CapLaw
SWISS CAPITAL MARKETS LAW

No. 5/2016

Securities

Regulatory

Events

which includes far reaching obligations on disclosure of shareholder identity, transparency obligations of institutional investors and related party transactions. If these proposals find their way into the final directive, Switzerland will have to carefully consider whether it is itself poised for fundamental changes to certain concepts it has grown accustomed to in the past decades.

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Bail-in Recognition Clause

Reference: CapLaw-2016-44

This paper intents to outline the purpose and scope of article 55 of the European Bank Resolution and Recovery Directive, to present, as an example, the Bail-In Recognition Clause suggested by the Loan Market Association, and to discuss the legal nature of such a clause in a Swiss law governed agreement or document.

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1) Introduction

Effective as of 1 January 2016, the European Bank Resolution and Recovery Directive[1] (BRRD) requires financial institutions and certain other in-scope institutions established within the European Economic Area[2] (the EEA Financial Institutions) to include a contractual bail-in recognition clause (the Bail-In Recognition Clause) in certain types of agreements which are not governed by a law of an EEA country (*e.g.*, Swiss law). Pursuant to this clause the counterparties of such EEA Financial Institution acknowledge and agree that liabilities of the EEA Financial Institution may become subject to bail-in.

1 JP Braithwaite, Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council.

2 The EEA (the European Economic Area) consists of the member states of the European Union as well as Iceland, Liechtenstein and Norway.

The intention of this paper is to outline the purpose and scope of article 55 BRRD, to present, as an example, the Bail-In Recognition Clause suggested by the Loan Market Association (LMA), and to discuss the legal nature of such a clause in a Swiss law governed agreement or document.

2) Article 55 BRRD

a) Genesis of BRRD and Implementation into National Law of EEA Countries

On 15 May 2014, the European Parliament and the European Council adopted the BRRD, which became effective on 2 July 2014. The BRRD is part of the European Union's response to the financial crisis; it grants European regulators competences and means to intervene in operations of credit institutions and other investment firms, *i.e.*, the EEA Financial Institutions, to save financially distressed institutions and prevent failure. If an EEA Financial Institution faces failure, the respective resolution authorities now have a comprehensive set of tools to restructure the business of such institution and to minimise negative repercussions by preserving the systemically important functions of the concerned EEA Financial Institution. The lack of such instruments during the financial crisis has been considered to be one of the factors that forced the EEA member states to use taxpayers' money to save certain bank and other financial institutions.

By 1 January 2016, the EEA countries had to implement the BRRD regulations into national law, including the requirements set forth in article 55 BRRD.[3] As there will be different implementing regimes in each EEA country, the details of the Bail-In Recognition Clause may also vary, in particular if an EEA country chooses to exceed the requirements of article 55 BRRD.

b) Writedown and Conversion Powers

BRRD contains wide ranging recovery and resolution powers for EEA resolution authorities to facilitate the rescue of failing EEA Financial Institutions, including the powers for EEA resolution authorities to write-down and/or convert into equity a failing EEA Financial Institution's liabilities. As a matter of law, it is expected that an EEA bank resolution authority's exercise of those write-down and conversion powers will be effective in respect of liabilities under documents governed by the laws of an EEA country, regardless of the terms and conditions of that document.

Under the BRRD, such bail-in and other resolution actions may be imposed on an EEA Financial Institution if it becomes financially distressed and reaches the point of

3 As of the date hereof, Iceland, Liechtenstein and Norway have not yet enacted implementing legislation.

non-viability. The detailed conditions for such resolution actions are listed in articles 32 et seq. BRRD. The resolution powers include, among other things, the competence of the relevant resolution authorities in the respective EEA country to (i) write-down or convert into equity certain liabilities of that institution (Bail-In), and (ii) impose temporary restrictions on early termination rights on the institution's counterparties (Resolution Stay).

A Bail-in or Resolution Stay imposed by an EEA bank resolution authority on a EEA Financial Institution are given cross-border recognition throughout the EEA and, as a consequence, resolution steps under BRRD with regard to agreements subject to a law of an EEA country should take effect in any other EEA country.

However, with regard to agreements governed by laws of a non-EEA country or, for these matters, a third-country (*e.g.*, Switzerland), there is a risk that the effectiveness of a Bail-In or Resolution Stay may be challenged under the laws of the relevant third-country jurisdiction. To mitigate the risk that a creditor of an EEA Financial Institution successfully challenges the application by an EEA bank resolution authority of a Bail-In, article 55 BRRD sets forth that the EEA member states require EEA Financial Institutions established in their jurisdiction to include a Bail-In Recognition Clause in their non-EEA law governed agreements by which the counterparties of these EEA Financial Institutions recognise that any liability of the EEA Financial Institution may become subject to Bail-in, *i.e.*, the write-down or conversion powers of the competent resolution authority. On the other hand, BRRD does not require that the competence of the relevant resolution authorities to order a Resolution Stay is also acknowledged and agreed.

c) Bail-In Recognition Clause

i) General

For lack of statutory regimes giving effect to resolution actions taken by an EEA Bank resolution authority outside EEA jurisdictions, the purpose of such contractual Bail-In Recognition Clauses is to support cross-border enforceability of resolution actions in non-EEA countries. In the absence of statutory or contractual provisions giving effect to such resolution actions, courts may not enforce such resolution actions, *e.g.*, a Bail-In or a Resolution Stay, imposed under foreign resolution regimes where the contract is governed by their domestic law, or would be unlikely to do so sufficiently promptly to meet the needs of an effective resolution.

Therefore, article 55 BRRD requires EEA Financial Institutions[4] to include a Bail-In Recognition Clause in certain non-EEA law governed agreements to which they are a party and under which they can become liable. Pursuant to the Bail-In Recognition Clause, the EEA Financial Institution's counterparties acknowledge that the EEA Financial Institution's obligations under that agreement could become subject to an EEA bank resolution authority's exercise of write-down and conversion powers.

ii) Scope

The article 55 BRRD requirement to include Bail-In Recognition Clauses applies to agreements and documents if:

(1) such agreement or document is governed by a law of a non-EEA country, *e.g.*, Swiss law;

(2) the EEA Financial Institution has, or may have, any liability under the agreement or document (be it a contractual or non-contractual liability); and

(3) the respective agreement or document is only entered into by the EEA Financial Institution after 1 January 2016, or, should it have been entered into earlier, the agreement or document is materially amended or new liabilities arise under the agreement or document after 1 January 2016.

In principle, EEA Financial Institutions have to include Bail-In Recognition Clauses in almost every agreement or document to which they are a party and which is governed by the law of a non-EEA country.

Articles 44 (2) and 55 (1) (b) BRRD only provide for the following exemptions: (i) deposits protected by national guarantee schemes, (ii) deposits that are held for natural persons, and micro, small and medium sized enterprises and which exceed the amount protected by national guarantee schemes, (iii) secured liabilities (including covered bonds and liabilities secured by a charge, pledge, lien or collateral arrangement), (iv) client assets or client money (including assets or money held for UCITS or AIFs) and liabilities arising under fiduciary relationships, (v) liabilities to other regulated EU banks or capital requirement regulated investment firms (CRR investment firms) with an original maturity of less than 7 days, (vi) liabilities to settlement finality systems, their operations or participants, and arising from the participation in such a system, with a

4 The precise scope of the entities subject to article 55 BRRD is beyond the scope of this position paper. The scope is specified in article 1 BRRD and, in broad terms, includes EEA incorporated credit institutions or investment firms and relevant affiliates. EEA branches of non EEA incorporated institutions are not included.

remaining maturity of less than 7 days, (vii) liabilities to employees (except for variable remunerations such as bonuses), (viii) liabilities to commercial trade creditors for goods or services critical to daily operations, (ix) tax and social services liabilities (if these are preferred liabilities under the relevant EEA member state's law), and (x) liabilities in relation to depositor protection schemes.

To further delineate the exemptions listed above, article 55 (3) BRRD required the European Banking Authority (EBA) to publish draft regulatory technical standards on the contractual recognition of write-down and conversion powers (RTS) by no later than 3 July 2015. EBA submitted to the European Commission its final report containing the draft RTS on the last day of this deadline. The RTS, once enacted, will automatically have effect in national law.

On 3 February 2016, the European Commission, based on EBA's draft RTS, published the delegated regulation regarding, among others, the contractual recognition of write-down and conversion powers (Delegated Regulation). At the date hereof, both the RTS and the Delegated Regulation were only available in draft form.

In sum, and subject to the exemptions listed above, article 55 BRRD and the requirement to include a Bail-In Recognition Clause applies to a broad range of non-EEA law governed agreements and documents under which an EEA Financial Institution is or may become liable. The most obvious liabilities are repayment obligations of funds borrowed under any credit- or debt capital market instruments. However, article 55 BRRD also wants to be applied to potential contractual or non-contractual liabilities of EEA Financial Institutions, be it, for instance, in the capacity as lender, underwriter, agent, secured party or beneficiary. In such a capacity an EEA Financial Institution may become liable for breach of lending commitments, confidentiality undertakings, restrictions of creditor actions, administrative obligations, misrepresentations, negligence or other contractual or non-contractual obligations.

The broad scope of application of article 55 BRRD is impracticable and results in uncertainty and potential inconsistencies in application of Bail-In Recognition Clauses and, therefore, the relevant EEA resolution authorities should aim at defining a clear and consistent approach across the EEA countries to provide the EEA Financial Institutions with a clear and workable solution. In particular, the scope of article 55 BRRD should be amended to align it with that agreed at the international level through the Financial Stability Board (FSB). According to the FSB Principles for Cross-border Effectiveness of Resolution Actions, dated 3 November 2015, the scope of application of contractual resolution action recognition clauses should only cover debt instruments.

iii) Terms of Bail-In Recognition Clause

Pursuant to article 44 Delegated Regulation, which specifies the terms of a Bail-In Recognition Clause, such clause shall include:

(1) the acknowledgement and acceptance by each counterparty of an EEA Financial Institution that the liabilities of the EEA Financial Institution may be subject to the exercise of write-down and conversion powers by a resolution authority;

(2) a description of the write-down and conversion powers of each resolution authority in accordance with the applicable national law;

(3) the acknowledgement and acceptance by each counterparty of an EEA Financial Institution that:

  (i) it is bound by the effect of an application of the write-down and conversion powers, including any reduction in the principal amount or outstanding amount due, including any accrued but unpaid interest, in respect of the liability of an EEA Financial Institution, and the conversion of that liability into ordinary shares or other instruments of ownership;

  (ii) the terms of the relevant non-EEA law governed agreement may be varied as necessary to give effect to the exercise by a resolution authority of its write-down or conversion powers and such variations will be binding on the counterparty of the EEA Financial Institution; and

  (iii) ordinary shares or other instruments of ownership may be issued to or conferred on the counterparty of an EEA Financial Institution;

(4) the acknowledgement and acceptance by each counterparty of an EEA Financial Institution that the Bail-In Recognition Clause is exhaustive on the matters described therein to the exclusion of any other agreements, arrangements or understandings between the counterparties relating to the subject matter of the relevant agreements.

Even though the European Commission in its Delegated Regulation sets the parameters for Bail-In Recognition Clauses, it does not provide examples or a template wording for such Bail-In Recognition Clauses.

iv) Legal Opinion

According to article 55 (1) para. 3 BRRD, EEA member states have to ensure that their resolution authorities may require EEA Financial Institutions within their territory to provide them with a legal opinion confirming the enforceability and effectiveness of Bail-In Recognition Clauses.

We understand that such legal opinions should be addressed to the relevant resolution authorities and allow them to rely on the opinion and, therefore, we believe that such opinions would not be the opinions which are customarily rendered as condition precedent document in connection with a financing or other transaction, but that these opinions would rather be specifically requested by a resolution authority, be in the context of a regulatory audit, resolution actions or other circumstances.

3) Bail-In Recognition Clauses in Practice

a) General

Following the adoption of the BRRD, different professional associations have published models or recommended wordings for Bail-In Recognition Clauses, either for EEA Financial Institutions resident in a particular EEA jurisdiction, or for EEA Financial Institutions generally.

For example, the LMA published The Recommended Form of Bail-In Clause and User Guide originally dated 13 January 2016, as amended from time to time and currently available in the version dated 4 August 2016 (LMA Bail-In Guide). The LMA Bail-In Guide provides for a template Bail-In Recognition Clause (the LMA Bail-In Recognition Clause) which contains the mandatory features specified by the RTS and the Delegated Regulation.

b) LMA Bail-In Recognition Clause and EU Bail-In Legislation Schedule

The LMA Bail-In Recognition Clause reads as follows:

> *"[ ] Contractual recognition of bail-in*
>
> *Notwithstanding any other term of any Finance Document[5] or any other agreement, arrangement or understanding between the Parties[6], each Party acknowledges and accepts that any liability of any Party to any other Party under or in connection with*

5 The LMA Facility Agreements contain a definition of "Finance Documents" which encompasses all documents involved in the financing transaction. If the LMA Bail-In Recognition Clause is adapted for use in another document, all references to "Finance Document" should be replaced with the appropriate defined term or description of the relevant documents.

6 The LMA Facility Agreements contain the following definition: "Party" means a party to this Agreement. If the LMA Bail-In Recognition Clause is adapted for use in another document which does not contain such a defined term all references to "Party" or "Parties" should be replaced with the appropriate reference.

the Finance Documents may be subject to Bail-In Action by the relevant Resolution Authority and acknowledges and accepts to be bound by the effect of:[7]

(a) any Bail-In Action in relation to any such liability, including (without limitation):

(i) a reduction, in full or in part, in the principal amount, or outstanding amount due (including any accrued but unpaid interest) in respect of any such liability;

(ii) a conversion of all, or part of, any such liability into shares or other instruments of ownership that may be issued to, or conferred on, it; and

(iii) a cancellation of any such liability; and

(b) a variation of any term of any Finance Document to the extent necessary to give effect to any Bail-In Action in relation to any such liability."

The LMA Bail-In Recognition Clause uses the following definitions:

*""**Bail-In Action**" means the exercise of any Write-down and Conversion Powers.*

*"**Bail-In Legislation**" means:*

(a) in relation to an EEA Member Country which has implemented, or which at any time implements, Article 55 of Directive 2014/59/EU establishing a framework for the recovery and resolution of credit institutions and investment firms[8]*,*

7 In the LMA Facility Agreements express "agreement" between the parties is provided by a general operative clause at the beginning of the facility agreement. If the LMA Bail-In Recognition Clause is adapted for use in another document which does not contain such a general operative clause it should be prefaced with "It is agreed that".

8 LMA facility agreements contain the following interpretative provision: "[any reference to] a provision of law is a reference to that provision as amended or re-enacted." If the LMA Bail-In Recognition Clause is adapted for use in another document which does not contain such a provision this reference to article 55 of Directive 2014/59/EU should be supplemented accordingly.

the relevant implementing law or regulation[9] as described in the EU Bail-In Legislation Schedule from time to time [; and

(b) in relation to any other state, any analogous law or regulation from time to time which requires contractual recognition of any Write-down and Conversion Powers contained in that law or regulation].[10]

"***EEA Member Country**" means any member state of the European Union, Iceland, Liechtenstein and Norway.*

*"**EU Bail-In Legislation Schedule**" means the document described as such and published by the Loan Market Association (or any successor person) from time to time.*

*"**Resolution Authority**" means any body which has authority to exercise any Write-down and Conversion Powers.*

*"**Write-down and Conversion Powers**" means:*

(a) in relation to any Bail-In Legislation described in the EU Bail-In Legislation Schedule from time to time, the powers described as such in relation to that Bail-In Legislation in the EU Bail-In Legislation Schedule[; and

(b) in relation to any other applicable Bail-In Legislation:

(i) any powers under that Bail-In Legislation to cancel, transfer or dilute shares issued by a person that is a bank or investment firm or other financial institution or affiliate of a bank, investment firm or other financial institution, to cancel, reduce, modify or change the form of a liability of such a person or any contract or instrument under which that liability arises, to convert all or part of that liability into shares, securities or obligations of that person or any other person, to provide that any such contract or

9 LMA Facility Agreements contain the following interpretative provision: [any reference to] a "regulation" includes any regulation, rule, official directive, request or guideline (whether or not having the force of law) of any governmental, intergovernmental or supranational body, agency, department or of any regulatory, self-regulatory or other authority or organization. If the LMA Bail-In Recognition Clause is adapted for use in another document which does not contain such a provision all references to "regulation" should be considered and amended appropriately.

10 Paragraph (b) of the definition of "Bail-In Legislation" is optional and is not required for compliance with the article 55 Requirement.

instrument is to have effect as if a right had been exercised under it or to suspend any obligation in respect of that liability or any of the powers under that Bail-In Legislation that are related to or ancillary to any of those powers; and

(ii) any similar or analogous powers under that Bail-In Legislation].[11]"

Since the LMA Bail-In Recognition Clause shall be able to be used in agreements and documents with EEA Financial Institutions from various EEA countries with different Bail-In and Bail-In recognition regimes implemented in their national laws, the LMA Bail-In Recognition Clause refers to the so-called EU Bail-In Legislation Schedule (the EU Bail-In Legislation Schedule). In this schedule jurisdiction specific definitions of "Bail-In Legislations" and "Write-down and Conversion Powers" for every EEA country are set out. By using the EU Bail-In Legislation Schedule it shall be avoided that detailed descriptions of the relevant national implementing regimes would need to be included in the LMA Bail-In Recognition Clause.

The LMA reserves the right to update the EU Bail-In Legislation Schedule from time to time to reflect the enactment of new or amended national implementing regimes. The goal is that the EU Bail-In Legislation Schedule at any time reflects the then current versions national implementing regimes.

4) Bail-In Recogntion Clauses in Swiss Law Governed Agreements and Documents

a) Legal Nature

In a Swiss legal understanding, powers of insolvency authorities (such as EEA bank resolution authorities vested with Bail-In powers) pertain to public law and, consequently, are generally not subject to the discretion of the parties. The personal and geographical scope of (direct) application of official acts based on public law, in turn, is generally governed by the principle of territoriality (limiting the effects of such acts to the territory of the state whose authority enacted them). It appears at least questionable whether such scope is capable of being further defined or altered by way of agreement between private parties actually or potentially concerned by such acts.

As regards powers of foreign insolvency authorities in particular, the Swiss Federal Supreme Court traditionally declined to recognise the purported effects of their exercise where assets or counterparties located in Switzerland were concerned, outside the

11 Paragraph (b) of the definition of "Write-down and Conversion Powers" is optional and is not required for compliance with the Article 55 Requirement.

specific recognition procedures provided by statute (articles 166 ff. Swiss Federal Private International Law Act (PILA); article 37g Banking Act).[12]

Commercial contracts, on the other hand, are governed by the principle of freedom of contract. Both the governing law and their substantive contents may, within the boundaries of statutory law, be determined by the parties as they think fit (article 116 PILA; article 19 (1) Swiss Code of Obligations (CO)). Therefore, nothing prevents the parties to a particular contract from agreeing therein that their respective contractual rights and obligations shall, from time to time, be adjusted in such manner as to "mirror" the stated effect of any act taken by a foreign public authority (such as, for instance, an EEA bank resolution authority) under the public law of its jurisdiction. Such an agreement should, as a matter of Swiss law, generally be valid and effective as a matter of contract between the parties as long as the results do not go beyond what the parties could also have specifically agreed in their contract from the beginning, and that the boundaries of the prohibition of undertakings contrary to public order, common decency and the right of personality (articles 19 *et seq.* CO), including excessive restrictions to the use of a party's freedom (article 27 (2) of the Swiss Civil Code (CC)), are not exceeded.

These prohibitions are, in our view, not generally infringed upon by the mechanism of a Bail-In Recognition Clause (where its terms make it clear that it is purely in the nature described in the preceding paragraph), but could be considered relevant if in a particular instance an EEA bank resolution authority made a use of its Bail-In powers which, from a Swiss perspective, appears arbitrary, discriminatory, inequitable, or in any other manner an abuse of such powers, either in substance (*e.g.*, where arbitrary distinctions would be made between creditors of the same types of claims) or in respect of the procedure in which it is taken.[13]

The conclusion in favour of the enforceability, in principle, of appropriately defined Bail-In Recognition Clauses is supported by the fact that Swiss law itself requires Swiss banks and financial infrastructures to implement a mechanism of contractual recognition of the exercise of (Swiss) insolvency powers of a comparable nature: Pursuant to article 12 (2^{bis}) of the Banking Ordinance, Swiss banks need to "ensure that new contracts or amendments to existing contracts, which are subject to foreign law or provide

12 BGE 137 III 570 ff. E. 3.

13 A comparison may be made with the principle stipulated by the Federal Supreme Court that contractually agreed rights of one party to unilaterally change the contents of a contract, while not generally illicit, must be exercised equitably ("*nach billigem Ermessen*"; BGE 118 II 157 ff., E. 4 (b) (bb)).

for a foreign forum, are only entered into if the counterparty recognizes a stay of termination of contracts pursuant to art. 30a Banking Act", thereby referring to the power of the Swiss Financial Market Supervisory Authority FINMA (**FINMA**) under the Banking Act to suspend contractual termination rights as part of a reconstruction plan (and a similar duty applies to Swiss financial market infrastructures based on article 71 (2) of the Financial Market Infrastructure Act). Although these provisions govern a reciprocal rather than an analogous situation, it would appear inconsistent if Swiss law refused to recognize the effect of a contractual recognition clause where the exercise of foreign insolvency powers is concerned, while itself requiring such clauses to be entered in contracts concluded by Swiss banks to protect the effects of an insolvency power of the FINMA.

b) Drafting Options

Where the proposed wording of a specific proposed Bail-In Recognition Clause is ambiguous as to the nature of the non-EEA party's undertaking in the sense of the distinction described above (*i.e.*, as to whether such party is purporting to submit to a direct application of a potential official act under foreign public law, or is merely consenting to a potential adjustment of rights and obligations as a matter of contract between the parties), Swiss counsel may propose to add clarificatory language to the proposed model language which removes such ambiguity.

Such clarificatory language could, for example, take the following form (as an additional section added at the end of the model clause):

> *"The parties further agree that upon the taking of any Bail-In Action by a relevant Resolution Authority, any liability of a Party to another Party under these [Finance Documents] shall, as a matter of contract as between the Parties, be reduced, converted, cancelled, or suspended (and that any term of this [agreement] shall be varied) in such manner as it is expressed to be pursuant to such Bail-In Action."*

Provided, however, that where an agreement or debt instrument also contains contractual mechanisms for write-down or conversion of creditors' claims upon certain defined triggers outside of resolution (*e.g.*, if the borrower's or the issuer's capital ratio falls below a particular level), it should be clear that this contractual bail-in mechanism is distinct from the exercise of statutory bail-in by an EEA resolution authority and that there may be circumstances where both could apply consecutively.

5) Conclusion

EEA resolution authorities, as well as any other bank resolution authority, must have confidence that the exercise of resolution powers will be legally enforceable in relation to a financial institution's loss-absorbing capital resources. Where agreements or

instruments are governed by non-domestic laws or, as supposed by article 55 BRRD, non-EEA laws, an acceptable level of confidence can only be achieved where there are legal frameworks in place by which resolution actions imposed by the home regulator of an EEA Financial Institution can be recognized in other jurisdictions, such as non-EEA jurisdictions, promptly and with an adequate degree of predictability and certainty. Should there be no statutory regimes in place supporting the cross-border enforceability of such resolution actions, contractual recognition clauses are an adequate means to support the timely and adequate cross-border implementation of resolution actions.

From a Swiss law point of view, the inclusion of a Bail-In Recognition Clause in a Swiss law governed agreement or documents is in line with the principle of freedom of contract and, therefore, nothing seems to prevent the parties to a particular contract from agreeing that their respective contractual rights and obligations shall, from time to time, be adjusted in such manner as to "mirror" the stated effect of any act taken by a foreign public authority (such as, for instance, an EEA bank resolution authority). Subject to general legal reservations, a Bail-In Recognition Clause, should generally be valid and effective as a matter of contract between the parties.

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Revisited Notification Duty for Voting Rights Delegated on a Discretionary Basis

Reference: CapLaw-2016-45

Practical problems arising from the present notification duty for voting rights delegated on a discretionary basis caused FINMA to consult on a revision of this rule. If implemented, those persons who actually decide on how delegated voting rights are exercised will be subject to the notification duty and no longer the persons controlling either directly or indirectly a relevant legal entity to which voting rights were so delegated on a discretionary basis.

By Benjamin Leisinger