Special report

Balkans

Serbs for enthusiasm

Although there has been a downturn in M&A work, elections and legislative change have helped keep Serbia's legal community busy

Joanne Harris

Serbians went to the polls last month, in the first elections for the Balkan state since it became an EU candidate in February.

The election was largely uneventful until the final stage. The incumbent government, a coalition of the Democratic Party and the Socialist Party, won enough seats to take power again, even though the Progressive Party and its running mates in the election won slightly more seats than the Democrats.

In the presidential run-off on the 20 May, however, the Progressive's Tomislav Nikolic, seen as the nationalist candidate, beat the pro-EU incumbent Boris Tadic, leader of the Democratic Party. Nikolic had earlier threatened to pull out of the election, claiming fraud, although independent observers had been happy with the way the election was run.

Serbian lawyers and the country's business community are generally happy with the results.

"There's stability, there's continuation of the same political platform and nothing will change," says Joksovic Stojanovic & Partners partner Alex Petrovic. "This is the only country in the region, and perhaps Europe, where the government has survived these tough economic times."

In brief

Economic strife is blighting much of the Balkan region, with deals almost stagnant. However, political stability provided by recent elections in Serbia and the prospect of EU membership on the horizon may kickstart things again and lawyers are eyeing up pan-regional opportunities.

Petrovic does not think that the presidential results will change much politically.

"If the new president will stick to his presidential promises, nothing should change," he predicts. "Right after his win was confirmed he reiterated that Serbia will stay on the EU course. Also, the presidential role is largely ceremonial and as such doesn't have any impact on the business of running the country – this is the job of the government which should be led by Tadic's party with the same political partners as before."

"In general, this is good for the country – this brings stability, particularly towards the expectation of

Montenegro in brief

Of all the countries in the former Socialist Federal Republic of Yugoslavia, Montenegro is perhaps one of the more promising jurisdictions. Although it is a small country, its mixture of coastline and mountains have made it a target for tourism and it is doing well compared to its larger neighbours.

When it comes to law firms, Montenegro has few large domestic firms. Many of the bigger transactions to have happened there have been handled by firms headquartered in Serbia.

Bojovic Dasic Kojovic (BDK), Harrisons Solicitors and Karanovic & Nikolic are three of the Serbian firms to have an office in

Montenegro and all report considerable activity in the jurisdiction.

Harrisons founder Mark Harrison reports the recent completion of two deals in Montenegro and says he sees plenty of opportunities in the region. "If I were a Serbian law firm I'd get down there straight away and open up," he enthuses.

BDK partner Tijana Kojovic also says her firm's Podgorica office is busy, but adds that not everything beginning in Montenegro comes to a successful completion. She describes working on a major PPP project to build a hydropower plant for two years before the deal was axed.

"There's a lot of enthusiasm, transactions are planned, but very few of these major transactions come to closing," Kojovic warns.

She points out that comparing Montenegro to its larger neighbours is perhaps dangerous.

"Montenegro is a very special country. It's so small and very easily managed so it's very difficult to compare with other countries in the region," she adds.

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Balkan expansion

Karanovic is planning a new office in Croatia

The majority of Balkan firms are content to work within their own jurisdiction, using referral relationships with other domestic firms for cross-border work. But this belies the fact that work spanning several countries in the region is increasing; as the Balkans continue to pull together, cooperation between states is increasingly common.

Belgrade-headquartered Karanovic & Nikolic has the broadest geographical coverage of any firm in the region, with offices in Serbia, both the Muslim-Croat and Serbian parts of Bosnia and Herzegovina, Macedonia and Montenegro. The firm is shortly opening up its sixth office in Croatia, hiring a team including DLA Piper senior associate Josip Marohnic and Wolf Theiss's Aleksandra Raach.

Founding partner Patricia Gannon says competition in Croatia is fierce, with the top-tier domestic firms dominating the market and doing good work for good clients.

"In many ways the legal market is more mature [than Serbia's]," she says, explaining that Croatian law allows mechanisms such as a sale and leaseback on property that cannot be done in Serbia.

Gannon says Karanovic & Nikolic's move into Croatia is in response to the increasing trend for regional work. She believes that in a few years, the Balkans may resemble the Baltic states of Estonia, Latvia and Lithuania, where cross-border work has driven many of the largest law firms to pan-jurisdictional mergers.

"I'm hoping that in the next five years 40 per cent of my business will be pan-jurisdictional," Gannon says, reporting success with the firm's model over the past few years. "It surprised us how quickly the market has responded to that and how well that's gone down as a product."

Kinstellar Belgrade partner Branislav Maric agrees that "regional weight" is increasingly important and many M&A transactions are increasingly cross-border, involving several jurisdictions.

> **"I'm hoping that in the next five years 40 per cent of my business will be pan-jurisdictional"**
> **Patricia Gannon**

But the concept of a pan-Balkan firm is still not something that has taken off in the market more generally.

"We believe that lawyers should be engaged in the jurisdictions where their origin is and there's no way to go into foreign jurisdictions without having really good local people and that isn't always easy, particularly in the Balkans," argues Jankovic Popovic & Mitic senior partner Nikola Jankovic. He says his firm prefers to build solid referral relationships with leading firms in the other jurisdictions, which are often smaller than Serbia.

Meanwhile, Bojovic Dasic Kojovic (BDK) partner Tijana Kojovic believes her firm's membership of the pan-regional South East Europe (SEE) Legal Group fulfils all its regional needs. The alliance has members in all the former Yugoslav countries, although it is not present in the Republika Srpska – the Serbian half of Bosnia.

Kojovic reveals that BDK has examined the prospect of opening up in Republika Srpska's capital Banja Luka, but for the moment thinks the level of transactions is too low to warrant a presence on the ground. Harrison is more enthusiastic, noting that "Banja Luka is the next natural port for us", although an opening would not be immediate. He adds that Republika Srpska is an easier place to move into for a Serbian firm, as there are none of the cultural issues involved with launching in Muslim-Croat Sarajevo.

In the meantime, both Harrison and Gannon say the future of the Balkans as a region will lie in attracting finance from western Europe. Harrisons has an office in the City for this purpose, "to suck work back from the investment banks and the big law firms to the Balkans", says Harrison.

Gannon, meanwhile, reports several recent meetings with UK investment banks looking at the region.

"The deal size is too small for them today, but they're developing relationships," she says.

Opportunity across the Balkans may not always be obvious, but it is certainly there.

Serbia becoming a member of the EU," adds Jankovic Popovic & Mitic (JPM) senior partner Nikola Jankovic.

Karanovic & Nikolic founding partner Patricia Gannon is more cautious in her assessment of the results.

"In a nutshell, we're surprised at the result and believe it'll have an impact on investment in the country as it spells instability. We are, however, hopeful that it also presents new opportunities as yet unclear and are positively using this moment to focus on local business in need of expansion capital," she says.

An economy in need

Kinstellar Belgrade partner Branislav Maric says the election results set the stage for important work to be done. Serbia is struggling economically, with its currency falling to a 10-year low against the euro in May.

The jurisdiction had agreed a $1.3bn (£822m) precautionary loan with the International Monetary Fund (IMF) in September 2011, but the loan programme was frozen in February.

In mid-May the Serbian Finance Ministry confirmed that the country had missed public debt and budget deficit targets. Its budget deficit for the first quarter of 2012 was RSD52.7bn (£374m), double that agreed with the IMF, while public debt equalled 46.8 per cent of economic output against a limit of 45 per cent set by the government.

"I think the political elite is aware of the fact that the situation is such that they should continue with the regulatory work of the government as soon as possible," says Maric. "All in all, there are a lot of things on the economic agenda that need to be addressed as soon as the new government is formed."

Although he welcomes the election results, Jankovic is concerned that the relatively weak majority of the reformed coalition will prevent any major changes to legislation or the economy.

Tijana Kojovic, a partner at Bojovic Dasic Kojovic, also thinks that change might not happen to the extent that it is needed.

"There's predictability but, on the other hand, we as a country need some major changes and they probably aren't going to happen – or they aren't going to happen at the pace that is actually necessary," she says.

However, something is required to kickstart Serbia's economy. For law firms, 2011 was a quiet year and the general lack of activity has persisted into 2012, exacerbated by the election campaign and its effect on business.

Special report

Balkans

Bringing business back

Some are hopeful that things will now pick up. Last year there were few significant corporate transactions in Serbia – in fact, just two broke through the €100m (£80.01m) barrier. The biggest deal was the July [2011] takeover of Serbia's largest food retailer, Delta Maxi Group, by Belgian giant Delhaize. The transaction was valued at €932.5m (£746.2m). CMS Reich-Rohrwig Hainz (RRH) advised Delhaize, while a JPM team led by senior partner Nenad Popovic acted for Delta. The deal was the largest-ever private transaction in Serbia and affected `not only the chain's 350 stores in the country, but also another 100 shops across the Balkan region.

On the finance side, one of the biggest deals that happened at the start of 2012 involved a €470m loan by a syndicate of banks led by UniCredit to Telekom Srbija. However, the loan replaced a proposed privatisation of the company, cancelled by the government in mid-2011, and followed a €380m re-purchase of 20 per cent of Telekom Srbija's shares from the Hellenic Telecommunications Organization in December 2011.

"We as a country need some major changes and they probably aren't going to happen at the pace that's actually necessary"
Tijana Kojovic

Momentum from energy

Privatisations in Serbia are now "mostly finished", confirms Harrisons Solicitors' Mark Harrison, whose firm had been advising the government on the Telekom Srbija privatisation before it was canned.

As a result, firms are mainly involved in work in two areas. One is infrastructure and energy projects, which continue across the Balkan region and are attracting foreign investment. For example, Italian energy company Edison has signed a joint venture agreement with Electric Power of Serbia (EPS) to construct a thermal power plant in central Serbia.

Russian energy giant Gazprom is also planning to build a gas pipeline, known as the South Stream project, which will run through Serbia and Bulgaria on its way to Austria.

Meanwhile, Luxembourg-based private equity house Securum Equity Partners announced an incubator fund in November 2011 that will finance the creation of the world's largest solar power park. In February Securum signed a €1.75bn agreement to buy photo-voltaic panels from Italy's MX Group for the park.

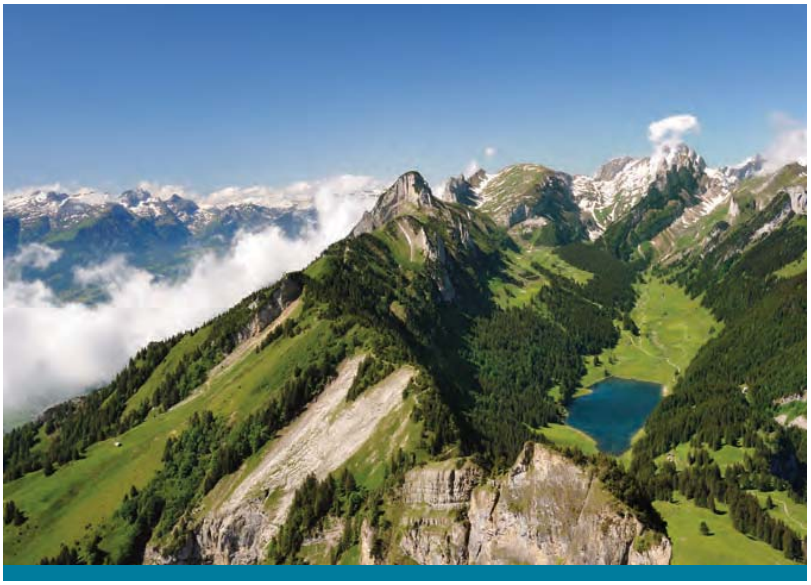
"Particularly in Serbia infrastructure projects are rather strong because after 20 years of war and instability, where nothing has been invested in infrastructure, the government is trying to put some money towards that," explains Jankovic. He adds that highway and railway projects are also being proposed.

Petrovic points to mining and resources as another potential growth area.

"Just recently the state introduced a strategy for the management of major resources up until 2030," he says. The

THE LAWYER

BRIEFING SWITZERLAND



As Switzerland moves to enhance and improve its financial services laws to increase transparency and flexibility, this week's briefings look at some of the key developments in the jurisdiction. Among the topics on the table are tax information exchange agreements, changes to the laws governing banks, and an overview of the laws for financial planning.

TAX

Exchange of tax informati

The technical evolution of policy on exchange of tax information at international level

Laïla Rochat (top) is an associate and Jean-Blaise Eckert is a partner at Lenz & Staehelin

This article takes a look at the changing Swiss policy on the exchange of tax information at international level, drawing on examples of agreements between Switzerland and the US.

Trigger events

In September 2007 the US authorities initiated an investigation into Swiss bank UBS, which they suspected of helping US account holders to conceal their assets from the US Internal Revenue Service (IRS). The investigation targeted the existence of a tax fraud by individuals holding accounts with UBS, committed methodically and with some support of the bank, or bank's employees.

In June 2008, following tough negotiations between the US and Switzerland, the latter persuaded the US tax authorities to put an end to the investigation and retrieve the desired information through international administrative assistance. In July the Swiss Federal Tax Administration (SFTA) received such a request. The SFTA agreed to provide administrative assistance and ordered UBS to remit the relevant information and records. Thereafter, some of the US citizens involved, who were beneficial owners of UBS accounts of offshore companies incorporated in the British Virgin Islands, appealed to the Federal Administrative Court of Switzerland (FAC) against the decision of the SFTA.

On March 5 2009 the FAC issued a ruling concluding, in the specific case, the existence of a tax fraud in application of Article 26 of the 1996 Swiss-US double taxation treaty, known as 'DTT 96'. Consequently, the relevant information was to be exchanged with the US tax authorities. Furthermore, the FAC stressed that the request by the IRS was valid even though the US tax authorities did not issue the names of US beneficial owners of accounts and that the description by the IRS of the behavioural pattern of the offending conduct sufficed to require administrative assistance. This was the real starting point for changes in Swiss policy on the exchange of tax information.

The appeal had, in any case, lost its interest since the information on this specific case had already been exchanged. Indeed, before the FAC rendered its decision and following US threats to institute criminal proceedings against UBS, the Swiss banking supervisory authority (FINMA) had ordered – on February 18 2009 – the immediate exchange of information related to 285 US clients of UBS to the IRS.

Finally, to resolve the dispute, a separate bilateral treaty between the US and Switzerland ('the Agreement') was signed on August 19 2009. The Agreement stipulated inter alia that requests by the IRS for administrative assistance with the SFTA would be accepted in cases that met certain requirements listed in the Agreement and detailed in its attachment. The number of UBS clients targeted by the request was approximately 4,450 and it involved around $18bn in assets.

In parallel with the UBS case the US authorities started, in 2009, to investigate other Swiss banks' US clients.

On September 26 2011 the 1RS asked the SFTA for administrative assistance to obtain information regarding the accounts of certain US persons held through domiciliary companies maintained with certain banks in Switzerland, among which Credit was Suisse AG between January 1 2002 and December 31 2010.

All these events led Switzerland to review its standards and reshape its legal system on administrative assistance in tax matters between Swiss and foreign authorities.

Redesign of DTT 96

Following the UBS case and under threat of seeing Switzerland 'greylisted', the Federal Council decided on March 13, 2009 to line up its standards of exchange of tax information with Article 26 of the OECD Model Tax Convention. Therefore, it was decided that existing and future DTTs should be revised or adopted accordingly.

Following the decision of the Federal Council, the US immediately requested a redesign of DTT 96, with the intention of creating a convention that would reflect the full scope of Article 26 of the OECD model. On June 18 2009 both contracting states installed a protocol amending DTT96 and, on September 23, representatives of the US and Swiss governments signed said protocol to DTT 96 (hereinafter 'DTT 09').

Whereas the DTT 96 allowed for legal assistance in cases of suspected " tax fraud and the like", the new protocol amends the exchange of information provisions of DTT 96 provided that the exchange of information between the two states is not only applicable in cases of suspected " tax fraud and the like" , but also in cases of suspected " tax evasion" . This means that, as per OECD standards, Switzerland can no longer invoke banking secrecy to avoid sharing information in cases of tax evasion.

Regarding the formal requirements regarding a request for assistance, DTT 09 provides that this should specify the name of the owner of the information, but can also identify the person by information other than their name – for example, their bank account number. Automatic exchange of

ion

information remains excluded to protect client privacy.

On April 6, 2011, following the OECD-led review by peers, the Federal Council explained that said peers felt the conditions required for an exchange of information were still too restrictive. In August 2011, the Federal Council therefore proposed to Parliament the adoption of a Federal Decree concerning a supplement to DTT 09.

This specified that a request for administrative assistance (i) must demonstrate that the requesting state does not intend to make 'fishing expeditions', (ii) may identify the taxpayer by means other than name and address and (iii) indicate the name and address of the holder of the information (mainly banks and financial institutions) to the extent that the requesting state is in possession of that information.

Finally, on August 8, 2011 the Swiss government published yet another message clarifying interpretation of the decree. This essentially states that the case law of the FAC ruling of March 5, 2009 relating to the UBS case will remain valid under DTT 09. Thus, the possibility of exchanging tax information based on the description of a behavioural pattern will remain, although no longer limited to cases of tax fraud or the like.

On March 16 this year, the Federal Decree was adopted by Parliament. It provides that taxpayer identification can be achieved by describing a pattern of behaviour. It is further stipulated that taxpayers can be identified in this manner only if the information holder (or its employees) have contributed significantly to such behaviour.

For the time being, DTT 96 is still in force. Indeed, even if the Swiss Parliament approved the protocol the US Senate still needs to ratify the instrument for DTT 09 to enter into force.

However, one can see a number of signs suggesting that the US and Switzerland will soon reach an agreement and therefore the US Congress will not delay in ratifying DTT 09. Many proceedings initiated by the US authorities against Swiss banks (11 in total) have been frozen by the U S Department of Justice. Moreover, on May 16, 2012 the media revealed that the request regarding 620 customers of Credit Suisse has been withdrawn by the IRS. This indicates that US tax authorities will soon re–lodge a request for information, probably using exactly those criteria issued by the Swiss government on August 8, 2011, in relation with the DTT 09.

Implementation

In parallel with the realignment of double tax treaties, Switzerland needed to fix in an ordinance regarding the implementation of the new provisions governing administrative assistance. Therefore, the ordinance on administrative assistance according to conventions against double taxation (OACDI) became effective as of October 1, 2010.

In a second step, and in order to replace the OACDI, Switzerland initiated the process of adopting a new law allowing the implementation of double taxation treaties with regard to administrative assistance.

On July 6, 2011 the Federal Council issued a statement regarding the adoption of the newly drafted Federal Law on Administrative Assistance in Tax Matters (LAAF). The latter, with some amendments, was approved by the National Council on February 29 this year. On April 24 the Committee for Economic Affairs and Taxation of the Council of States also approved it.

Unlike OACDI – with its scope limited to existing double taxation treaties or ones revised after October 1 2010 – the LAAF will not only apply to all double taxation treaties but also to international conventions having provisions regarding administrative assistance (including, in particular, the EU–Swiss Agreement on the Taxation of Savings Income).

The LAAF should enter into force later this year.

Conclusion

There has been a rapid and sustained ramping up of pressure on the Swiss financial sector. The efforts of the Swiss government have pulled Switzerland into a state of full OECD compliance. The Swiss government now needs to agree with the US government on a global solution that covers the entire industry. This will probably require massive information still to be provided. The political, rather than the fiscal, battle will nevertheless not stop, and the Swiss government will need to ensure that its OECD compliant status is thoroughly reinforced in the minds of the international community and that – to a greater extent than that which would be required by some of its peers – such status continues to be well publicised and remembered.

FUNDS

New landscape

Switzerland is betting on the appeal of a duly policed funds playing field

Dunja Koch (top), Mark Montanari (middle) and Benjamin Duerig are partners at Froriep Renggli

In 2005 the Swiss Revenue opened the door for fund managers to set up in Switzerland by exempting capital gains taxes on non-Swiss funds. On 2 March this year the Federal Council published a draft amendment to the Swiss Collective Investment Schemes Act (CISA) which triggered fierce reactions as the new rules, instituted to match the EU's directive on alternative investment fund managers will reshape the Swiss funds landscape.

Asset managers

Today, save for anti-money laundering regulations, neither independent asset managers nor managers of foreign funds are regulated and hence do not need an authorisation by the Swiss Financial Market Supervisory Authority (FINMA). Under the new CISA, such asset managers will be regulated. They will need to notify FINMA within six months and apply for an authorisation within two years from the day the new CISA becomes effective. Small asset managers may benefit from certain exemptions.

Further, the new CISA provides that foreign asset managers may set up a Swiss branch although, given their capacity as managers of foreign funds, such branches will require FINMA authorisation.

Distribution

Currently, the distribution of foreign funds by way of private placements and distribution to qualified investors does not require authorisation by FINMA.

Under the new CISA the criterion of "public advertisement" is dropped. Any distribution, whether public or private, to non-qualified investors and certain qualified investors will be caught. Some activities remain exempt, such as the purchase of funds (i) upon solicitation by the investor or (ii) in the framework of a written asset management agreement with regulated financial intermediaries or with an independent asset manager subject to Swiss anti-money laundering regulations and the code of conduct of a professional organisation, provided the agreement complies with it.

As regards qualified investors, under the new CISA high-net-worth individuals benefit from qualified investor status only if they declare in writing that they want to be deemed as such. Unlike now, a written advisory asset management agreement with a regulated intermediary will not suffice for the investor to be considered a qualified investor.

In addition, the distribution of foreign funds to qualified investors will only benefit from the FINMA authorisation exemption if:

- the fund or the managers and custodian are subject to equivalent supervision with regard to organisation, investor rights and investment policy;
- the label "collective investment scheme" does not provide reason for confusion or deception;
- the fund employs a representative and a paying agent in Switzerland; and
- FINMA has an information-sharing agreement with the foreign supervisory authority.

Hence, the proposed amendment would lead to a significant change in the CISA's concept of distribution to qualified investors. In particular, the foreign fund would need to appoint a FINMA-authorised representative who would have to adhere to certain duties, such as checking that the fund, its manager and the custodian are (i) supervised by a recognised foreign authority, (ii) subject to regulations equivalent to the provisions of CISA and (iii) a cooperation and information-sharing agreement is in place. Swiss representatives would be liable for damages to investors, the fund and creditors.

Consequences

Whereas the changes in the definition of "distribution activities" and the slightly amended list of qualified investors would not seriously jeopardise the distribution of foreign funds in or from Switzerland, the new regulation on distribution to qualified investors and two new additional conditions for distribution of foreign funds will do, as (i) it is not foreseeable with which (offshore) jurisdictions FINMA would enter into information sharing agreements and (ii) it is not clear who would be able and willing to provide services as a representative to foreign funds, considering the increased burden of responsibilities.

Without a Swiss representative and a cooperation and information sharing agreement, any distribution of foreign funds in or from Switzerland would be prohibited and foreign funds would have to amend the language of disclaimers in their prospectus.

Outlook

Funds sector lobbying has triggered much discussion in the competent commission of Parliament. The commission has made proposals to tone down the new regulations, in particular by (i) replacing the requirement of "equivalent supervision" with "adequate supervision", (ii) waiving (at least partially) the requirement of information sharing agreements between FINMA and the foreign supervisory authority and (iii) refraining from increasing the duties of Swiss representatives. Finally, it is proposed that investors having a written asset management agreement with a regulated financial intermediary shall be considered as qualified investors.

ESTATE PLANNING

New planning tools

New tools for financial planning provide tailor-made solutions and enable optimal coordination with succession planning

David Wallace Wilson is a partner at Schellenberg Wittmer

Swiss guardianship legislation is getting a makeover. The reform adapts it to modern circumstances such as extended life expectancy, medical advances, patchwork families, changing lifestyles and global mobility. It enters into force on 1 January 2013 and implements new planning tools – lasting powers of attorney, living wills, healthcare proxies and even asset management guardianship. Guided by the principles of autonomy, subsidiarity of official measures and family involvement, the reform encourages individuals to take measures in advance, and reduces state intervention to a minimum.

Lasting powers of attorney

By executing a lasting power of attorney, a person of sound mind may appoint a trustworthy person as his attorney-in-fact who must provide personal assistance, manage his assets or represent him in relations with third parties in case he becomes incompetent to look after his own interests. This hybrid instrument is useful for protecting a client's assets when he runs a family business, has minor children or a step-family, suffers from a generative disease or is considering a risky medical procedure.

The principal can designate an individual or a legal entity such as a lawyer, trustee, executor, family office or a bank. This allows him to ensure optimal coordination with succession plans. He should specify in as much detail as possible the tasks entrusted to the agent. The principal may even issue instructions on how to perform them – say, by forbidding certain investments. The agent must perform these tasks diligently and in accordance with the rules of the Swiss mandate agreement.

Further, the agent is subject to supervision by the Swiss Adult Protection Authority, which can act ex- officio or upon request of the principal or any interested third party. This authority may adopt measures to protect the principal's interest, including ordering the establishment of an inventory, the periodic production of accounts or even withdrawing the power. The principal may revoke or modify the powers granted and is free to provide remuneration.

Establishing a Swiss lasting power of attorney involves three simple steps: the principal establishes a written power (the consent of the appointed person is not required at this stage). This written declaration may be done in holographic form or authentic form (i.e. before a notary public, although witnesses are not required). Once the principal becomes incapacitated, the authority verifies the lasting power's validity and examines the attorney-in-fact's capabilities. Finally, the attorney-in-fact must inform the authority of his acceptance or refusal of office.

Living wills and healthcare proxies

Anyone of sound mind can secure his medical care by executing a living will or advance healthcare directive and thus determine the agreed or refused medical treatment if he should become incapacitated. He may also revoke or amend such instructions at any time. A physician may only deviate from the living will in three cases: when it violates statutory provisions; when serious doubts suggest it was not given freely; or when doubts suggest that it does not reflect the patient's presumed wishes – especially because of developments in medical science. Only then can the physician deviate from the will, but he must document this in the patient's medical record. If the physician does not comply with the will or risks jeopardising the patient's interests the authority can take action on its own initiative or upon the application of a relative of the patient.

In the context of – or in addition to – a living will, a patient may designate a person to take decisions on his behalf concerning the medical care to be administered, if he is no longer able to do so. The existence of such a healthcare proxy suspends the patient's confidentiality in favour of his medical representative, who may be informed of all relevant aspects of treatment, its purpose, risk, cost and the consequences of lack of treatment. The proxy can also be integrated into a lasting power of attorney to ensure optimal coordination with the tasks of representation vis-à-vis third parties.

Asset management guardianship

In the absence of a lasting power of attorney the authority can only order an official measure of protection if it is necessary and appropriate for the person concerned, but it must customise the measure. In particular, the authority can order an asset management guardianship. This includes any act that, by its nature, is able to preserve or increase the person's estate or achieve its intended purpose (e.g. contracting an obligation, selling property or initiating a lawsuit). Moreover, as the term 'asset' must be understood broadly, the authority must specify the property the guardian can manage. This could be capital, income or specific bank accounts.

Switzerland's lasting powers of attorney, living wills and healthcare proxies constitute welcome new tools for planning and protecting a client's personal, legal and financial interests, in the event that he becomes incapable. Coordinating the devolution of his estate with his succession plans is now possible.

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BANKING

A new playing field

The Swiss financial industry faces a wave of regulatory developments across the board

Prof. Rashid Bahar is a partner at Bär & Karrer

In the coming year the Swiss financial industry faces a wave of regulatory developments in areas such as capital adequacy requirements, insolvency and resolution, as well as rules on the distribution of financial products.

Capital adequacy

On 1 March 2012, a sweeping reform of the Federal Act on Banks and Saving Institutions was signed into law and will be further implemented over the coming year by various regulations. These amendments are a direct response to the state aid offered by the Swiss Confederation in the wake of the sub-prime crisis.

In a nutshell, they are structured around three principles. First, they aim to create a special regime for the supervision of systemically important financial institutions. Second, the Federal Council announced an overhaul of the capital adequacy regime in line with Basel III principles including countercyclical buffers and stricter requirements for mortgage lending. At the same time, these reforms provide banks with a way to raise both hybrid capital and equity, without following all formalities of corporate law. Finally, the reform revises the bank insolvency regime by granting new resolution authority to the Swiss financial markets authority (FINMA).

Distribution of financial products

In parallel, reacting to the Madoff scandal and the losses of retail investors who invested in structured investment products issued by Lehman Brothers, FINMA published in February a position paper on the distribution of financial products foreshadowing a sweeping reform of distribution rules. This roadmap for regulatory reform is focused on three areas of concern – disclosure requirements, enhanced rules of conduct for intermediaries and additional licensing requirements.

In a nutshell, FINMA advocates the introduction of an overarching duty to prepare a prospectus for all offerings of financial products to private clients in Switzerland. This obligation would extend across asset classes to include shares and bonds as well as derivatives and structured products. Moreover, taking inspiration from the Key Investor Information Document prepared for UCITS funds, it proposes that products should include a description for all offerings of structured investment products. This document would summarise the key terms and risks of the product as well as its costs. Both documents would be subject to a regulatory review and approval process currently unknown in Switzerland outside the realm of collective investment schemes.

In addition to these product-based rules, FINMA proposes to enhance the rules of conduct applicable to financial intermediaries by introducing a general suitability requirement and comprehensive disclosure obligations covering any competing interests as well as the characteristics, risks and costs of the products. While these requirements would only apply where a financial intermediary actively distributes products to the exclusion of pure execution-only orders, FINMA is in favour of regulating such orders by prohibiting financial intermediaries from offering execution-only services in connection with complex financial instruments.

The final focus of FINMA is extending regulatory supervision. FINMA advocates licensing requirements for all financial intermediaries, including domestic investment managers, who have until now been only subject to limited supervision in connection with anti-money laundering regulations, and introducing professional qualification tests for client advisers and other front-office employees.

However, FINMA proposes to regulate not only the provision of investment services by Swiss-based intermediaries, but also cross-border services to Swiss clients by institutions based outside Switzerland. In summary, the position paper sketches a roadmap for reform. While the proposals would mark a significant change in the Swiss regulatory environment, it is too early to foresee how they will be translated into law.

Disclosure of distribution fees

While FINMA has been considering issuing regulations on the disclosure of fees paid by issuers of structured investment products and collective investment schemes to distributors, courts have already acted. Relying on a line of precedent of the Swiss Supreme Court holding that external portfolio managers must account for any profit received from third parties, such as custodians, while discharging their duties to their clients, the Superior Court of the Canton of Zurich recently held, in a decision pending an appeal before the Swiss Supreme Court, that intermediaries are also required to account to their clients for fees received for distributing financial products of third parties unless they have sought a waiver after disclosing the likely range of commissions they would expect to receive as well as conflicts of interest resulting from such payments.

Overall, together with a general revision of the Unfair Competition Act due to enter into force on 1 July 2012 that will subject general terms and conditions to judicial review, Swiss financial institutions are facing several challenges this year on the regulatory front.

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EXECUTIVE REMUNERATION

Say on pay

Debate over proposed laws on executive compensation is hotting up

Ralph Malacrida (top) and Till Spillmann are partners at Bär & Karrer

Amid financial turmoil and public outrage over excessive management compensation by financial institutions that received taxpayers' support a popular initiative – the so-called 'Rip-off Initiative' (the Abzocker Initiative) – was launched in 2008 aiming to subject board and management compensation to mandatory approval by shareholders of Swiss-listed companies. This involves a citizen-proposed amendment to the constitution that – if passed by the Swiss voters – will result in Parliament having to prepare and draft a bill to specify the principles laid down in the amendment.

Since the initiative is seen as anti-business, Parliament has been grappling to ensure a counter-proposal is put forward when it goes to a nationwide ballot. The counter-proposal addresses most of the Rip-off Initiative's concerns but seeks to ensure a more flexible and balanced regime, setting out a level playing field comparable with 'say on pay' regulations in other major jurisdictions.

In addition, a second counter-proposal – also known as the 'Bonus Tax' – seeks to introduce a regime limiting the tax deductibility of compensation payments to CHF3m per year and recipient.

The Swiss people are expected to vote on the Rip-Off Initiative and both counter-proposals in November 2012 or March 2013.

What's at stake

Below are the key elements of the proposals that will be put to the vote.

Rules proposed by the Rip-Off Initiative feature annual election of the members of the board and the chairmen of Swiss-listed companies to enable shareholders to vote on members' individual performances. The counter-proposal includes the possibility of extending the minimum term from one to three years and having the chairman appointed by the board.

To increase control over the compensation committee the Rip-Off Initiative requires shareholders to elect its members. The counter-proposal is silent on the subject of the compensation committee.

While the Rip-Off Initiative requires binding votes on the compensation of each board member, the advisory board and the management of Swiss-listed companies, the counter-proposal takes a more differentiated approach. Pursuant to the counter-proposal the aggregate compensation of each of the board of directors and the advisory board is subject to a binding vote. However, with respect to management compensation shareholders' approval may be defined as advisory only in the articles of association.

Furthermore, the counter-proposal draws a distinction between a base compensation (Grundvergütung) and additional compensation (zusätzliche Vergütung), and specifies that base compensation must be approved for the time between the relevant AGM and the next (i.e. the vote would be of a prospective nature) whereas additional compensation must be approved for the past business year (i.e. the vote would be retrospective).

Base compensation can comprise both fixed and variable components (including, in particular, a bonus) but must be limited to a cap approved by shareholders. Compensation in excess of this is permissible only if approved by shareholders in connection with the vote on additional compensation.

In addition, according to the Rip-Off Initiative, articles of association must contain rules on the amount of credits, loans and compensation plans that may be granted to directors and managers, incentive and participation programmes, the number of positions directors/managers may have outside the group and the duration of managers' employment contracts.

The counter-proposal mirrors this with a less burdensome proposal requiring the board of directors to set out most of this information in compensation regulations (Vergütungsreglement). The board of directors is obliged to prepare such compensation regulations and obtain shareholders' approval. Furthermore, together with the requirement to introduce compensation regulations, the board of directors must publish a compensation report (Vergütungsbericht) confirming compliance with the regulations on an annual basis.

The likely outcome

Swiss pundits say that because it could be perceived to be anti-business the Rip-Off Initiative will probably fail to win popular backing, but warn that recurring managers' pay scandals could change sentiment. Although many Swiss firms have increased transparency and control over management compensation, shareholder activists such as the Swiss-based Ethos Foundation continue to criticise executive pay as excessive. No doubt, 'say on pay' will continue to spark heated debates in Switzerland before the ballot takes place.

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The Lawyer Briefing series will continue with the following forthcoming topics:

- Litigation - June 18th
- The Bar - June 25th
- China/Hong Kong - July 9th
- Compliance - July 30th
- Latin America - August 6th
- Insurance - September 3rd
- Baltics - September 10th
- Private Client - September 24th
- Eastern Europe - October 15th
- Insolvency - October 29th
- Benelux - November 5th
- India - November 19th
- IP - November 26th
- Ireland - December 5th
- Client Retention - December 12th

* Please note these dates are subject to change.

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Special report

Balkans

strategy aims for Serbia to become the producer of at least 90 per cent of Europe's lithium – a key element in the production of many electrical items – by 2020. According to Petrovic, this ambition and the presence of unexploited lithium and other mineral resources is leading major global mining companies to begin exploration in Serbia.

Beyond infrastructure

But much of Serbian lawyers' time has recently been spent on advisory work rather than actual transactional work. A new company law led to a flurry of instructions for many firms to help get corporate governance issues sorted out for clients, while amendments to legislation on takeovers, cartels and capital markets provided similar work.

"This was all part of the push to do as much as possible on the harmonisation side to gain EU candidacy," explains Maric. "For us lawyers that's a big challenge because the entire landscape has changed significantly. For a number of clients we had to deal with issues relating to harmonisation of corporate governance, as well as other internal rules under the new legislation. That was one of the things we did frequently in the second half of last year and the beginning of this year."

Joining the EU

The procedure for Serbia to convert its EU candidate status into membership is a long one, according to Gannon.

"We don't expect too much out of EU integration in the near future, except for a flurry of legislation," she adds.

Indeed, several countries in the past have spent years as candidates before negotiations with the EU for membership even begun. The hope in Serbia is that the government will try to progress the process as much as possible and that this will help encourage foreign investors to come to the country and indeed the region. Although some thought Nikolic's election could slow this process down, others are confident that going into reverse is now impossible.

"With respect to the EU membership, I think Serbia has been on a long, very slow, but irreversible path towards EU membership – I don't expect Nikolic to reverse that course.

"Infrastructure projects are rather strong because, after 20 years of war and instability, the government is trying to put some money towards that"
Nikola Jankovic

The first reactions of the EU officials to results of presidential elections have been relaxed and unconcerned," Kojovic says.

Already improving

Harrison says he sees enormous untapped potential in Serbia.

"One of the barometers for me for Serbia is why hasn't there been more

Special report

Balkans

Where to stay and eat in Belgrade

GETTY

You have to go to Square Nine. It's one of the leading small hotels, right in the city centre and there's also a restaurant there.

Down by the river you've got Iguana, which is a classic, but you also have quirky new places. Homa is off the beaten track. It's downtown, but not in an obvious place. For traditional Serbian food people would go to Vuk, off the main pedestrian street or, on the new Belgrade side, go to either Chameleon – international cuisine in a casino – or Zabar, which is a fine restaurant by the river. Belgrade's really good by the river.
Patricia Gannon, Karanovic & Nikolic

Madera is a renowned bohemian restaurant located in the city zone with a lengthy history. The restaurant offers dishes from the national cuisine. It must be noted that Madera has the loveliest *al fresco* dining in the city, incorporated into the Tasmajdan park. The Kalemegdanska terasa restaurant is located in the prettiest part of Belgrade, in Kalemegdan, and is completely adapted to the ambience of the 13th-century fortress. Hidden away in a quiet corner from which the Belgrade sights and the zoo can be seen, the restaurant transforms from informal during the day to elegant and romantic in the evening. This beautiful restaurant offers dishes from national and international cuisines.

The Cantina de Frida restaurant, bearing the name of famous Mexican artist Frida Kahlo, is located at the confluence of the Sava and Danube rivers, in the Concrete Hall. It has excellent food and a lovely view of the delta formed by the two rivers, as well as an entertaining musical programme, with the best bands in town playing far into the night.

The menu of the Cantina de Frida is based on numerous colourful and tasty dishes from Spain and the Mediterranean, in small plates (tapas-style), and on large plates designed to be shared with friends.
Nikola Jankovic, Jankovic Popovic & Miticsu

Key figures

GDP (current US$, 2010)
38.4bn

Annual inflation (April 2012)
2.7%

Population (1 January 2011)
7,276,195

Life expectancy at birth
74

Unemployment rate (November 2011)
23.7%

Source: World Bank, Statistical Office of the Republic of Serbia

"The critical thing here is the branding of Serbia. People in the West still think it has issues"
Mark Harrison

greenfield investment? Why haven't people chosen Serbia to build their factory?" he asks. "The critical thing here is the branding of Serbia. People in the West still think it has issues."

Others agree that the need for foreign investment is crucial. They point to changes such as recent judicial reform, which saw the re-appointment of judges, as a sign of good intent with less impact than required.

Kojovic says work is needed to improve the commercial courts in Belgrade, despite the Serbian litigation landscape having moved on immensely in the past decade. She believes that the lack of continuing professional education for the judiciary makes it difficult for Belgrade Commercial Court judges to get to grips with complex commercial and financial disputes, leading to a mistrust of the system.

"In major deals and transactions parties almost never opt for the jurisdiction of the Commercial Court," she says.

Instead, Kojovic explains, Serbia has invested heavily in improving its criminal court system – a necessary investment following the Bosnian war in the 1990s.

"There you can see a tangible improvement. That's really a different animal from what we had 10 years ago, but because commercial disputes weren't such a priority then I don't think much has been invested there," she adds.

A recent change that might make some difference to the court system is the introduction of private enforcers – essentially bailiffs, who will be able to aid in the enforcement of judgments and awards. This is a key change that could speed up the system, something desperately needed in an environment of growing disputes.

"There are a number of disputes right now and arbitrations that we didn't have in the past," confirms CMS RRH Balkan head Radivoje Petrikic.

In it for the long haul

However, even the recent legislative changes, EU candidacy and the stability provided by the elections look unlikely to encourage any more firms into the Balkan market. Harrison, who set up his firm in the late 1990s after a career at Linklaters and Eversheds, says it would not at present be worthwhile for any international outfits opening up in the region, although he is committed to it.

"We're in it for the long haul. Maybe in 2014 we can start moving forward. With a stable government they've got to get people attracted to come here," he says.

"In general, I'm rather positive about developments in Serbia though if you read the Serbian newspapers it looks like a disaster," adds Petrikic. "I'm rather optimistic for future developments because I think there'll be a lot of pressure from the European Commission and the EU. With this pressure we can hope that things will change."