

A reading grid for practitioners: characterising a credit transaction

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The Geneva tradition of characterising transactions, inherited from the magistrates of the sixteenth century, retains its practical usefulness. When confronted with a financing transaction, the Swiss practitioner must determine its legal nature, because the applicable regime, the authorisations required and the compliance obligations all depend on that characterisation.

The first question concerns the nature of the contract. The loan for consumption, governed by Art. 312 et seq. of the Code of Obligations, obliges the lender to transfer ownership of a sum of money and the borrower to return an equivalent amount. In commercial matters, interest is owed even in the absence of an agreement (Art. 313 para. 2 CO). A transaction presented as a sale, an investment or a participation may, depending on its characteristics, in reality constitute a loan, and vice versa.

The second question concerns the professional character of the activity. The acceptance of deposits from the public on a professional basis is reserved to banks and authorised institutions (Art. 1 para. 2 BankA), and the Banking Ordinance specifies the point from which an activity is deemed to be carried on professionally.¹ Financing an activity with funds borrowed from a large number of persons may therefore fall within the scope of banking legislation, with criminal consequences where the activity is carried on without authorisation.

The third question concerns the protection of the borrower. Where the borrower is a consumer, the Federal Consumer Credit Act imposes rules on form, information, the assessment of creditworthiness and the maximum rate of interest. Where the borrower is a business, contractual freedom is broader, but the general rules on unfair advantage and usury continue to apply.

The fourth question concerns the fight against money laundering. Credit transactions carried on professionally by non-bank intermediaries fall in principle within the scope of the Anti-Money Laundering Act, with the due diligence obligations that follow from it.² The origin of the funds lent, the identity of the borrower and the purpose of the credit must be documented.

The fifth question, finally, concerns economic substance. Like the Geneva magistrates confronted with sales with a right of repurchase, the practitioner must verify that the form of the transaction corresponds to its reality. Tax authorities, supervisory authorities and the courts recharacterise arrangements that conceal the true nature of a transaction.

Caution. The characterisation of a financing transaction determines its entire legal regime. An error of characterisation may result in an activity subject to authorisation being carried on without the required authorisation, in the nullity of certain clauses or in criminal proceedings. A prior legal review is essential for any unusual structure.

1 Notes

1. FINMA, press release of 1 September 2017 on the revision of Circular 2008/3 “Dépôts du public auprès d’établissements non bancaires” (Public deposits with non-banks): the revised Banking Ordinance, in force since 1 August 2017, allows deposits from the public of up to one million francs to be accepted without authorisation, even from more than 20 depositors, provided that the deposits “are neither invested nor interest-bearing” (sandbox), except where they finance a principal commercial or industrial activity; depositors must be informed of the absence of supervision and of deposit protection; settlement accounts extended from seven working days to 60 days. ↩

2. Federal Act of 10 October 1997 on Combating Money Laundering and Terrorist Financing (Anti-Money Laundering Act, AMLA; SR 955.0), Art. 2 para. 3 let. a (financial intermediaries carrying on credit transactions) and Art. 3 to 8 (due diligence obligations: verification of the identity of the contracting party, identification of the beneficial owner, clarifications, documentation, organisational measures); text accessed on lexfind.ch. ↩

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