has the Notion of 'Private Offerings' Been Abolished by the Prospectus Regulation of 14 June 2017?", January 2018. *Bulletin Joly Bourse* 01/01/2018 – N 1 – Page 60. Available here.

(4) See Pietrancosta and Marraud des Grottes, Fn 3, N 4.

(5) See *Erläuternder Bericht,* Fn 2, 19.

(6) See Pietrancosta and Marraud des Grottes, Fn 3, N 1.

(7) See Pietrancosta and Marraud des Grottes, Fn 3, N 1.

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