REPORTS LEGAL

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A feast for litigators?

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Switzerland: still resilient and reliable?

By Dominic Carman

Like the country in which they operate, Swiss law firms seem immune to adversity beyond their borders. So how do they do they manage it?

Notwithstanding last year's dramatic collapse of Credit Suisse, Swiss banking maintains a strong reputation for safety and security in the management of money. This was underpinned in March 2024 when the Swiss National Bank (SNB) announced a surprise cut to its benchmark interest rate – by 25 basis points to 1.5 per cent. As the first central bank of a major western industrialised country to make such a move in the current cycle, it was heralded as a sign of policymakers' confidence in the low rate of Swiss inflation – currently just 1.2 per cent – being sustained.

But more than that, it was arguably a wider vote of confidence in the stability of the Swiss economy – as confirmed by Thomas Jordan, the SNB chair, who said: "The easing of monetary policy has been made possible because the fight against inflation over the past two-and-a-half years has been effective. For some months now, inflation has been back below 2 per cent and thus in the range the SNB equates with price stability."

Notably, the SNB move stands in stark contrast with the European Central Bank which has declined to commit to future rate cuts amid warnings that relatively high inflation in the Eurozone will persist throughout this year. The US Federal Reserve has also held rates steady, indicating only that cuts would be fewer in number and potentially less significant than had been anticipated at the start of this year. Looking ahead, this affirmation of the SNB's successful monetary policy can only be good news for Swiss law firms and their clients.

Dealmakers

In looking back over the past year, things held up quite well: Swiss M&A deal values and volume may have fallen, but the scale of decline was less than in some of Europe's bigger markets. So how did Swiss law firms fare? In the annual Mergermarket table for 2023, the top three domestic firms by value were Homburger, Baer & Karrer and Advestra, while in volume, six firms made the cut: Walder Wyss, Baer & Karrer, Niederer Kraft and Frey (NKF), Lenz & Staehelin, Homburger and Vischer.

"Worldwide, the M&A market, and even more so the capital markets, were in a lull in 2023 – a lot of medium-sized transactions, but nothing ground-breaking outside the tech space," says

Daniel Daeniker, senior partner at Homburger. "It's not like the crazy years 2021/22, which broke all records, but stable enough to keep people busy."

Last November, Homburger was recognized as Switzerland Legal Adviser of the Year at the Mergermarket European M&A Awards. A year earlier, Baer & Karrer had taken the crown at the same awards. At Walder Wyss, which topped the deal volume table in 2023, partner Hans Rudolf Trueb notes: "We're still leading in terms of deal volume – a lot of mid-market transactions. Large Swiss transactions are rare these days." Homburger, Walder Wyss and Baer & Karrer all featured in the most prominent M&A deal last year – the UBS acquisition of Credit Suisse, which is featured elsewhere in this report.

Rising star

A notable new addition in the Mergermarket table is Advestra, a breakaway boutique from Baer & Karrer, which only opened in 2021. The firm's 30+ lawyers focus on corporate M&A, capital markets, finance, financial services, and tax, with a particular focus on transactional work.

"The deal landscape has been resilient this year, more so than other jurisdictions; not much inflation and relatively stable interest rates," says Advestra's founding partner, Thomas Reutter. "There have been big deals, the ROSEN Group, to name one – a private M&A deal, quite sizable, but predominantly foreign in terms of law firms advising. On the capital market side, one highlight was the refinancing of Sandoz, the spin-off of Novartis, almost SFR3bn. We did the refinancing with new bonds governed by Swiss law – which was a bit unusual. We see light at the end of the tunnel in terms of IPOs – companies planning for an IPO in the mid-term – and larger M&A will come back again."

❝ Every day, I tell myself I'm so fortunate because in this stable country I'm in one of the best law firms

Benoît Merkt, managing partner, Lenz & Staehelin, Geneva

ROSEN, a provider of inspection services for energy infrastructure assets with an enterprise value of $2.5bn (€2.3bn) was acquired by Swiss private equity firm Partners Group from its founder, Hermann Rosen. Advestra advised ROSEN alongside DLA Piper while Latham & Watkins and Baer & Karrer advised Partners Group.

The biggest deal of 2023, valued between $30bn and $34bn was Bunge's acquisition of Canadian grain trader Viterra which was backed by Glencore, the Swiss mining and trading giant. Grains merchant and oilseeds processor Bunge was advised by Homburger and Latham & Watkins, while Freshfields Bruckhaus Deringer advised Viterra.

Advestra corporate partner, Alexander von Jeinsen, notes: "Overall, the volume of work for transactional lawyers was pretty stable in 2023 – a decline in M&A activity but that's partly driven by fewer large transactions and fewer competitive auctions, which are very straightforward. Deals simply take more time to negotiate, sign and execute. Our view on the market is possibly somewhat distorted, because we believe we have gained market share. We didn't see 2023 as a weak year in terms of transactions. Compared to other European markets, the Swiss market has been surprisingly resilient. There are still deals in the pipeline: our clients are busy looking, but they're more careful, taking more time to negotiate."

Among prominent Swiss deals so far this year, Baer & Karrer and Latham again teamed up in February to advise Constantia on its acquisition of 57% of SIX-listed packaging producer Aluflexpack, which was advised by Walder Wyss. Freshfields advised Montana Tech Components (MTC) on the sale of its 57% stake in Aluflexpack.

Double awards

Another firm to feature prominently in deals, and across a broad spread of corporate work, is Lenz & Staehelin. In recognition of their efforts last year, Lenz was named Swiss Law Firm of the Year by both the Lawyer and by Chambers and Partners, which noted: "With the highest number of departments and individuals ranked in the Chambers and Partners Europe 2023 guide, Lenz & Staehelin's breadth makes them stand out."

Benoît Merkt, Lenz's managing partner in Geneva, says: "We won both of these awards in the same year, which is exceptional. What makes us exceptional is that we have a continuous ability to attract the best people. Every day, I tell myself I'm so fortunate because in this stable country I'm in one of the best law firms. What else can I have? As lawyers, in terms of activity, while there is political instability elsewhere, Switzerland is a safe haven."

Among Lenz's transactional work, he points to "a very large ▶

takeover battle: we represented companies controlled by (French businessman) Xavier Niel in their fight for a Swiss-listed asset manager, GAM. Our clients had less than 10% in GAM, but managed to prevent the company from being taken over by Liontrust, a UK asset manager (and FTSE 250 company). They also succeeded in replacing GAM's board to launch an ambitious turnaround. It showcased our ability to navigate high-profile matters."

Homburger advised GAM, which manages client assets of SFR68 billion, in the Liontrust public exchange offer for all publicly held shares in GAM, while Dentons and MLL Legal represented Liontrust.

Geneva ambitions

NKF has also had a very strong performance. "2023 was the best year ever," says Patrik Peyer, co-head of NKF's Corporate and M&A team. "Everyone talks about the M&A downturn, but we have not faced that. We've been extremely busy. I'm really positive: there is so much dry powder out there and funds need to invest. If interest rates fall, then leverage becomes more interesting. If all this comes together, we will have crazy times ahead."

NKF opened a Geneva office in January 2023, with an initial team of 27 lawyers, including 10 partners. "We put the Geneva office successfully on the launch pad, now the rocket just needs to lift off – which takes time," says Peyer. "I'm very positive that the rocket will lift off in the next 12 months. Our strategic reasoning is that we think that the Lake of Geneva – Lausanne and Geneva together – will become a very important tech hub. Many big tech companies have moved their European or regional headquarters there. We want to offer them the full package on the ground.

"Originally, a large corporate and a large disputes team joined," he explains. "So, we were not full

❝ Compared to other European markets, the Swiss market has been surprisingly resilient. There are still deals in the pipeline

Alexander von Jeinsen, capital markets partner, Advestra

service in Geneva from day one – that's the ultimate aim. In the meantime, two tax partners joined from Oberson Abels last October. We already have a strong tax team in Zurich, but we need additional capacity in Geneva because tax law is still to a large extent, local: each Canton has its own tax law.

"If we want to serve significant corporate clients in Geneva, we need to have tax advice onboarded. We are extremely happy that these two partners joined us – it's only the beginning of the growth we want to achieve. We now have the largest corporate team, alongside Lenz, in Geneva. We hope that more will join."

Generational shift

By contrast, Homburger remains as a Zurich only shop. Daeniker cites management guru Michael Porter: Strategy is choosing what not to do. "Our 34 equity partners pride ourselves of being under the same roof, he says. "We do not need a Geneva office because we have a francophone desk in-house: five partners and 20 associates. Since I've been a partner, we considered opening shop in Geneva, Frankfurt, Brussels, New York and London. Never did so, and never got the impression that our competitors who did were terribly happy about it.

"We remain a cohesive partnership—almost no lateral hires, no changes to our compensation model, which combines a lockstep with merit-based elements, since 1991. It's the opposite of the poach fest with US firms poaching from each other now they've out-poached all the UK firms."

Daeniker points to a generational change. "Many of our heavy hitters are around 60, and we have an extremely strong two next generations, with the new roster of partners around 40," he says. "We're preparing a passing of the mantle – first in client relationships and then law firm management. In the young generation, there are more women – we will be close to 20% female equity partners in 2025. That's good."

And concerns? "We're a domestic player in an extremely strong economy," he says. "If the Swiss economy tanks, we tank, we have no natural hedge: an Asian or US operation to offset. Our biggest competitive threat is not necessarily the Americans opening in Zurich, because the domestic market is rather small – it is international firms who try to poach Swiss instructions from abroad, especially in cross-border finance and M&A; and international arbitration involving Swiss parties, but masterminded by international firms."

Still growing

Walder Wyss has expanded significantly in recent years with offices in Zurich, Geneva, Basel, ▶

Berne, Lausanne and Lugano. "We're still growing at a steady rate: 8-12% is our annual target," says Trüeb. "We're back to organic internal growth and benefit from certain opportunities as they arise. We're still hiring laterals, but more selectively. Last October, Hans-Jakob Diem (everyone calls him Joggi) joined us – he's a great guy, a very prominent and strong addition to our M&A team." Joggi was previously head of corporate and M&A at Lenz. He follows David Borer, who also joined Walder Wyss as a partner from Homburger. "He has since strengthened our team, a very good addition," says Trüeb.

"I used to say that the best for us is if the economy either moves up or down; if it's flat, it's not good," he adds. "In the long run, we usually lag behind the economic cycles. I'm slightly pessimistic about the economy as a whole, especially Germany and France, but less pessimistic about the legal profession. We will, fortunately or unfortunately (all a question of perspective), benefit from a downturn, as we benefit from an upturn."

He notes that "biotech has suffered for two years in a row, but we're seeing signs of recovery. The bloodbath has ended and some companies are again trading above their book values. Switzerland has developed a biotech cluster in Basel and Schlieren/Zurich with many start-up companies or spin-offs – some already listed, others still early stage. This will be a growth market. Finance has also been very strong – we've done a bn-covered bonds program for a large Swiss bank – while employment had a great year, growing exponentially: restructurings, share plans, option plans, but also disputes – which is strange, because we have very low unemployment."

Trüeb concludes by offering some advice: "If you're a young lawyer, go into pharma biotech. They pay salaries our poor banking proletariat can only dream of."

"Super busy"

Elsewhere, Schellenberg Wittmer had a good year, according to partner Caroline Clemetson. "Litigation and arbitration picked up like crazy with a lot of energy disputes – everybody's super busy," she says. "On the advisory side, M&A deals are a bit slower but still quite active, while banking and finance are booming, and restructuring/insolvency has been increasing."

She points to a lot of investments in infrastructure, although private equity market valuations make investors cautious with fewer deals. "Linked to Switzerland's climate strategy, the real estate sector is focussed on renewables to get returns while ESG sustainability is a big trend – it's super important," she adds.

Next Gen is also an issue at Schellenberg. "The older generation is retiring – they have managed the transfer with a very well organised succession planning," she says. The next generation is great, very motivated: we've so many partners in their forties – the years when you grow all your business. But the younger generation also puts more emphasis on work-life balance."

At Prager Dreifuss, managing partner Daniel Hayek notes that the Credit Suisse-UBS takeover last year has had "a significant impact on the economy: we have been working on a number of restructurings of European or Swiss-based companies. What is also keeping us busy this year is litigation: banking litigation, insurance litigation, and my practice, insolvency and a lot of medium to large restructurings.

Companies in trouble

Real estate, he adds has become an issue. Mortgage finance: if they have don't have long-term mortgages, companies with 2-5,000 employees are in trouble if they have relied on stable interest and growth rates.

Looking ahead, he anticipates "more of the same – more restructurings, more difficulties for companies. It's going to be restructuring, litigation, certainly insurance litigation, because when the economy is not doing well, people litigate more over money than they would if they could just earn more by settling things and not spending time talking to lawyers. They fight, and that is what we are going to see. We might also see some distressed M&A, hopefully, at least for our M&A lawyers. In 2025, it should become more normal, but it's hard to say."

At Vischer, managing partner Christian Oetiker confirms that regulation has been a key driver of work. "With the enactment of the Data Protection Act, our Data Protection team has been extremely busy," he says. "We also had a very good year in employment: Switzerland has no hiring and firing culture, but people are looking at employment issues much more."

The overall workload, he suggests, has been stable. "Fee rate increases have been relatively widely accepted by clients," he notes. "Inflation and interest rates should (hopefully) remain under control in Switzerland – that will allow businesses to adapt which would be a basis for an uptick. But business caution is the key point." Despite geopolitical uncertainties, Vischer has not seen an increase in disputes work. "Many businesses are reluctant to put money into litigation, which is a cash binder, unless it's absolutely necessary," explains Oetiker.

For lawyers, he notes, previous crises have also been opportunities. "The Swiss Air grounding created loads of work for the legal market in Switzerland. So did the Lehman crash and the financial crisis in general. This time, it's different – so far, there hasn't been a contentious restructuring wave. Instead, quite a bit of restructuring, less distressed M&A, or contentious insolvency work. In Switzerland, there's fear of a downturn in the market – but the numbers are relatively stable, so we're not complaining."

❝ Litigation is stable: the focus is shifting from commercial disputes to distressed situations and asset recovery, arising out of defaults under agreements

Robin Moser, Head of Litigation, Loyens & Loeff

Partner melting pot

Loyens & Loeff is one of Europe's biggest independent firms. "In 2016, we started with two lawyers in Switzerland, we now have 38," says Robin Moser, Head of Litigation in Zurich. "We're quite strong in tax: the alliance of the Netherlands, Luxembourg and Switzerland means we can cover the needs of multinational enterprises."

The tax department in Switzerland drives about 40% of local work; internationally, a third of the firm's fee earners are tax lawyers. "Tax will remain busy because of Pillar Two legislation," suggests Moser. "Litigation is stable: the focus is shifting from commercial disputes to distressed situations and asset recovery, arising out of defaults under agreements."

Being one of the few international firms with quite strong practices in Benelux is "a big advantage in Switzerland," he says. "We have an incredibly large referral network. We're trying to outgrow the market faster than our competitors – around that, we built a corporate M&A practice.

"Our goal is to be less conservative than other firms. We strive to be an attractive employer with flat hierarchies, maintaining a start-up spirit, despite the fact that we've grown substantially. Younger lawyers often come to us because they like that dynamic."

Moser describes Loyens Switzerland as "a melting pot at partner level: people who came from Lenz, Homburger, and NKF. We also hire relatively junior people from other firms, so we can pass on our culture – or university students do a short-term internship: if they perform well, we try to hire them. As the new kid on the block, we're attractive for them because of the culture, the international aspect. We offer junior associates a one-month secondment in Amsterdam, Brussels or Luxembourg, which helps get the right people." ●

Germany's distress:

Switzerland needs the sick man of Europe to recover

As the German economic miracle gives way to stagnation and a real estate crisis, can Switzerland remain immune to the challenges facing its giant neighbour?

By Dominic Carman

Swiss success in Europe has long depended on economic success in Germany, which arguably remains Switzerland's most important economic and political partner. Critical to this close exchange is market access granted by the myriad bilateral treaties between the EU and Switzerland in selected sectors of mutual interest. But problems over the German border are causing Swiss alarm bells to ring. "We heavily depend on the economic relationship (with Europe), especially with Germany – there is an impact," says Patrik Peyer, co-head of NKF's corporate and m&a team.

"Switzerland is still working on its difficult relationship with the EU," explains Daniel Hayek, managing partner of Prager Dreifuss. "Given the importance of Swiss exports to the EU (72%) and to Germany (52%), this relationship is crucial." Christian Oetiker, his counterpart at Vischer, adds: "Our ties to Germany are very close. It's usually an inbound market. A cooling off in Germany is an issue for the Swiss economy."


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Bottom of the eurozone

Europe's biggest economic engine has certainly cooled off over the past two years, becoming the slowest-growing of the 20 EU countries in the eurozone. According to the IMF, it was the worst-performing major economy in the world last year as rising rates and high energy costs contributed to a 0.3% decline in GDP. Germany's export-focused manufacturing sector was impacted by the combined loss of cheap Russian energy and a marked slowdown in demand from China.

Having fallen into recession in 2023, Germany is forecast to stagnate in 2024. As the only G7 economy to shrink last year, it is set to be the group's slowest-growing economy again this year, according to the IMF's latest projections.

At Homburger, senior partner Daniel Daeniker nevertheless remains sanguine. "What always surprises me is that a country like Switzerland, so dependent on exports, manages to contain inflation, while all the countries surrounding us have been going crazy – UK 12 to 13%, Germany 6% to 8%, worldwide 8% – while Switzerland is somewhere between 1.5% and 2.5% per year," he says. "An economist recently gave me a complicated explanation which ended: you can be surrounded by the sick men of Europe and still continue pretty strongly as an economy."

Strong Swiss growth predicted

His optimism is underlined by some experts who predict that Switzerland's economy will grow significantly faster in 2024 than neighbouring countries and potentially even outpace the United States.

Alexander von Jeinsen, partner at Advestra, offers a broader perspective. "Swiss correlation to the German market is not short term," he says. "Whether the German economy goes up, flat, or down, we don't see that having an impact on deal activity. If private equity can't do deals in Germany because financing is simply too expensive, they would rather look to Switzerland for targets. There seemed to be more deal activity from German sponsors in 2023 than before, but that's very subjective.

"Long term," he suggests, "the ties between the Swiss and German economies are very strong. So, if Germany performs badly for a couple of years, this will certainly have an impact on Switzerland – for example, in the real estate sector, which is under a lot of pressure in Germany, we also see an impact here. Our real estate investor clients are more cautious because they see what's happening in Germany."

❝ The German real estate market is really causing concern – it crashed hard and fast

Hans Rudolf Trüeb, partner, Walder Wyss

Although German retail sales, exports and industrial production all fell in 2023, domestic commercial real estate attracted most attention with prices falling by 12.1% in the final quarter of 2023 compared with a year earlier – their biggest-ever drop.

Germany: big problem

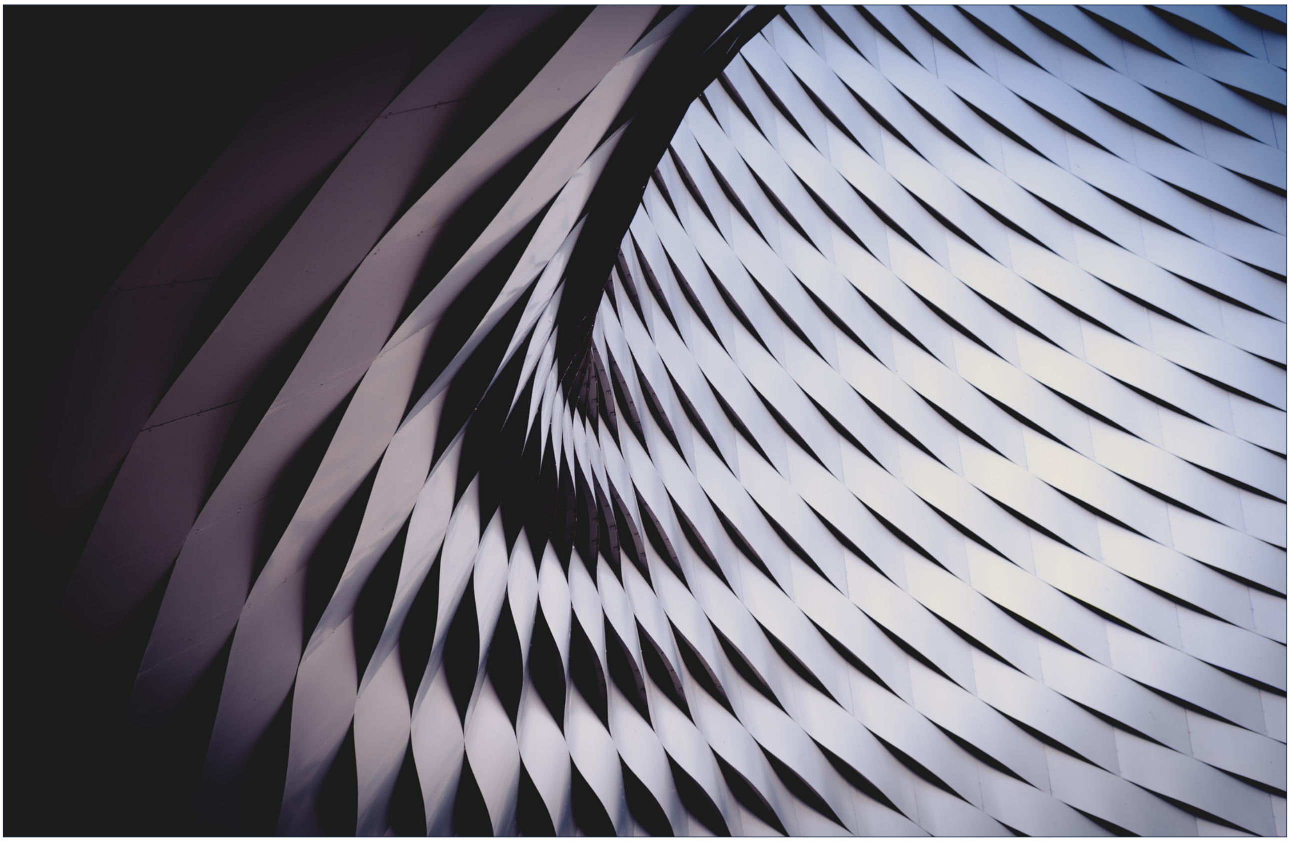
For some Swiss lawyers, such uncharacteristic turmoil over the border is disconcerting. "Germany is a big problem," says Hans Rudolf Trüeb, partner at Walder Wyss. "The German real estate market is really causing concern – it crashed hard and fast. The big real estate funds and companies were re-evaluating their portfolios; some may still run into defaults; leverage ratios are too high. They will have to repay bonds: not good if you have to liquidate an overvalued portfolio and demand is slow."

In February 2024, Deutsche Pfandbriefbank described the current state of the market as the "greatest real estate crisis since the financial crisis." It followed a warning from Germany's central bank about the risks surrounding commercial real estate, suggesting there could be "significant adjustments" leading to higher defaults and credit losses.

There is, of course, a silver lining for law firms. "Restructuring lawyers will have full books, although long-term interest rates are falling which will help a soft landing," notes Trüeb. "Hopefully, 2024 will see a low point in the market. Fortunately, our trade with the US is developing well. Germany used to be our biggest trading partner, now it's the US." ●

Swiss regulation:

The privacy vs transparency debate rages on



New data protection law and anti-money laundering proposals that impact law firms' privacy – how is Switzerland managing to square the circle?

By Dominic Carman

"If you ask a Swiss manager: what irks you most? He will say: new regulation. If you ask: what hurts you most? He would probably say: tax. It's a pain, but it doesn't upend the economy." This neat summary from Daniel Daeniker, senior partner at Homburger, provides a window into how tax and regulation affect Swiss clients. Both practice areas certainly provide an ever-increasing flow of instructions for Swiss law firms.

Hans Trüeb, partner at Walder Wyss, offers some context. "Regulation is boring, but it creates a lot of work," he says. "For decades, the US bothered us with their regulation, mostly tax. The most interesting part is the Common Reporting Standard (CRS), which the US pushed in the OECD to allow for the automatic exchange of information, forcing us to abolish our unique banking secrecy. Guess who did not adopt the CRS? The US. They've exported their regulations for decades to support and help their industry. Now, the EU has struck back – first with taxation, and then with data protection. You now have a common data market in the EU, which provides a competitive advantage."

The new Swiss Federal Data Protection Act (DPA) came into force last September: like much of Swiss regulation, it mostly aligns with existing EU regulation, complying with the revised Council ▶

of Europe Convention 108 through provisions that are largely similar to those of the GDPR.

Boring, but good business

"We have a group of ten lawyers doing data protection," says Trüeb. "Everyone wants to be fully compliant. Although entirely boring, it's a nice business for lawyers: it creates jobs, but unfortunately doesn't create productive value for companies. The good news is: we are equivalent with the GDPR. What a surprise – and a relief. Next stage is ESG. This will top GDPR by far. Again, it's mostly paper. And you sometimes wonder whether the mushrooming ESG bureaucracy (which flies around the world six times a year) creates more emissions than it hopes to reduce. But again, a wonderful playground for lawyers (with or without talent)."

Rolf Auf der Maur, TMT partner at Vischer, suggests that the revised DPA has provoked a renewed interest in data protection in Switzerland. "Probably the biggest difference from the GDPR is that, in Switzerland, you don't need a legal ground for processing personal data, which is still allowed if the principles of data protection are observed," he says. "It's quite a big conceptual difference. A higher level of disclosure needs to be given to users in the data protection policy.

"There are no high financial penalties, but there is personal criminal liability for those responsible for data protection within an organisation, which triggers a personal interest from those concerned. We haven't seen any enforcement action yet under criminal law, but it's an offence to make false or misleading representations in a data protection policy. For most managers who are just employees of their companies, it's a very unpleasant experience to be subject to a criminal investigation, irrespective of the outcome. You hope that the investigation will be stalled, or ultimately, even if the case is brought to the criminal court, that they will be acquitted. But this can take years."

" Tick-box compliance comes with substantial collateral damage at the cost of privacy, which has been enshrined in Swiss law for a long time

Rolf Auf der Maur, TMT partner, Vischer

Working round the clock

The corporate drive towards achieving compliance with the new DPA took much less time. "The new law has created a lot of work for our data protection law experts," says Benoît Merkt, co-managing partner of Lenz & Staehelin. "Clients ask: What about implications for us? We have to draft data protection policies, or adapt existing ones."

Patrik Peyer, co-head of NKF's Corporate and M&A team echoes the point. "For our data protection team, it was very good news," he says. "For clients, there are more rigorous requirements. But apart from initial compliance – work that needs to be done, especially by foreign companies active in Switzerland – I don't see much long-term impact on the attractiveness of Switzerland."

Daniel Hayek, managing partner of Prager Dreifuss, points out that "for larger companies or those who sell to the EU via the internet, and almost everyone does, it's not so new. Domestic business now has to adapt to the more European framework. As an important business for law firms, providing a lot of work we have specialists working on it almost around the clock."

AML drive

Notably more contentious than the new DPA regime are tighter anti-money laundering (AML) regulations which have been proposed by the Swiss parliament. Currently, Swiss AML laws are largely governed by the Anti-Money Laundering Ordinance (AMLO) and the revised Anti-Money Laundering Act (AMLA) which entered into force in January 2023.

Suspicious activity reports (SARs) filed in Switzerland have mushroomed in recent years, thanks to the Russian Laundromat, Mossack Fonseca and the Panama Papers, 1MDB, and other corruption scandals linked to the Swiss banking system. According to the latest Money Laundering Reporting Office Switzerland (MROS) Annual Report, a record 11,876 SARs were registered in 2023 – an increase of 56% compared to the previous year.

Swiss banking secrecy and data privacy laws, which can restrict banks from sharing information, have led to an impetus for further change in AML regulation. Recent ▶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changes have included the Swiss Bankers Association revised agreement on the Swiss banks' code of conduct regarding due diligence and the Swiss Parliament passing amendments to the AMLA. Most notably, these concerned: verification of beneficial owners and updating know your customer (KYC) processes. At the same time, Swiss Financial Market Supervisory Authority (FINMA) revised its Money Laundering Ordinance.

In response to recommendations by the Financial Action Task Force (FATF), the Swiss Government drafted further new AML regulations, which would impose a higher regulatory standard than in the EU, holding lawyers, consultants and banks to a greater degree of accountability for reporting, scrutiny and control.

Last September, this draft went to consultation which finished at the end of November. The Federal Council is expected to submit the draft to the Swiss parliament at some point in 2024 – if accepted, the new rules would raise due diligence and reporting obligations.

A Swiss finish

Robin Moser, who heads the Swiss Litigation and Risk Management practice at Loyens in Zurich, suggests that AML standards have been quite high in Switzerland. "They're enforced and applied in most cases," he says. "In 2021, a draft bill was submitted to the Swiss parliament, which did not adopt it. International pressure is increasing, so they brought in a new draft that includes subjecting lawyers and other service providers to AML. If the government can convince parliament to implement the laws, there will be a Swiss finish to it, but I don't expect the rules to be as strict as other jurisdictions, such as Luxembourg."

The proposal concerning AML due diligence would apply to consultancy activities (particularly legal advice) that carry "a perceived elevated risk of money laundering." Lawyers' duty of professional secrecy is claimed to be respected – by not subjecting them to reporting obligations for transactional or advisory work unless they act as financial intermediaries. Notwithstanding this caveat, some Swiss politicians have raised concerns about the potential diminution of lawyers' professional secrecy.

❝ AML revision is very controversial because the regulation that goes with it wants to put lawyers under the AML regulations

Caroline Clemetson, partner, Schellenberg Wittmer

"The proposals are much debated," says Merkt. "Our partner Miguel Oural, currently chair of the Geneva Bar, represented Lenz at a session in the Swiss Administration. He says that there will be numerous compliance implications in law firms and huge bureaucracy. It could take many weeks to audit and check." Christian Oetiker, managing partner at Vischer, adds: "It will provide work for clients, and internally, compliance wise. I'm very much in favour of Switzerland having a sound system to fight money laundering."

Collateral damage

At Schellenberg, partner Caroline Clemetson adds: "AML revision is very controversial because the regulation that goes with it wants to put lawyers under the AML regulations – all the advisors in relation to creating companies and real estate, but not litigators. The open question is related to the client-attorney privilege." Patrik Peyer, co-head of NKF's Corporate and M&A team, notes: "We're analysing this carefully. For us, as lawyers, that's one of the most significant changes. But it's still very early to say how this will impact us. Compliance as a function within a law firm becomes much more important than it was."

There's an inherent conflict of interest between the two regulations (privacy and AML), according to der Maur. "The danger is that these tick-box compliance measures relating to money laundering are being expounded without a big benefit to the public interest," he says.

"Tick-box compliance comes with substantial collateral damage at the cost of privacy, which has been enshrined in Swiss law for a long time. Even going back to the current privacy laws, that has been upheld and infringement or disclosure of information covered by bank secrecy is also subject to criminal sanctions. That's an area where Swiss law has traditionally been very stringent. Ultimately, there is a conflict of interest and a debate rages. But we will have to apply the EU standards. Once they are established, I hope we can maintain some flexibility and protection of clients' privacy." ●

A feast for litigators:

Fallout from the UBS-Credit Suisse merger

As AT1 bondholders use "the world's best, most expensive lawyers" to take on the Swiss financial regulator, what lessons does the Swiss bank merger provide?

By Dominic Carman

On Sunday 19th March 2023, the unthinkable happened in Switzerland: Credit Suisse (CS) announced that it had entered into a merger agreement with UBS. This was no ordinary merger, but arguably the only viable emergency solution following a crisis of confidence and heavy deposit withdrawals. Ultimately, a catalogue of scandals and sustained financial losses at CS had led the two titans of Swiss banking to become one via a state-brokered deal – the biggest banking merger since the global financial crisis. Following the intervention of the Swiss Federal Department of Finance, the Swiss National Bank and the Swiss Financial Market Supervisory Authority (FINMA), UBS emerged as the 'surviving entity' from a fraught weekend of negotiation. A triumph of Swiss efficiency, it was achieved in no small part thanks to the lawyers who worked at great speed to get the deal over the line before the markets opened on Monday morning, thereby avoiding a potential disaster.

But on any view, the deal was fairly disastrous for CS shareholders and a genuine bargain for UBS, which paid the modest sum of $3.6bn for a bank that had an estimated tangible book value of around $33bn. Things were even worse for CS bondholders. While CS shares at least retained some value, albeit much reduced, additional tier one (AT1) bonds became entirely worthless.

▲ **UBS-Credit Suisse deal architects. Left to right: Urs Schenker, Walder Wyss; Daniel Daeniker, Homburger; Rolf Watter, Baer & Karrer**

Typically, when a company goes into liquidation, bondholders rank above shareholders in the creditor pecking order. But to get the deal done, the Swiss government passed an Emergency Ordinance allowing FINMA to write down the AT1 bonds (also known as "contingent convertibles" or "CoCo" bonds) to zero. As a result, the CS bondholders – many of whom are international fund managers – lost around SFR16bn, which their lawyers argue is contrary to the conventional rules by which equity investors are wiped out before debt-holders.

Undermining confidence

Perhaps inevitably, this has resulted in cross-border litigation being launched involving several jurisdictions. AT1 bondholders have two principal legal options: bringing an action before Swiss courts in relation to FINMA's decision to write down their bonds and investment arbitration against Switzerland under an applicable investment treaty.

Notably, Quinn Emanuel, which represents over 1,000 bondholders from around the world, holding more than a third of the total notional value of the AT1 bonds, is challenging FINMA. Quinn Emanuel was quick to file a suit in the Swiss Federal Administrative Court in St Gallen, which has since received several hundred claims against FINMA.

Recently, FINMA has tried to block the release of key documents to AT1 bondholders, claiming that this would undermine confidence in the Swiss regulator and strengthen potential legal claims against the Swiss state.

According to a March 2024 letter seen by the Financial Times, FINMA wrote as follows to the Court in St Gallen: "The transmission of confidential procedural documents to the plaintiff could permanently undermine the confidence of those subject to Finma in the confidentiality of the information they share with Finma and thus seriously undermine Finma's supervisory activities."

Thomas Werlen, managing partner of Quinn Emanuel in Switzerland, had previously said: "FINMA's decision (in March 2023) undermines international confidence in the legal certainty and reliability of the Swiss financial centre. We are committed to rectifying this decision, which is not only in the interests of our clients but will also strengthen Switzerland's position as a key jurisdiction in the global financial system." A dedicated website was set up for bondholders: **www.at1action.com**

The firm later announced that it was joining forces with several other international law firms to represent bondholders in various jurisdictions: US – Wollmuth Maher & Deutsch; UK – Keidan Harrison; Singapore – Engelin Teh; GCC- Global Advocacy and Legal Counsel; and Switzerland – Geissbühler Weber & Partners. London-based Pallas also became involved in acting for bondholders.

Daniel Hayek, managing partner of Prager Dreifuss, says: "We were approached by a lot of bondholders. Hedge Funds, including some of my traditional clients, chose Quinn Emanuel, who have a small office in Zurich. We did not get involved in the AT1 matter: first, because we have enough work; second, because I'm not convinced of the case, and ▶

third, because the proceedings will take several years and the legal fees will be too high for smaller groups of clients or smaller family offices."

OECD: new risks and challenges

The fallout extends beyond multinational litigation, the AT1 bondholders and FINMA. The OECD stated that the takeover has also created "new risks and challenges" for the Swiss economy, adding "UBS – already a global systemically important bank before the merger – has thus become even larger and according to the 'too big to fail' regulations, it must meet even stricter regulatory requirements."

There are inevitable questions about competition within the banking sector since UBS holds roughly 25% of all domestic deposits and loans: combined assets that dwarf the economic output of Switzerland. Meanwhile UBS' status as a leading global wealth manager was reinforced in March 2024 when its market capitalisation surpassed $100bn with 60 per cent of the bank's total revenues derived from wealth and asset management.

"The takeover was a surprise; it turned out to be a necessity – there was so much cash outflow, so there was no alternative but to rescue Credit Suisse," says Robin Moser, who heads the Swiss Litigation and Risk Management practice at Loyens & Loeff in Zurich. "It was a shock," says Patrik Peyer, co-head of NKF's Corporate and M&A team. "But the market dealt with it very positively. There's been some recalibration, rebalancing and there was an immediate psychological gap: people thought Credit Suisse isn't there anymore, but it is. There is also a market gap that needs to be filled, and it's almost filled, by Swiss banks, smaller banks and big foreign banks wanting to beef up their practices in Switzerland."

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Christian Oetiker, managing partner, Vischer

Although smaller Swiss banks are stepping up to fill some of the gaps, the consensus is that US, French, German, and UK banks have used the merger as an opportunity to increase their market share in investment banking. Several international banks have already announced an expansion of their operations in the Swiss market, including BNP, Chase and JP Morgan. "On the M&A and equity capital markets (ECM) side, it's going to be more the US banks, and on the debt capital markets (DCM) side, more European banks with BNP, Deutsche, and smaller Swiss banks," says Alexander von Jeinsen, capital markets partner at Advestra.

Swiss market perception, he notes, is that the merger "was handled quite well in terms of avoiding further turmoil. The big question mark: was it the only way that this could have been done – the merger which seems to be a fairly good deal for UBS." Beyond sizeable unused state support, there is also a perception that "there should be other tools to help in these situations, rather than a forced merger," he suggests. "That said, many people, including us, see more pros than cons, from a law firm perspective, but also from a market perspective. The elephant in the room is that you now have one very dominant bank in the market, which creates some fears that it is too strong with doubts about how a competitive market will develop."

Competition concern: UBS dominance

Benoît Merkt, co-managing partner of Lenz & Staehelin and a leading expert in competition law, says: "In terms of the reputation of Switzerland, it's difficult to judge. Credit Suisse has been rescued; the system has worked; we avoided catastrophe; UBS is doing well. In terms of security of the Swiss banking system, it was a stress test – but it worked. We now have one big UBS. Competition did not play a role in authorising the UBS-Credit Suisse merger, but it will play a role in the future. The Competition Commission (COMCO) will assess the market position of the new UBS, particularly in small and local and regional markets, like credit to small and midsize enterprises, and the mortgage loan market for individuals. COMCO's report

will tell us a lot about the areas of the market where the new UBS is dominant."

According to an "anonymous source with knowledge of the matter", Reuters reported in February 2024 that COMCO favours a deeper investigation into UBS' dominance of certain parts of the market. COMCO submitted its findings to FINMA in a report examining the impact of the takeover, but for now, the financial regulator is keeping the report under wraps. Although COMCO's recommendations are not binding, they could be influential in shaping the debate about UBS, which analysts suggest has a dominant position, particularly in the Swiss loan and debt markets.

In a similar vein, Vischer's senior partner Christian Oetiker considers what it means for Swiss Banking. "Before we had two banks, which were perhaps a bit too big for our country; now we have one which is even bigger," he says. "This creates a contingency issue for Switzerland if something goes wrong. We saved Swissair because of cash considerations. Switzerland said: Okay, we step in. In the end, the Swiss Federation made a profit out of it. But it shows that cash is an issue. With UBS being even bigger, this may create additional issues. It's not clear to what extent banks will step in to the role that Credit Suisse fulfilled in the commercial world. In commercial financing, trade financing, it's not yet clear to what extent other banks will provide these services."

Hayek adds: "After the UBS takeover, there are only two full-service banks left, UBS and Zürcher Kantonalbank. The Swiss cantonal banks have a rather conservative approach, which is very popular with many Swiss people, including myself and our firm." The deal, he adds, was "the right thing to do. Maybe there were other solutions, but there was big time pressure. It's a bit unfair to question their decision now – they made it under enormous pressure. Danny Daeniker of Homburger drafted the acquisition agreement – a core M&A agreement that had to be drafted..."

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A lost cause?

Homburger's senior partner, Daniel Daeniker, provides context. "Was Credit Suisse a lost cause? There are a lot of Monday morning quarterbacks, who say: I saw this coming a year ago," he says. "Some even say the tide turned in 2015, when Tidjane Thiam was made CEO, because he was an insurance guy and didn't understand Credit Suisse. My personal view? I believed the bank would manage the turnaround until a few days before it went through the forced merger.

"There's much talk about how the regulator should have interfered more quickly – say, in October 2022 – and applied more pressure. But looking at it from Credit Suisse's perspective, if you believe in your strategy, you need to be standing with your back to the wall and a gun pointed at your head before you realise that this is the point of no return. And ▶

once you realise this, if there is one credible merger offer on the table and various attempts to cherry-pick assets, then you select the credible offer."

The price tag for each domestic crisis gets bigger and bigger, suggests Daeniker, pointing to:

– The merger of UBS and SBC (Swiss Bank Corporation) in 1998 which came in the wake of a SFR1bn loss on Long Term Capital Management.
– The re-capitalisation of UBS in the Global Financial Crisis of 2007/8, which followed a SFR50bn loss at the UBS trading desk in New York. The Swiss government intervention was limited to a SFR6bn equity investment and the takeover by the Swiss National Bank of toxic assets valued at $38.7bn. Both positions were sold at a gain to the government and the Swiss National Bank.
– The forced Credit Suisse merger came in the wake of losing SFR120bn of assets under management in 2022, most of it in the first three weeks of October. The guarantees given (but not utilised) were above SFR200bn.

Return to normal

"Even so, it's surprising how quickly Switzerland's financial market returned back to normal," he says. "The cancelled AT1 bonds created a big clamour: this is the end of the AT1 market. But the AT1 market continues to work as if the Credit Suisse incident never happened. So, the amounts get more staggering from crisis to crisis, but then return to normal, which is what surprises me most.'

Following the demise of Swiss watches in the 1970s, he adds, "there was a big reshuffling in machinery, equipment and manufacturing. Some watch manufacturers went into med tech and became unbelievably successful. Pharma became more important. The successor airline of Swissair continued. Banking just continued. We somehow have the knack of surviving crises."

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Daniel Daeniker, Homburger

[After its planes were grounded in October 2001, a bail out from UBS and Credit Suisse, and then insolvency, Swissair eventually merged with the regional airline Crossair, allowing the successor company to start operations in March 2002. Three years later, it was taken over by Germany's Lufthansa.]

The impact of Credit Suisse's merger on Homburger and Switzerland? "Credit Suisse – an important client of the firm for over 30 years – was a disruption for Switzerland, but things got back to normal rather quickly," he says. "Our firm was running on all six cylinders throughout the entire restructuring phase. Is the loss of business significant? Not really, none of our large clients, Credit Suisse included, contribute more than 5-10% to revenues. Obviously, the forced merger led to a spike of work in the first half of 2023, but the post-merger lull hasn't really had much impact."

The macro-outlook following the merger is back to business as usual, he suggests. "All the government guarantees were rescinded or waived last August, so not all of the SFR150bn loss guarantees were utilised. UBS is facing restructuring costs, but this started off from an accounting gain of SFR30bn due to "negative goodwill" – the difference between purchase price and book value. Quite a big cushion to offset restructuring costs."

FINMA: "egg on its face"

Elsewhere, there has been criticism about the Credit Suisse rescue. For example, Peter Hahn, former Dean and Emeritus Professor of Banking at the London Institute of Banking & Finance, wrote about FINMA's role in the Financial Times in April 2024:

"Since the 2008 financial crisis, no substantial regulator has more egg on its face than the Swiss regulator. No one has forgotten the rapid failure of a supposedly well-capitalised bank, the absurd move to prioritise equity over (AT1) debt in default and the incredibly poor communications between Finma, the financial regulator, and the Swiss National Bank, to cite just some of the many mis-steps.

"Yes, other regulators have served up some poor dishes (e.g. Greensill in Germany, Silicon Valley Bank and Signature in the US), but Credit Suisse was truly the bad fondue that left long time patrons wondering about the entire restaurant. After any disastrous failure, especially in financial markets, surely the best policy is complete transparency by the regulator. There's undoubtedly going to be some findings implicating the chefs (the regulators), the ingredients (Credit Suisse issues), and, I think, the recipe (applying bank recovery and resolution methodology)."

In the context of such media comment, Daeniker says: "The English financial press often snipes at Switzerland. Every few years, when they do an in-depth survey, they come to their senses and acknowledge that the economy seems to work perfectly well. Then they start sniping again. But look at it this way: in the 1960s, when the pound was at SFR5, they made jokes about the gnomes of Zurich. They sniped at us for banking secrecy in the 1990s, when the pound was SFR2.50. They're now sniping at us for the demise of Credit Suisse, when the pound is SFR1.15. And perhaps they will

continue sniping when the pound is well below SFR1."

Sad story

At Walder Wyss, Hans Rudolf Trüeb says: "What a shame for this proud bank and its equally proud employees. Once you lose the confidence of the market, you're dead. It's a sad story, really sad. I know a lot of people working there, but in the end, this was probably the best outcome."

He agrees with Daeniker on the prevalence of retrospective wisdom. "After the fact, every lawyer in town will say: I always told you it would not end well," he says. Referring to the firm's representation of CS as "our landmark deal in 2023", Trüeb summarises it bluntly as "an emergency transaction done over the weekend which ended our no. 2 Swiss international bank for good. This is how a decent transaction should unfold: smooth and fast.

"It was reminiscent of Swissair. The architect of the transaction to save the airline was Urs Schenker," says Trüeb. "Here again, Urs played the key role (in CS). He joined our firm eight years ago, and has been on top of things since then. He's well integrated, a good team player, and incredibly strong."

Trüeb is keen to emphasise the domestic nature of the problem and Switzerland's ability to meet the diverse challenges that arose. "The corporate side was purely Swiss," he says. "The two main players were Swiss, the lead lawyers were Swiss, it was a domestic Swiss transaction. Credit Suisse involved our team of 20 lawyers across various locations. It was done in haste; the cleaning-up took some time. It includes several branches of litigation, some have already started and others may start – although probably not in Switzerland, they will try their luck elsewhere. Singapore is always a good address for claimants with weak claims and no evidence at

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Daniel Hayek, managing partner, Prager Dreifuss

hand."

Investors' day in court

Although opinions vary about the legal actions by AT1 bondholders, there is a consensus that the litigation will be slow-burning, potentially across multiple jurisdictions. "It's a sign of a functioning legal system, that there is this claim to be made," says Thomas Reutter, founding partner at Advestra. "Investors have a right to have their day in court without saying that they should win or lose. That these kinds of governmental measures can be subject to litigation is, in the general sense, a good thing for the rule of law in society."

Moser adds: "Certain groups of investors are preparing investment treaty arbitrations against Switzerland. But challenging the order of FINMA – that won't be successful. Those appeals will first go to the Federal Administrative Court, then to the Swiss Supreme Court – not known for being daring when it comes to the application of the law, they will likely uphold the regulator's orders. But we will have to await the outcome of the arbitration cases."

AT1 bondholders in countries including China, Japan, Singapore and South Korea are relying on Bilateral Investment Treaties (BITs) to prepare cases against Switzerland over its role in eliminating CS bond-related debt. Oetiker notes: "There's quite a bit of litigation on the horizon, which Switzerland is not used to – BIT claims. Our administrative procedural team is heavily involved in administrative proceedings, challenging the decision of the Swiss government to quash the AT1 bonds."

In its March 2024 letter to the Administrative Court, FINMA warned that disclosing documents could help foreign investors build their cases against the Swiss state: "This would greatly increase the risk of uncontrolled circulation of the procedural documents and that these documents would be used against the Swiss Confederation or the bank in arbitration and civil proceedings, circumventing the procedural rules applicable to civil proceedings."

Challenging the FINMA decision before the Swiss Administrative Court is a big mistake, according to Trüeb. "A group of investors will eventually sue in exotic jurisdictions: the Swiss forum is difficult for various reasons," he suggests. "The burden on claimants is much higher than in common law jurisdictions. I don't think the AT1 claimants will have any chance challenging this in Switzerland. But other jurisdictions, I can't make a call."

Top guns hired

He notes that in choosing Quinn Emanuel, "they've lined up the best and most expensive lawyers in the world. The claimant team includes Thomas Borer as advisor who is well known in the market. The AT1 guys really have top guns." Borer, who started his career at Credit Suisse in Geneva, is a Swiss management consultant, lobbyist and a former Swiss ambassador to Germany.

Hayek says that "what's happened with bondholders being treated worse than shareholders is not exactly what you would expect. However, such treatment may be permissible under the bond indenture on the basis that it allows the bonds to be written down with FINMA's approval: that's what happened. The European banking regulators didn't like it because they were afraid that the AT1 bond market would be damaged, which it wasn't. But it certainly didn't help Switzerland's reputation as a financial centre."

Legally, he suggests that: "It can be argued that the Emergency Ordinance of 19 March 2023 is itself unconstitutional because it does not meet the requirements set out in the Federal Constitution. Furthermore, it can be argued that the provision of the Emergency Ordinance that allows the Swiss Regulator FINMA to write-down AT1 (Art. 5a) violates the constitutional principles of legality and proportionality and the constitutionally protected guarantee of property and economic freedom. The principle of legality is violated because the mentioned provision does not have the quality of a law (i.e. it is not a general abstract rule) and does not provide FINMA with sufficient guidelines with regard to its power to write down the AT1 bonds.

"The principle of proportionality is violated because, inter alia, FINMA's order may be useful to achieve the desired result, but the order was not necessary (i.e.

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>
> ***Daniel Daeniker, Homburger***

there would have been milder measures in accordance with the Federal Banking Act to achieve the necessary result). You can also argue that the mentioned provision violates the Federal Banking Act, in particular its provisions applicable outside a resolution framework. Nevertheless, in my opinion it is already an uphill battle from a legal point of view.

"I don't think there is much chance that the courts will, with the benefit of hindsight, decide that the rescue was unlawful. The proportionality argument, which ultimately underpins all the individual legal arguments, is also very difficult to make. Because in this situation, over the weekend, when Credit Suisse was rapidly losing assets under management, the courts will be very reluctant to second-guess the decisions that were made. Was the rescue desirable? Parliament has answered that question: it has approved and ratified it.

"There is another aspect to the AT1 litigation that could be called political, because it is not legally relevant: Many claimants are hedge funds that bought these bonds for 1 cent after the fact. So, your case before the Federal Administrative Court will be that your clients should get 100% for a bond that they bought for 1% after it was written down. There is not much sympathy for that. Maybe it works in New York, or even in London, where people are much more open to the distressed business, but a very traditional Swiss judge, which is even more the case with administrative judges, would find that quite problematic."

Key conundrum

Daeniker outlines his thoughts of the main issues. "The terms of the bonds and the prospectus were very clear: the AT1 instrument is a hybrid between a bond and a share. Wiping out the AT1 bonds and leaving the shares intact was mentioned explicitly in the bond documentation. There may be a mismatch between market expectations and what the legal documents say, but the legal documents allowed FINMA to write down the bonds.

"The key conundrum, which nobody has dared to touch, is technically a debt of SFR16bn owed by Credit Suisse, now owed by UBS, was wiped out by a term which says: the government can tell you to cancel the bonds, and then you have to cancel. Cancellation was a government decision. If the plaintiffs got their day in court, it would be interesting to find out who is liable because Credit Suisse was executing a government order.

"The Swiss government authorised FINMA to do what the terms of the bond foresaw: write down the instruments. FINMA told the board: write down the instruments, and cancel them. There's not even a secondary market, which would be a market in the chances of success of the litigation. The Credit Suisse board writes it down, cancels the instruments, tells everybody your instrument is now worthless. Where you would put responsibility is somewhere between authorisation by the Swiss government and the FINMA order.

"Litigation all the way to the Supreme Court can take five or six years. In the meantime, AT1s continue to be issued. The market is not dead, unlike what everybody said, and it will be a feast for litigation lawyers." On that point, it would be foolish to disagree. ●

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