

Current developments in Swiss business law

Dear Madame, dear Sir,

From a business law perspective, particularly the following changes attained the force of law in the period from 1 January to 30 June 2012:

1. Banking regulations – amendment to the Banking Act

In the wake of the too-big-to-fail debate, an amendment to the Banking Act entered into force on 1 March 2012. In conjunction with the generally applicable provisions of banking law, it is intended to additionally alleviate the risks emanating from the system-relevant banks for the stability of the Swiss financial system. Also, the amendment is intended to guarantee the continuation of economically important functions and to prevent the necessity of government aid. System-relevant banks now have to have equity capital which, measured against statutory requirements, is able to cushion higher losses and to make a substantial contribution to the continuation of system-relevant functions in a case of threatening insolvency. The obligation to diversify risk is now expressly enshrined in the Banking Act. System-relevant banks are now further obliged to spread their risks in such a way that counterparty risks and risk concentrations are limited. In the same context, the Federal Parliament adopted provisions concerning additional capital. Now, the possibility of creating both reserve and convertible capital is stated in the Banking Act. By means of an amendment to the statutes, an annual general meeting may empower the board of directors to increase the share or participation capital. The subscription right may be suspended for important reasons.

A further change in the Banking Act affects the sphere of remuneration, which is not, however, limited to a certain management level in the Act. If a bank requires government aid from federal resources, the Federal Council will impose measures in the field of remuneration for the duration of the period during which the bank benefits from such aid. The Federal Council is entitled to prohibit the payment of variable remuneration entirely or in part and to impose adjustments to the remuneration system.

2. Banking regulations – prospects for 2013

To strengthen the Swiss banking system above and beyond existing regulations, the Federal Council adopted a banking regulation package on 1 June 2012. A totally revised Capital Adequacy Ordinance is intended to enter into force as from 1 January 2013. Among other things, this Ordinance is meant to implement the special requirements intended for system-relevant banks in the Banking Act and to coerce banks to comply with the rules of the Basel Committee on Banking Supervision (“Basel III”). Also, banks should be obliged to comply with supplementary requirements regarding equity capital and risk diversification in the future. Additionally, system-relevant banks will have to submit a contingency plan to FINMA, which is supposed to demonstrate how they intend to guarantee the continuation of functions relevant to Switzerland in the case of threatening insolvency.

3. Amendment to the Ordinance of the Swiss Financial Market Supervisory Authority on Stock Exchanges and Securities Trading (FINMA Stock Exchange Ordinance, SESTO-FINMA)

The FINMA Stock Exchange Ordinance was amended by the Swiss Financial Market Supervisory Authority with effect as from 1 January 2012 in view of the stock exchange reporting requirements. If, under this new regime, it is reported that a threshold has been reached, there will be no need for a renewed report if this threshold is exceeded or reached again unless the next higher threshold is reached or exceeded in the meantime. In the case of foreign collective capital investments that have not been approved for distribution, the fund management or the company will be able to satisfy its reporting requirements unless it is dependent on a group of affiliated companies.

4. Revision of the Federal Act against Unfair Competition

The amendments to the Unfair Competition Act primarily served to reinforce the substantive protection against unfair competition through the adoption of new provisions. The list of specific offences in Art. 3(1) of the Unfair Competition Act was extended. Now, people also engage in unfair competition who use bid forms, corrected bids or similar documents to advertise entries in directories of any kind or advertisement orders or who immediately offer such entries without indicating their payment basis, periods of time, overall prices and distribution in big letters and in comprehensible language (letter p) and who send out invoices for entries into directories or for advertisement orders without previously receiving a corresponding order (letter q). This is intended to protect customers from concluding a contract by mistake. Furthermore, the Unfair Competition Act was supplemented by a specific offence which classifies so-called snowball systems, Ponzi schemes or pyramid systems as unfair competition. Letter s additionally enshrines information requirements in electronic business transactions and letter t the so-called loss leaders. The extended list is concluded by the prohibition of ignoring riders in telephone directory entries (letter u). In addition, cross-border cooperation with foreign partner authorities in terms of mutual assistance for an improved protection of consumers was to be stated in the law. These amendments became effective as from 1 April 2012.

Moreover, Art. 8 of the Unfair Competition Act concerning abusive general terms and conditions ("GTC") entered into force as from 1 July 2012. According to the Federal Council, this provision serves to provide a sharper configuration of the existing GTC regulation. The correction in Art. 8 of the Unfair Competition Act allows for the contents of GTC to be vetted. Thus a judge is intended to be able to declare GTC as unfair, for instance, if they provide for an unjustified disproportion between the contractual rights and obligations in a way that violates good faith. Furthermore, the revision also involved provisions for better law enforcement. Thus Art. 10(3) of the Unfair Competition Act grants the Confederation the right to institute proceedings for the protection of the public interest.

In addition to the revision of the Unfair Competition Act, the Ordinance on the Right of the Confederation to Institute Proceedings in the Context of the Law on Unfair Competition became effective as from 1 April 2012. This Ordinance stipulates, in particular, that in civil and criminal proceedings based on Art. 10(3) of the Unfair Competition Act, the Confederation is represented by the State Secretariat for Economic Affairs (SECO).

5. Change in auditing law

The Federal Parliament resolved to amend (in force since 1 January 2012) the provision concerning ordinary audits. Before the revised provision entered into force, companies were obliged to have an ordinary audit of the annual financial statements conducted by an auditor, among others, if they exceeded in two consecutive years two of the following thresholds: a balance sheet total of 10 million francs (letter a), a sales revenue of 20 million francs (letter b) and 50 full-time positions on annual average (letter c). Now the threshold of the balance sheet total has been increased to 20 million francs, of the sales revenue to 40 million francs and of the full-time positions on annual average to 250.

6. Specific changes concerning value added tax

On 1 January 2012, Art. 78(4) of the Value Added Tax Act entered into force, according to which a taxable person may make a justified request for an audit to be carried out by the Swiss Federal Tax Administration. The audit must be performed within two years. On the same date, specific amendments to the Value Added Tax Ordinance became effective with regard to shipping traffic on Lake Constance and passenger transport in border areas, as well as provisions concerning the Value Added Tax Consultative Commission.

7. Amendment to the Federal Act on Stamp Duties

As from 1 March 2012, the Federal Council amended the Federal Act on Stamp Duties to the effect that when bonds and money market securities are issued by a domestic debtor, no stamp duty will be levied. Previously, a stamp duty of 0.12 per cent was levied on bonds and money market securities, and 0.06 per cent was levied on the nominal value and on each year of the life of medium-term notes.

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Bratschi Wiederkehr & Buob in brief

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