

### Securities

- The Globalization of Class Actions  
*By Thomas Werlen/Jonas Hertner* 2

### Regulatory

- Swiss People to Vote on Caps on Executive Compensation  
*By Thomas Reutter* 9

### Takeover

- New Regulatory Framework for Share Buy-backs  
*By Dieter Gericke/Vanessa Isler* 12

### Derivatives

- Segregation and Porting: Two Special Features for Cleared Trades  
*By Martin Hess* 20

### News | Deals & Cases

- Credit Suisse issues approx. CHF 4 bn of Write-down Bonds 26  
FINMA publishes "Market Conduct Rules" Circular 27  
US Department of Justice publishes "Program for Non-Prosecution Agreements or Non-Target Letters for Swiss Banks" 27  
CHF 175 million Subordinated Contingent Write-off Securities issued by Swiss Reinsurance Company Ltd 27

### Events

- 7th Conference on Asset Management  
(7. Tagung zur Vermögensverwaltung) 28  
Capital Investment Law 2013 (Kapitalanlagerecht 2013) 28  
9th Conference on Capital Market Transactions  
(9. Tagung zu Kapitalmarkttransaktionen) 28  
5th Conference on Restructuring and Insolvency of Companies:  
the new Swiss Reorganization Law  
(5. Tagung zur Sanierung und Insolvenz von Unternehmen:  
Das neue Schweizer Sanierungsrecht) 28  
Conference on Financial Market Regulation: Current legal problems  
(Tagung zur Finanzmarktregulierung: Aktuelle Rechtsprobleme) 28



### The Globalization of Class Actions

Reference: CapLaw-2013-26

In June of this year, the European Commission issued non-binding recommendations inviting member states to introduce collective redress mechanisms at the domestic level. In addition, key EU member states have already implemented or are currently considering introducing class action legislation. This article provides an update on pending proposals towards a EU class action system and gives a brief overview of existing group redress provisions in selected member states.

*By Thomas Werlen/Jonas Hertner*

#### 1) Background

A group expected to number in the millions sues Google for alleged privacy violations. Tourists sue a travel operator for putting them up in accommodations inferior to what was promised. Thousands of plaintiffs seek damages for the meltdown of a nuclear power plant. These sound like the everyday stories of the class action system in the United States, yet these actions were brought in the U.K., Italy, and Japan respectively. There is a clear global trend towards collective actions. Predictions are that there will be a significant increase in the adoption of class action procedures throughout the world in the next decade. And although criticisms of the U.S. system abound – for example, objections to contingent fee agreements and binding those who do not opt-out – components of U.S. procedure are finding their way into the procedures of other nations. A number of states allow collective actions to be prosecuted by private individuals, as opposed to requiring a public official or other public organization to bring them, and allow for the recovery of money damages. Yet more recent legislation and current proposals on the European continent are diverging significantly from the U.S. model (*cf.* Quinn Emanuel Urquhart & Sullivan, LLP, Business Letter November 2013).

Following an extensive consultation and review process, the European Commission (Commission) presented its proposals for the implementation of collective actions in the EU in June of this year. The non-binding Commission Recommendation – pursued by the Commission's Health and Consumer Affairs Directorate – invites EU member states to introduce collective redress systems at the national level (*cf.* Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (Recommendation), OJ L 201, 26 July 2013, p. 60–65). The Recommendation's key features are (1) an “opt-in” mechanism, (2) representative actions can be brought by pre-designated or certified bodies, (3) safeguards for minimising the abuse of litigation.

Against this background, the objective of this article is to provide an overview of these recent developments in the field of collective action in the EU.

### 2) Towards a European Collective Action Scheme

Collective actions are comparatively new in the European Union. Although a number of measures for the purpose of protection of consumers' collective rights had been in effect, these have been mainly targeted at injunctive relief rather than damage claims (e.g. the Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests (later codified as Directive 2009/22/EC)). The Commission long hesitated to take a position on collective redress for consumers (*cf.* Commission Communication "Towards a European Horizontal Framework for Collective Redress", COM(2013) 401 for a detailed chronology). Then, in June of this year, in order to improve access to justice while simultaneously avoiding abusive litigation, the Commission adopted a Recommendation stating that within two years, all EU member states should adopt mechanisms for collective redress which allow multiple claimants to seek relief on a collective basis and/or through a representative plaintiff. The Commission (via its Competition Directorate) has also adopted a draft Directive on competition law private damages actions (Proposal for a Directive of the European Parliament and the of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member states and of the European Union, COM(2013) 404, 11 June 2013) and a Communication on quantifying harm in competition law actions, as well as a draft non-binding Communication and Practical Guide on the quantification of harm in antitrust infringement cases. Interestingly, the Commission has dropped references to collective actions in the draft Directive on competition law and it is now the Recommendation that serves as a reference document for member states. The Commission's ambition at this stage is thus not to harmonize the national systems, but to gather common, non-binding principles that provide member states guidance in creating such mechanisms. Member states are asked to implement these principles by 26 July 2015. The Commission's Recommendation requests that member states incorporate the following elements into their collective redress systems:

- a. Representative standing should be limited to non-profit making entities authorized by member states to bring such claims. The objectives of these entities should align with the rights claimed to be violated, and they should have sufficient resources to handle the claim.
- b. The class should include only members who affirmatively opt-in.
- c. Claimants should be required to declare the source of their funding. Third-party funders should be prohibited from influencing procedural decisions, including on settlement, and should not be compensated on a contingency fee basis unless third-party funding arrangements are subject to regulation by a public authority.

- d. Member states should provide for evaluation at the earliest possible stage of litigation (and on the court's own motion) as to whether conditions for collective actions are satisfied.
- e. There should also be some cursory early examination of the elements to eliminate manifestly unfounded cases.
- f. The parties should be encouraged both before and during litigation to settle.
- g. Member states should ensure that it is possible to disseminate information about the action in a manner that balances freedom of expression with a defendant's right to protection its reputation, such as via a national public registry.
- h. Only compensatory damages should be permitted; punitive damages are discouraged.
- i. Losing parties should reimburse prevailing parties for necessary legal costs.

Within two years following implementation of the Recommendation, the Commission will evaluate its effects and impact. The overarching ambition of the Recommendation is to encourage member states to provide access to justice through collective action schemes under domestic law while ensuring that abusive litigation is avoided through suitable procedural limitations and safeguards (not least, European countries are interested in introducing collective actions as U.S. courts have taken to exclude non-U.S. claimants from suits against non-U.S. companies filed in the U.S.). In particular, the Commission expressly seeks to avoid the introduction of punitive damages, contingency fees for lawyers, U.S.-style pre-trial discovery and “opt-out” procedures. The Commission has stated that it considers an efficient justice system, *i.e.* legal certainty and a reliable legal environment, as essential for the EU to remain competitive at the global level. But having identified a “justice gap”, the Commission is contemplating procedural law solutions on the basis of EU law as well (existing (quasi-)procedural law on the basis of EU law are the European Small Claims Procedure applicable to consumer claims resulting from cross-border sales, the European Order for Payment Procedure directed at cross-border debt recovery, the Mediation Directive promoting ADR in all cross-border civil disputes).

A number of EU member states already had implemented collective litigation procedures prior to the issuance of the Commission's recommendation. Whether and to what extent those states may revise their mechanisms (as well as whether additional states will enact class legislation) remains to be seen. During the recent consultation process, the Commission identified three main areas where current national legislative frameworks diverge: (1) the scope of the provisions, *i.e.* whether laws apply generally or relate exclusively to limited areas of law or losses, (2) whether standing is granted to

individual claimants or actions can only be brought by accredited organizations, (3) whether participating claimants need to “opt-in” or “opt-out” of collective actions. Below are, by way of example, four specific examples of current member state legislations.

### **a) The United Kingdom**

While the English Civil Rules allow a party to represent a class of claimants, that party can represent them only if they share the “same interest”. English courts have construed this requirement narrowly, thereby limiting the utility of this rule. Aggravated and exemplary damages are rare in the UK; awards are more restrained and largely based on actual losses (*cf.* Quinn Emanuel Urquhart & Sullivan, LLP, Business Letter November 2013).

A more common type of collective action is the group litigation order (GLO). A GLO is not a representative action procedure; rather, similar to the United States’ Judicial Panel on Multidistrict Litigation, which leads to creation of “MDLs” where multiple parties bring the same claim in at least more than one federal jurisdiction, a GLO is a case management device for handling and coordinating multiple, independent claims. Any party to a claim may request a GLO, which may be granted if the claims presented give rise to common or related issues of fact or law. If granted, a single court will be assigned to manage the GLO and all claims will be transferred to the so-called “management court.” The management court is afforded great discretion and flexibility in managing group litigation, and charged with implementing a procedure which best serves the specific needs of a particular set of claims (*cf.* Quinn Emanuel Urquhart & Sullivan, LLP, Business Letter November 2013).

Where a judgment or order is issued in relation to one or more GLO issues, unless otherwise stated that judgment or order is binding on the parties to all other claims that are on the group register at the time of issuance. The management court may give directions as to the extent to which that judgment or order is binding on subsequently-added claims.

GLOs, as a mechanism effectively requiring claimants to “opt-in”, have not been used extensively in the UK. Against that background, the UK government has announced in January that it will pursue plans to extend the power of the Competition Appeals Tribunal (CAT) and to allow “opt-out” class actions for breaches of competition law. Under the new regime, CAT will have the power to hear collective claims for damages brought by claimants or by representative body (*e.g.* consumer association) (*cf.* the Draft Consumer Rights Bill as presented to Parliament in June 2013, < [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/206367/bis-19-925-draft-consumer-rights-bill.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/206367/bis-19-925-draft-consumer-rights-bill.pdf) > (accessed on 17 October 2013)). These changes, however, are not expected to come into law before 2015.

### b) Germany

Germany has a number of procedures that allow representative action on claims concerning consumer protection and antitrust law. For example, German law provides for multiple claimants to join an action if their claims arise from the same transaction or occurrence, or if there is a common question of law or fact relating to all claims. Moreover, individuals may pool their interests for legal enforcement and assign those interests to a new entity who acts as the plaintiff in a court proceeding. There are, however, strict limitations on the use of such litigation pools. Finally, there are several organizations that have the authority to enforce consumer protection and unfair competition law.

There is an important limitation on Germany's ability to adopt formal class action procedures. Germany's constitution prohibits court judgments from having a negative preclusive effect on non-parties—thus raising the question of whether issues can be decided that will affect absent class members, that is, anyone other than what we think of in the United States as class representative. At least some commentators see this as an impediment to expanding class action procedures in Germany in the near future (cf. Quinn Emanuel Urquhart & Sullivan, LLP, Business Letter November 2013).

### c) France

France's Parliament is currently debating legislation that would allow consumer class actions (permitting non-consumer class actions is not under consideration) (see for current status <[http://www.assemblee-nationale.fr/14/dossiers/projet\\_de\\_loi\\_consommation.asp](http://www.assemblee-nationale.fr/14/dossiers/projet_de_loi_consommation.asp)> (accessed on 16 October 2013)). Under the proposed law only accredited consumer associations (which excludes law firms) would have standing to sue any defendant in any line of business (Draft proposal available under <<http://www.assemblee-nationale.fr/14/projets/pl1357.asp>> (accessed on 16 October 2013)). The class action would permit compensation for harms (1) suffered by groups of consumers in similar or identical circumstances; (2) due to breaches of consumer and competition laws; (3) in connection with the sale of goods or services; (4) due to anticompetitive practices under French or European law. The proposed law would only compensate consumers for economic losses, i.e. tangible damages; non-pecuniary damages fall outside the scope of the proposed bill as well as punitive damages.

Under the French system, the defendant against whom the action is filed has an obligation to inform and notify potential consumers of the existence of this claim. As currently written, the legislation provides for “opt-in” class actions, where consumers would only be members of the class if they affirmatively expressed their desire to join it. If they do not opt-in, class members may not share in any recovery but retain their right to pursue individual relief. Under the current proposal, any contractual stipulation that would prohibit a consumer from participating in a class action is deemed null and void.



### **d) Netherlands**

The Dutch system knows three main mechanisms for collective redress (english translations of the provisions available at <http://www.dutchcivillaw.com>): (1) “claims bundling”, whereby multiple claims are purchased by a litigation vehicle and pursued in its own name in return for a share of any recovery, (2) a court-based collective action that may result in a declaration of liability potentially supporting further litigation or settlement, and (3) the Collective Settlements of Mass Claims Act (WCAM) by which collective settlements may be declared binding on an “opt-out” basis (the WCAM procedure is increasingly significant as it is being used to achieve settlements which purportedly bind class members domiciled in multiple jurisdictions. Cf. U.S Chamber Institute for Legal Reform, “Collective Redress in the Netherlands”, 6 February 2012).

The WCAM came into force in 2005. Like the U.S. class settlements, it operates on an “opt-out” basis. It facilitates the collective settlement of mass damages claims: a group of injured parties can establish an association or a foundation representing their interests by virtue of its articles of association in settlement negotiations with the damage paying party. Compensation may be paid on the basis of “damage classes”. If a settlement is reached, the injured parties may file a joint petition with the Amsterdam Court of Appeals to declare that settlement agreement collectively binding. There are no limitations under this scheme as to the types of claims that can be brought or settled collectively other than that the injured parties claim has to result from one or more similar acts by the respondent. To be valid, settlement agreement must contain: (1) the occurrence to which the settlement agreement relates, (2) a description of the class of persons affected, (3) the compensation to be paid, (4) details of the eligibility for receiving compensation, and (5) details of the compensation’s calculation. If the settlement agreement is approved by the Amsterdam Court of Appeals, related proceedings pending in the Netherlands are automatically suspended until the end of the “opt-out” period, and the agreement becomes binding on the class of claimants unless they expressly choose to opt out within a certain period following the approval (three months, generally). By electing to opt out, a claimant avoids being bound by the terms of the agreement, while those who remained in the class are able to collect their compensation within the timeframe agreed upon in the agreement (one year max.).

The Dutch class settlement system is being used frequently. It is particularly notable for its availability to foreign parties even if there is little, if any, connection to the Netherlands (thus allowing for worldwide settlement of class actions). Dutch courts have taken to accept jurisdiction if it is a Dutch foundation or association that enters into the settlement on behalf of potential claimants. The WCAM was amended in July of this year to further facilitate collective settlements, inter alia by making it available to the trustee and creditors in bankruptcy proceedings and by introducing the possibility for pre-trial hearings before the district court for the purpose of getting the parties to reach an agreement (separate from the amendments to WCAM, the Dutch Code

of Civil Procedure provides now for the possibility to submit a direct request to the Supreme Court for prejudicial questions of law).

### 3) Conclusions

While many elements of civil procedure (such as punitive damages or extensive pre-trial discovery) have never been successfully exported from the U.S., core principles of U.S. class action practice seem to have taken root in many international jurisdictions. Some deem it the democratization of justice globally while others view the proliferation of class actions as exporting a weapon of mass destruction, but there is one thing about which there can be no disagreement: class action practice has established a beachhead in virtually every developed nation around the globe (*cf.* Quinn Emanuel Urquhart & Sullivan, LLP, Business Letter November 2013). The U.S. model of aggregate actions forms the bedrock from which other nations' procedures are developing. This holds true not only for the EU and various EU member states as described in this article, but also for many other jurisdictions (Argentina, Australia, Brazil, Bulgaria, Canada, Chile, China, Denmark, Finland, Indonesia, Israel, Italy, Norway, Poland, Portugal, South Africa, Spain and Sweden).

Yet, significant uncertainty about the future development of a European collective redress mechanism remains – on the one hand it is still unclear whether member states will respond to the Commission's recommendations by creating or amending domestic civil procedure law, on the other hand the European collective action project remains vague due to considerable disagreement amongst member states with regard to the question whether binding legislation should be introduced on EU level (states considering binding EU rules with regard to specific policy fields or issues only are Denmark (with regard to cross-border collective redress), The Netherlands (with regard to private international law aspects of collective redress), Sweden and the UK (with regard to competition law)).

Against this background, Switzerland, too, has begun considering amending its laws with a view to introducing collective action mechanisms.

*thomaswerlen@quinnemanuel.com*

*jonashertner@gmail.com*



### Swiss People to Vote on Caps on Executive Compensation

Reference: CapLaw-2013-27

On 24 November 2013, the Swiss will have to vote on whether their employment compensation regime should become more egalitarian. A popular referendum promoted by the Young Socialist Party wants to limit executive compensation to 12 times the lowest salary within the same business undertaking. While a number of issues remain unclear at this stage, it is certain that the rather flexible and internationally competitive Swiss labor market would be severely impacted if the initiative were to be adopted by the Swiss people.

By Thomas Reutter

#### 1) The Initiative and Its Motivation

On 24 November 2013, the Swiss people will have to decide in a popular referendum whether they would like a more egalitarian income distribution. The referendum has been prompted by a popular initiative launched by the Young Socialist Party that aims at curbing differences in work compensation (Initiative). The Initiative demands that no salary may be higher than 12 times the lowest salary paid within a certain “undertaking” or “enterprise”.

The Initiative aims at introducing a new article 110a into the Swiss Constitution that would read as follows (free translation):

*“The highest paid salary within a certain undertaking [Unternehmen] may not be higher than 12 times the lowest salary paid by the same undertaking. ‘Salary’ means the sum of all benefits (whether monetary or in kind or by services) that are being granted in connection with an employment activity.”*

The second paragraph of the proposed article allows for exceptions in particular for trainees, interns, part-time and secondment relationships.

The promoters of the Initiative argue that there is a market failure in that neither the capabilities nor the performance nor the labor market would lead to excessive salaries but only the personal relationships between the managers and the board of directors of the company by which they are employed. The promoters further argue that by adoption of the Initiative many excessive salaries would have to be curbed and “huge sums of salaries could be released and distributed differently amongst workers”. Thus, the promoters of the Initiative being members of the Young Socialists assume that companies would simply increase the lower salaries and still have the same demand for work in spite of its higher price.

### 2) The Problem of Unequal Income Distribution

Of course, the Initiative raises a number of philosophical issues of justice and fairness within society. For example, is a more equal income distribution within society a goal in itself? Or should a fair society not rather be benchmarked against how its weakest members are treated? It goes without saying that these questions cannot be dealt with let alone answered in a contribution like this.

However, it is probably worthwhile to look at income distribution in Switzerland compared to other countries from an empirical perspective. In social economic studies, the so-called Gini coefficient is used to measure income distribution in any given society. A Gini coefficient of zero means that each member of a society or country has the same income whereas a coefficient of one means that only one person makes the entire income in any given society or country. Switzerland's Gini coefficient is 0.338 before taxes and transfers (e.g. subsidies) and is 0.29 after taxes and transfers. Quite surprisingly, this is the same level as France (0.292) and means a slightly more even income distribution than Germany (0.300). Not surprisingly, the UK (0.345) and the US (0.370) have more pronounced differences in income distribution. Therefore, the peer group of Switzerland with respect to income distribution are countries considered "socialist" even as of today. Similar observations can be made when using measurements other than the Gini coefficient.

### 3) Interpretation Issues about the Initiative

As mentioned above, the text proposed by the Young Socialists to amend the Swiss constitution lacks the desired clarity in a number of respects. The most important ambiguity relates to the term **undertaking** (*Unternehmen* in German and *entreprise* in French). It appears that the sponsors of the Initiative would like the 1:12 restriction not only to apply within any specific legal entity, but also within entities of the same group. The commentary to the Initiative which states that "entire vertical structures such as holdings" are included suggests that conclusion. Although it appears that the promoters of the Initiative do not seem to be familiar with the concept of a group of companies it appears that they wanted the term **undertaking** to be interpreted in an economic rather than a legal manner as is the case, for example, in antitrust law. Assuming the 1:12 restriction should apply within groups of companies it must be further assumed that the sponsors did not intend any extraterritorial impact of this proposed Initiative and hence the restriction would be limited to that part of any group of companies that is based in Switzerland.

Companies that are not part of a group of companies but are owned by the same owner would not be affected based on a reading of the promoter's commentary. Therefore, an entrepreneur may incorporate and own a company employing highly paid managers and another company employing low paid workers without observing the 1:12

restriction. Companies in which the highest paid executives are also owners are also unlikely to have a problem if the Initiative were to be adopted. Rather than paying salaries, they could pay dividends to their manager owners. This is true for most partnership based organizations in Switzerland. If the Initiative will be adopted, we will also likely see a number of creative compensation structures that could involve international secondments or special manager shares with preferential financial rights.

#### 4) Impact and Outlook

A study by the University of St. Gallen sponsored by opponents of the Initiative has endeavored to quantify the impact of an adoption of the Initiative on the Swiss economy. The study adopted various assumptions as to the use of moneys “saved” on prohibited excessive compensation (*i.e.* exceeding the 1:12 restriction) and migration of companies and officers affected to other countries. The study also tries to quantify the impact of any tax losses. It is noteworthy that according to the study even the promoter’s best case of a re-distribution of income from higher paid workers to lower paid workers would lead to significant tax losses due to the progressive tax system. Currently, only 2% of the population pay as much as 47% of the direct income tax on the federal level. If higher salaries were curbed and channeled to lower salaries, significant tax losses would occur because higher salaries are taxed at disproportionately higher rates on the federal level and in all but two cantons.

The large Swiss corporations and financials on average have a majority of foreign nationals in their senior management, are largely owned by foreign based shareholders and do their business across the globe. It would be unrealistic to believe that these companies will remain committed to the Swiss workplace even if conditions severely deteriorate. This also relates to conditions affecting the flexibility of employment. In fact, most rankings of international competitiveness use employment and compensation flexibility as a very important criterion for investment venue selection. It goes without saying that the current competitive edge of Switzerland would be significantly impaired with the salary caps proposed by the Initiative. It can also be expected that many large corporations will relocate management positions, management companies and even their registered office outside Switzerland if the Initiative were to be adopted.

In order to become effective, any constitutional amendment such as the Initiative will have to be approved by both a majority of the Swiss people and a majority of the Swiss cantons. All major parties apart from the Socialist Party have recommended rejecting the Initiative. In recent surveys, the originally high approval rate has come down to below 50% but a rejection is still far from certain. It can only be hoped that Swiss voters are wise enough not to send a signal of deterrence to the international business community.

*thomas.reutter@baerkarrer.ch*

## New Regulatory Framework for Share Buy-backs

Reference: CapLaw-2013-28

In a far-reaching revision of the Stock Exchange Act (SESTA), which entered into force on 1 May 2013, the prohibitions of insider trading and market manipulation were moved from the Penal Code (PC) into the SESTA. As the scope of the prohibitions is very broad, the Stock Exchange Ordinance (SESTO) has been amended to include certain safe harbor exemptions, in particular concerning share buy-back programs. By and large, these safe harbor rules mirror some of the rules developed by the Take-over Board (TOB) for share buy-backs and set out in former versions of TOB Circular No. 1. As the TOB consequently amended Circular No. 1 with the goal of eliminating duplications, the regulatory framework of buy-backs is now spread across TOB Circular No. 1, articles 33e–33f SESTA, articles 55b–55d SESTO, as well as the related FINMA Circular 2013/08 on Market Conduct Rules, and enforced by different authorities. Changes in substance include the publication and confirmation requirements or the elimination of the “safe harbour” exemption for public buy-back programs relating to less than 2% of the shares.

*By Dieter Gericke/Vanessa Isler*

### 1) Introduction

Prior to the introduction of the new framework, non-public buy-backs by listed companies needed to comply with certain rules of corporate law, but were otherwise hardly regulated. Publicly announced buy-backs have long since been deemed public offers for shares and therefore fell under takeover regulations and the authority of the TOB. Whether or not takeover rules could constitute an appropriate basis for the regulation of share buy-backs, has, however, always been controversial (*cf.* Dieter Gericke, Share Buy-back: Revision of Communication No.1, CapLaw 2009-41 and *Idem*, TOB Circular No.1: New Regulation of Share Buy-Back Transactions, CapLaw-2010-29). The legal basis for the regulation of buy-backs by the TOB in its Circular No. 1 was weak, in particular to the extent that its provisions aimed at avoiding market distortions in general and were less driven by concerns typical for a public offer for shares (equal treatment, *etc.*).

Accordingly, the transfer of provisions directed at regulating market behavior to the SESTA and, in particular, the SESTO, while TOB Circular No. 1 continues to regulate the **public offer**-aspects of an announced buy-back program, seems only logic. However, the tradition of regulation and supervision of buy-backs by the TOB was well-established and, on the whole, evolved with little practical problems. In contrast, today's concept of dual regulations, with supervision split between the TOB and the Swiss Financial Market Supervisory Authority FINMA (FINMA) (*cf.* Luc Thévenoz, *Développements du droit Suisse des OPA*, SZW 2013, 251), may unduly complicate the relatively straight-forward topic of share-buy backs and, specifically, announced share buy-back

programs. Furthermore, there is still an overlap of certain rules, which are included in the SESTO as well as in the amended TOB Circular No. 1 and, accordingly, may lead to different paths of interpretation depending on the competent authority.

### 2) Three sets of rules, three enforcing authorities

In fact, despite the *dual* concept, *three* sets of rules, enforced by *three* different authorities will have to be taken into account in the future.

#### a) Administrative law prohibitions of insider trading and market manipulation

The new articles 33e and 33f SESTA provide for administrative law versions of the prohibition of insider trading and of market manipulation, respectively. Article 33f (2) (b) SESTA specifically advises the Federal Council to regulate permitted behavior in connection with share buy-back programs. This has been done with the new articles 55b–55d SESTO, observance of which provides a safe harbor of permitted behavior under both insider trading and market manipulation rules, even if the behavior would otherwise fall under the scope of the prohibitions. Enforcement of these prohibitions and supervision of compliance with the safe harbor rules lies in the hands of FINMA.

Like TOB Circular No. 1, the safe harbor set out in the SESTO is limited to publicly announced buy-back programs, while the prohibitions of insider trading and market manipulation in principle apply to any securities transaction, *i.e.* any buy-back of shares, including non-public repurchases of shares by an issuer. That said, there is no requirement to use the safe harbor. Rather, both non-public share purchases and share purchases within the framework of public buy-back programs that do not observe the safe harbor rules are permitted as long as they do not qualify as insider trading or market manipulation within the meaning of articles 33e and 33f SESTA.

With respect to share buy-backs outside the safe harbor, the new FINMA Circular 2013/08 on Market Conduct Rules of 29 August 2013 will play an important role. While the FINMA Circular is not a binding legal act, it sets out FINMA's interpretation of the prohibition of insider trading and market manipulation. For example, it should be noted that FINMA's view is extensive as to the scope of possible “insider” information, which according to FINMA also includes outside information not known to the company and its insiders and which has no impact on its intrinsic value (*e.g.* an analyst's view or third party's intention). So far, FINMA has not been willing to entertain the possibility of no-action letters or to determine the permissibility of intended transactions under the new regime, but has not excluded the implementation of such procedures in the future. Hopefully, with the FINMA Circular now in force (as of 1 October 2013), FINMA may be more open to such requests.

### **b) Criminal law prohibitions of insider trading and market manipulation**

The new articles 40 and 40a SESTA set out the criminal law counterparts of the prohibition of insider trading and market manipulation. Formerly included in the PC, their wording has been adjusted to largely mirror the administrative law prohibitions. The criminal law prohibitions do not refer to the administrative law safe harbor established by the SESTO for public buy-back programs. While this is regrettable, clearly, a behavior, which the SESTO explicitly permits, cannot simultaneously qualify as a criminal offence (*cf.* article 14 PC). Therefore, it seems safe to say that the safe harbor defense can also be used in a criminal investigation.

As the criminal law prohibitions are investigated and prosecuted by the Federal Attorney General (and adjudicated in the Federal Criminal Court (article 44 SESTA)), it is in principle possible that the same buy-back program comes under scrutiny of FINMA and the Federal Attorney General in parallel. More likely, however, FINMA will open up an administrative investigation first and, if an administrative prohibition is found violated, may notify the criminal authorities of the matter. *De facto*, although with questionable authority to investigate into matters of potential market manipulation or insider trading, FINMA has already assumed this function in the past.

### **c) TOB Circular No. 1: Exemption from General Takeover Regulations**

As mentioned above, a reduced version of TOB Circular No. 1 applies and – as in the past – sets out the conditions, under which a buy-back program can be exempt from the general takeover regulations set out in the SESTA and in the Takeover Ordinance (TOO).

The exemption is, in principle, available for public buy-back programs that do not exceed 10%, while the previous *de minimis* exemption for public purchases of less than 2% of the shares has been deleted.

In practice, the reporting procedure set out in the TOB Circular with a filing to the TOB and subsequent public notice (see below) is still the key element of any buy-back procedure. In contrast, as mentioned above, no clearance is required from FINMA under the SESTO safe harbor, nor does FINMA, in principle, accept a clearance filing for a buy-back program or other share buy-back. Since the safe harbor rules are now hardwired in the SESTO and no longer under the TOB's control, the TOB is somewhat reluctant to issue exemptions that could be in conflict with the SESTO safe harbor. However, the TOB does, in principle, not need to take into account the SESTO safe harbor rules, except in cases of an obvious breach of the prohibition of insider trading or market manipulation. In addition, the TOB has explicit authority to approve exemptions from the buy-back volume restrictions set out in the SESTO and, in particular, to allow share buy-backs exceeding 10% of the share capital and voting rights or 20% of the free float or 25% of the average daily volume (article 55b (3) SESTO).



### 3) Categories of Exemptions and Procedures

#### a) TOB Reporting Procedure (*Meldeverfahren*)

As with the previous regime, the reporting procedure is applicable if the proposed share buy-back does not affect more than 10% of the share capital and the voting rights (TOB Circular No. 1 para. 11, article 55b (1) (b) and (2) (b) SESTO). In order to qualify for the reporting procedure, the buy-back program must satisfy a number of additional requirements (TOB Circular No. 1 paras. 8–15). The general tests required for the applicability of the reporting procedure have largely remained the same under the new regime:

- The cancellation of the equity securities acquired in the course of the buy-back program **may not lead to a significant change of control** with the issuer, in particular by exceeding the thresholds of 33⅓% or 50% of the voting rights. Whether lower *de facto*-controlling positions may be relevant is left open.
- The total volume of the buy-back **may not exceed 20% of the free-float**. It is worth noting that TOB Circular No. 1 uses its own definition of **free-float** which is as follows: the free-float does not include equity securities of over 5% held by an investor directly, indirectly or in concert with third parties. The reference date for this calculation is the day on which the application is submitted to the TOB. The free-float must be calculated separately for each category of equity securities covered by the buy-back program (TOB Circular No. 1, para.12). Accordingly, the buy-back volume of companies with significant shareholder groups holding more than 5% in the shares may be limited. The legitimacy of the TOB's concern with the liquidity of traded shares as witnessed by this requirement to the reporting procedure remains to be questionable (*cf.* Gericke, Share Buy-back, *op. cit.*).
- The implementation of the buy-back program may not lead to the issuer falling below the **minimum thresholds required for listing** according to the rules of the relevant stock exchange. This requirement may not always be sensible, in particular with respect to companies that were granted exemptions from the minimum free-float requirements or failed to maintain them. Of course, the TOB may deviate from this requirement in specific cases.

If the proposed buy-back program complies with all requirements of chapters 1–4 of TOB Circular No.1, the issuer may use the reporting procedure and report the program to the TOB (see TOB Circular No. 1, paras. 31–34). Such reporting takes place by submitting the form provided by the TOB at least five trading days before the planned publication date of the buy-back. If the conditions for the exemption under the reporting procedure are deemed satisfied, the TOB confirms within three trading days that it has taken note of the buy-back program and that no formal decision by the TOB is required.

The fee levied by the TOB for the review of a buy-back program in the reporting procedure amounts to 0.5 per mill of the total value of the buy-back and is capped at CHF 20,000.

### **b) Regular Exemption Proceedings**

If a buy-back program does not qualify for the reporting procedure, the issuer may, based on article 4 (2) TOO, submit a regular exemption application to the TOB (TOB Circular No.1, paras. 35–39) in addition to the applicable form (*Meldung eines Rückkaufprogramms*), wherein the issuer explains the reasons for the deviation from the requirements set out in the TOB Circular. The application must be submitted no later than 20 trading days prior to the launch of the buy-back program. The TOB then decides whether or not the buy-back program has to comply with any or all of the regular rules governing public offers for shares. The buy-back program may be launched no earlier than 10 trading days after the publication of the TOB's formal decision.

### **4) Rules affecting public buy-back programs**

Set out below are the applicable rules either pursuant to TOB Circular No. 1 or the SESTO safe harbor rule. As mentioned above, in principle, an issuer may deviate from those requirements which are only set out in the SESTO as part of the safe harbor rule, as long as such behavior does not qualify as insider trading or market manipulation. Deviations from requirements set out in TOB Circular No. 1 must be approved by the TOB in advance.

#### **a) General rules for buy-backs based on the reporting procedure**

In addition to the general eligibility requirements for the reporting procedure, a buy-back program which has been cleared through the reporting procedure must satisfy additional requirements, in particular with regard to the principle of equal treatment:

- The buy-back notice must state the purposes of the buy-back precisely and completely (TOB Circular No. 1, para. 8).
- The buy-back program must extend to all categories of listed equity securities of the issuer (TOB Circular No. 1, para. 9). If the buy-back program is executed through stock exchange purchases, the issuer must place simultaneous bids for all categories of listed equity securities (TOB Circular No. 1, para. 22).
- The issuer must ensure an adequate relationship of the prices offered for different categories of equity securities (TOB Circular No. 1, para. 14).
- The issuer may not purchase equity securities for the purposes announced other than through the buy-back program (TOB Circular No. 1, para. 15). This provision has been criticized due to its restrictiveness and lack of basis in formal law and,

therefore, may not be enforceable. It is advisable to phrase the purpose of the buy-back program as narrowly as possible in order to avoid a prohibition of legitimate share purchases outside of the buy-back program. Share purchases effected outside of the buy-back program must be published on the issuer's website together with the share purchases made within the program (TOB Circular No. 1, para. 27).

### **b) Special provisions for fixed-price offers and issuance of put options**

Fixed price-offers and buy-back programs implemented through the issuance of put options may not be conditional and must provide for an offer period of at least 10 trading days (TOB Circular No. 1, paras. 16 and 17, article 55 (2) (a) SESTO). Additional requirements apply, in particular, with regard to the principle of equal treatment (TOB Circular No. 1, paras. 18–20):

- If the issuer is unable to satisfy all acceptance declarations, it must satisfy them on a *pro rata* basis.
- If during the period of a buy-back program the issuer acquires equity securities at a price exceeding the offer price, it must offer the higher price to all accepting shareholders (best price rule).

The issuer must publish the buy-backs made at the latest on the day following the expiry of the buy-back program (article 55b (2) (d) SESTO). No later than 3 trading days after the expiry of the buy-back program the issuer must submit a confirmation to the TOB regarding its compliance with the applicable requirements (TOB Circular No. 1, para. 14–15, 18–19) as well the required reporting (para. 27).

### **c) Special provisions for buy-back programs at market prices**

The most common form of buy-back programs is the buy-back over the stock exchange, i.e. "at market prices", usually using a second trading line (for withholding tax reasons). Buy-back programs at market prices may not last longer than 3 years (TOB Circular No. 1, para. 21 and article 55b (1) (a) SESTO). The TOB Circular No.1 (paras. 22–26) and the SESTO (article 55b SESTO) impose the following additional requirements:

- If the buy-back program extends to several categories of equity securities, the issuer must offer a bid price for each category at the same time (TOB Circular No. 1, para. 22).
- The scope of buy-backs on the regular trading line may not exceed 25% per day of the average daily volume traded during the 30 days prior to the publication of the buy-back program (article 55b (1) (c) SESTO). The TOB defines the average daily volume traded as the sum of transactions on the regular trading line both within and outside of the order book at the stock exchange divided by the number of trad-

ing days in the 30 calendar days before publication of the notice of buy-back (TOB Circular No. 1, para. 23a). This restriction can be an obstacle for companies whose shares have a low trading volume, as the permitted buy-back volume may result to be insignificant. In such case, the issuer has no other choice but to obtain an exemption from the TOB pursuant to article 55b (3) SESTO. As such exemption cannot be obtained in the reporting procedure, the issuer has to obtain formal approval pursuant to TOB Circular No. 1, para. 35 et seq.

- The offer price may not exceed the last independently achieved closing price on the regular trading line or, if lower, the best currently available independent offer price on the regular trading line (article 55b (1) (d) SESTO).
- Each purchase at market price must be reported to the TOB and the SIX Swiss Exchange and published on the issuer's website no later than on the 5th day following such purchase (TOB Circular No. 1, paras. 27–30, article 55b (1) (h) SESTO).

The treatment of black-out periods, during which share buy-backs are interrupted, remains the same as under the previous TOB Circular No. 1, but is now regulated in the SESTO. Black-out periods are defined as (i) the duration of a postponement of *ad hoc* publicity of price sensitive facts in accordance with the rules of the relevant stock exchange, (ii) the period of 10 trading days prior the release of financial results and (iii) whenever the last published consolidated accounts date back more than nine months (article 55c (1) SESTO). Purchases are nevertheless permitted if they are delegated to a bank or securities dealer which executes purchases without the issuer's further influence within the parameters set by the issuer or, if the issuer is itself a securities dealer, a trading unit protected by information barriers (article 55c (2) SESTO). If the issuer delegates purchases to a bank or securities dealer, the investment parameters must be defined before the publication of the buy-back program and may be adjusted once a month. If the parameters are defined or adjusted during a black-out period as defined in article 55c (1) SESTO, the buy-back may only be carried out after a waiting period of 90 days (article 55c (3) SESTO).

It should be noted that the SIX Swiss Exchange's regulations and practice concerning *ad hoc* publicity and the FINMA Circular 2013/08 on Market Conduct Rules are not aligned as regards the definitions and interpretations of significantly price-relevant fact and insider information. In particular, FINMA's interpretation of insider information has a significantly broader scope. Accordingly, in order to be on the safe side, a buy-back program which is not executed by delegation to a bank or securities dealer in accordance with article 55c (2) SESTO may need to be interrupted even outside black-out periods pursuant to article 55c (1) SESTO.

The issuer must submit a confirmation to the TOB attesting compliance of its buy-back program with the applicable requirements (TOB Circular No. 1, para. 15), as well as

the required reporting (TOB Circular No. 1, para. 27). In addition, the bank or securities dealer appointed to conduct the buy-back program must issue a separate confirmation to the TOB regarding the satisfaction of the requirements regarding the adequate offer price (TOB Circular No. 1, paras. 14 and 22) and scope of the buy-back (TOB Circular No. 1, paras. 23–23a). Both confirmations must be reported on the 3rd trading day after the expiry of the buy-back program and at least once every year.

### **5) Reporting Requirements**

The revised buy-back regime requires the issuer to publish information on the purchase of equity securities within and outside of the buy-back program. The information has to be reported to the stock exchange and published on the issuer's website on the 5th trading day following the transaction at the latest (TOB Circular No. 1, paras. 27–30, article 55b (1) (h) SESTO). The information must be available on the website for at least twelve months after the end of the buy-back program (TOB Circular No. 1, para. 27a, article 55b (1) (g) SESTO).

A sale of equity securities during a buy-back program other than for purposes of an employee participation plan has to be reported to the stock exchange on the trading day following the transaction and published by the issuer on the 5th trading day. Such sale may per day not exceed 5% of the average daily trading volume on the regular trading line during the 30 days prior to publication of the buy-back program (see 4 c) above concerning the calculation).

As a public buy-back program is deemed a public offer for shares, in principle, the issuer's reporting obligations under article 20 SESTA are suspended for the duration of the program (article 19 para. 1 of the FINMA Stock Exchange Ordinance (SESTO-FINMA)). After closure of the program, a reporting in accordance with article 20 SESTA has to be made (article 19 (2) SESTO-FINMA). It may, however, be advisable to continue reporting during the program, also under article 20 SESTA, given the difficulty of correct application of this exemption.

### **6) 10%-limitation of article 659 Code of Obligations (CO)**

In the past, there has been some confusion with regard to the TOB's review of the issuers' compliance with the 10% limitation according to article 659 CO. The revised TOB Circular No. 1 now clearly states that an exemption granted with regard to takeover law does not exempt the issuer from adhering to the CO, which is, however, not reviewed by the TOB (TOB Circular No. 1, para. 7). The interpretation and application of article 659 CO are within the competence of the civil courts.

### 7) Conclusions and Outlook

Despite the new system of dual regulation, substantively, the new buy-back regime has largely remained the same. That share buy-backs are now regulated by two different bodies, FINMA and the TOB, and the rules enforced by three different authorities is regrettable, but it remains to be seen to what extent this will lead to actual conflicts.

The new framework will pose some challenges to issuers in getting an overview of applicable rules and to comply with the standards and practices of three different authorities, and requires more coordination among the authorities themselves. The improvement of systematic consistency with regard to the regulatory scope of the different authorities achieved thereby and an improved legal basis in formal legislative acts, offers some, but perhaps not sufficient justification for these complications.

Generally, it remains to be hoped that the new competences of FINMA, in parallel with the criminal authorities, will not lead to a tendency of criminalization of minor breaches of regulations governing share buy-backs as seen in other areas of capital markets regulations.

*dieter.gericke@homburger.ch*

*Vanessa.Isler@homburger.ch*

---

## Segregation and Porting: Two Special Features for Cleared Trades

Reference: CapLaw-2013-29

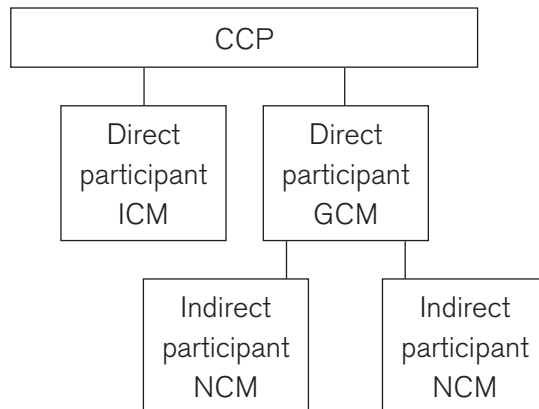
*By Martin Hess*

### 1) European Law

EU-Regulation 648/2012 of 4 July 2012 on OTC derivatives, central counterparties and trade repositories usually called **EMIR** (European Market Infrastructure Regulation) implements the Group of Twenty (G 20) commitment to have standardized OTC derivatives cleared through a central counterparty (CCP) in the European Union. In order to increase market transparency, EMIR requests that derivative transactions are to be reported to a trade repository. Finally, EMIR defines the conditions for authorization and the supervision of CCPs. This contribution deals with two of these requirements for CCPs.



### a) The parties involved in clearing



### b) Segregation

Under EMIR, CCPs have to offer clearing members (direct participants, *i.e.* general clearing member or GCM, and individual clearing member or ICM) the ability to legally and operationally segregate the claims and obligations resulting from cleared transactions (called Positions) and assets (*i.e.* collateral held to cover Positions – except default fund contributions – hereinafter Collateral) in the event that a clearing member or the CCP become insolvent or loses the respective authorization.

Article 39 (2) EMIR requires that the CCP keeps separate records and accounts enabling the distinction between

- the Collateral and Positions held for the account of clients of the clearing member, and
- the Collateral and Positions of the clearing member itself.

This is called ***omnibus client segregation***. The client account is fully segregated from the house account of the clearing member. The Positions and Collateral of the clients are commingled and not known to the CCP. In general, clearing members have to provide Collateral to the CCP for the net exposure recorded on the client account. Netting of client exposures is possible.

Article 39 (3) EMIR requires alternatively the CCP to keep separate records and accounts enabling the distinction between

- the Collateral and Positions held for the account of each client, and
- the Collateral and Positions held for the account of each other client.

This is called **individual client segregation**. The clients choosing individual client segregation are known to the CCP. Their Collateral and Positions must be recorded on separate accounts also by the CCP. Netting of Positions recorded on different accounts is prevented. The Collateral covering the Positions in an account are not exposed to losses connected to losses recorded in a different account.

In addition, article 39 (4) EMIR requests that clearing members keep separate records and accounts that enable them to distinguish between – both in accounts held with the CCP and in its own accounts – the Collateral and Positions held for the account of its clients at the CCP from its own assets and Positions.

### c) Portability or Porting

In case of default of a clearing member, article 48 (5) and (6) EMIR request that a CCP be committed to trigger the procedures for the transfer of Positions and Collateral held by the defaulting direct participant (GCM) for the account of its clients e.g. indirect participants (usually called non-clearing member or NCMs) to a transferee direct participant (Transferee GCM). This is known as **Portability** or **Porting** (*Übertragbarkeit*).

In order for Positions and Collateral to be ported in the event of default of a direct participant (GCM), an indirect participant (NCM) needs to have appointed a Transferee GCM who is prepared to act as replacement direct participant (GCM). If no such Transferee GCM is appointed, or if the Transferee GCM that has been so appointed declines to become party to replacement contracts, the CCP will have to liquidate the Positions, which will affect also the NCM's collateral and positions and therefore the market itself.

## 2) Current Swiss Legal basis

### a) Supervisory Regime in Switzerland

In order to protect the stability of the financial system, the Swiss central bank, the Swiss National Bank, oversees systems for the clearing and settlement of payments and of transactions with financial instruments. Such oversight also extends to payment and securities settlement systems including CCPs whose operators are domiciled abroad, provided that substantial parts of the operation or leading participants are located in Switzerland. The Swiss regulator for banks and securities traders FINMA might also grant tailor made banking licenses to such systems.

The Swiss National Bank has issued rules on portability and segregation in the National Bank Ordinance (NBO) which have entered into force on 1 July 2013 and are more or less similar to article 39 EMIR:

### *i. Segregation*

Article 24b (1) NBO stipulates that a CCP shall keep separate records and accounts, enabling it to distinguish

- a) its own assets and Positions from the Collateral and Positions of its clearing members;
- b) Collateral and Positions of a clearing member from those of other clearing members; and
- c) Collateral and Positions held for the account of indirect participants (NCMs) from those of a clearing member participating directly, unless the direct participant itself undertakes or is required to perform such segregation.

Article 24b (2) NBO requires that the CCP must offer a clearing member the choice between keeping and recording the Collateral and Positions of the indirect clients connected via the direct participant either jointly (omnibus client segregation) or separately (individual client segregation).

### *ii. Porting*

Article 24b (3) NBO stipulates that a central counterparty shall have procedures for the transfer of Collateral and Positions held by the defaulting GCM for an NCM to a Transferee GCM indicated by the NCM, provided

- a) the transfer is enforceable in the relevant jurisdictions; and
- b) the Transferee GCM has contractually agreed with the NCM to assume the latter's Collateral and Positions.

If such a transfer is not possible, the CCP must provide procedures offering comparable protection for the Collateral and Positions of the indirect participants (NCM) (article 24b (4) NBO).

### **b) Segregation according to article 12 Intermediated Securities Act**

Except the provisions in the amended NBO for CCPs, Swiss law so far does not impose segregation as mandatory. Segregation is mentioned in article 12 Intermediated Securities Act. Article 12 defines certain consequences in case a custodian applies segregation in respect of its holdings with sub-custodians.

### **c) Restructuring procedures according to the Banking Act**

The restructuring procedures defined in the Banking Act authorize FINMA to order the continuation of certain services of financial institutions in distress. FINMA has the

power to transfer the agreements or parts of a financial institution (including assets and liabilities) to a third party or a bridge bank (article 30 Banking Act). **Based on such an intervention of FINMA, Porting is currently already possible under Swiss law.** In case of transfer of certain services from a financial institution licensed in Switzerland as bank or securities trader in distress to a third party (including a bridge bank) FINMA is entitled to prohibit the use of contractual provisions which lead to the termination of a contract in case of default for a certain period of time, the longest for 48 hours (article 57 Bank Insolvency Ordinance).

### **d) Porting based on private law rules**

#### **i. Relevant principles of Swiss Bankruptcy Law**

According to the Debt Enforcement and Bankruptcy Act (DEBA) currently in force, a bankrupt debtor loses the right of disposition of its assets (article 204 (1) DEBA). Based on this provision, a Swiss direct participant (GCM) who becomes insolvent will lose the power of disposal, of amending, cancelling or transferring any Position or Collateral.

Any acts of the debtor performed after the adjudication of bankruptcy are not effective against its creditors (Void Disposition Rule).

Swiss law allows the advance disposal of claims as long as the limits imposed by article 27 Civil Code (protection of the individual against excessive commitments) and article 20 Code of Obligations (nullity of contracts of impossible, unlawful or immoral content) are respected. The sole requirements for such an advance disposal are that the pertinent claims can be designated with sufficient certainty and that the power of disposal is effective at the time it is executed.

Contractual arrangements in which the debtor, *i.e.* the defaulting direct participant, renounces in advance any rights in case of bankruptcy are likely to qualify as a preferential treatment of certain creditors and as an infringement of the principle of equal treatment of creditors. In case of insolvency of a Swiss direct participant any liquidation measures such as the transfer of Positions and Collateral of the defaulter by the CCP to another direct participant (GCM) or the creation of new contracts to which the defaulter is a party would therefore be in contradiction to the principle of equal treatment of creditors and might be challenged by the liquidator or other creditors because of preferential treatment of certain creditors (articles 285 et seq. DEBA).

#### **ii. Portability after close out netting**

Subject to regulatory measures as outlined above the Void Disposition Rule does not prevent termination of the contract by the CCP and the replacement of such contract by a new contract to which the defaulting direct participant (GCM) is not a party. The

cleared transactions will be terminated either mandatorily by Swiss Law in case of insolvency (article 211 (2<sup>bis</sup>) Bankruptcy Law) or as contractually agreed. The arrangement for replacing of cleared transactions by terminating the contract and concluding a replacement contract with a third party is a matter outside of the bankruptcy of the direct participant (GCM) and therefore possible.

### **3) Forthcoming Swiss regulation**

Except certain NBO-provisions there are no tailor made rules for CCPs in the currently applicable Swiss regulations. Switzerland is in the process of implementing regulations in the area of financial market infrastructure which are equivalent to that of the EU in order to allow Swiss CCPs to be recognized under article 25 EMIR (recognition of third country CCP).

The federal administration is preparing a Financial Infrastructure Law which should enter into force in 2015. Part of this new law will deal with Porting. It is expected that the Financial Infrastructure Law will introduce an obligation for CCPs to provide rules for the transfer of Positions and Collateral from an indirect participant (NCM) in case of default of a direct participant (GCM) to a direct participant (Transferee GCM) in good standing. The transfer of Position and Collateral will be declared mandatory by the forthcoming law.

### **4) Implications of Segregation and Portability**

#### **a) For the Swiss legislator**

The new Financial Infrastructure Law must create an unambiguous basis for Porting which supersedes the current obstacles as outlined above 2 d) i. A simple copying of the wording of article 39 and 48 EMIR does not create legal certainty as the ongoing discussions about the scope of EMIR demonstrate:

- There is need for a statement in the new law that the provisions of the DEBA are not applicable in the situation where Porting should work.
- The new law must clearly define whether it applies to both, *i.e.* the relationship CCP-GCM and the relationship GCM-NCM (or even the relationship NCM – client in case of indirect clearing arrangements), or only to the relationship CCP-GCM.
- The territorial scope of application of the new law must be defined, since clearing relationships cross national boundaries.

#### **b) For the contractual arrangements between CCP, GCM and NCM**

Porting is only possible if a tri-party agreement between CCP, direct participant (GCM) and indirect participant (NCM) is concluded. Furthermore, alternative clearing arrange-

ment between indirect participant (NCM) and the Transferee GCM need to be in place. Finally, the Transferee GCM must accept in advance (without knowing the details) all Positions (and the related Collateral) entered into by the defaulting GCM.

Porting depends on the level of segregation implemented. Porting of Collateral is likely to be more feasible for indirect participants (NCM) using individual client segregation. For omnibus client segregation, Porting of the entire client omnibus account to a Transferee GCM – subject to consent of all indirect participants (NCM) – is possible but does not seem likely given that all NCMs need to agree.

The choice of the type of security agreement for providing Collateral (full title transfer, e.g. **irregular pledge**, or security interest other than full ownership, e.g. **pledge**) need to be analyzed with great care. Furthermore, providing of Collateral to the Transferee GCM under the condition precedent of default of a GCM has to be agreed in advance.

The account structure for holding collateral will become more complex than for simple omnibus accounts. Collateral Management Services by neutral service providers such as custodians will be used more often for establishing the respective accounts, managing the Collateral, for the enforcement of the Collateral in case of default or for the transfer of the Collateral if Segregation and Porting apply.

*m.hess@wengerviel.ch*

---

## Credit Suisse issues approx. CHF 4 bn of Write-down Bonds

Reference: CapLaw-2013-30

In August and September 2013 Credit Suisse issued a total of approx. CHF 4 bn of write-down bonds that qualify towards the Progressive Component under the Swiss Too big to fail-Legislation, all governed by Swiss law and all listed on the SIX Swiss Exchange. Credit Suisse's inaugural issue consisted of USD 2.5 bn Tier 2 write-down bonds in two tranches, a Reg S tranche and a Rule 144A tranche. The Rule 144A tranche was the first of its kind governed by Swiss law. This deal was followed by a CHF 290 mn Tier 1 write-down bond issuance. The series was completed with a EUR 1.25 bn Tier 2 write-down bond issuance.



### FINMA publishes “Market Conduct Rules” Circular

Reference: CapLaw-2013-31

On 5 September 2013, the Swiss Financial Market Supervisory Authority FINMA (FINMA) published the definitive version of its fully revised “Market Conduct Rules” Circular. The Circular sets out specific details of FINMA's supervisory practices in combating market abuse and will enter into force on 1 October 2013. The new legislation underlying this Circular has been discussed in CapLaw 2013-9, and the editors of CapLaw expect to publish a discussion of the new Circular in one of the next releases of CapLaw.

---

### US Department of Justice publishes “Program for Non-Prosecution Agreements or Non-Target Letters for Swiss Banks”

Reference: CapLaw-2013-32

On 29 August 2013, the Department of Justice published its “Program for Non-Prosecution Agreements or Non-Target Letters for Swiss Banks”. This Program shall enable Swiss banks to address their past practices in dealing with US tax payers. The program was announced under a joint statement between the US Department of Justice and the Swiss Federal Department of Finance, wherein the Swiss Government welcomed the publication of the program by the Department of Justice and expressed its desire that the Swiss financial industry fully cooperates under the Program. In a communication of 5 November 2013, the Tax Division of the US Department of Justice commented on a number of questions received in relation to the Program, but essentially referred the banks and their counsel to “the plain language of the Program”.

---

### CHF 175 million Subordinated Contingent Write-off Securities issued by Swiss Reinsurance Company Ltd

Reference: CapLaw-2013-33

On 7 October 2013, Swiss Reinsurance Company Ltd successfully closed its issuance of CHF 175 million 7.50% Subordinated Contingent Write-off Securities with a scheduled maturity in 2045 (the Notes). The Notes provide for a dual contingent write-off mechanism which is triggered (i) in case the required minimum solvency margin falls below 135% and (ii) in the case of an insurance trigger event that is linked to the occurrence of a 1 in 200 year Atlantic hurricane. The Notes are listed on the SIX Swiss Exchange.

### 7th Conference on Asset Management (7. Tagung zur Vermögensverwaltung)

Thursday, 21 November 2013, 13.15–18.00, SIX ConventionPoint, Zurich

[www.eiz.uzh.ch/weiterbildung/seminare/](http://www.eiz.uzh.ch/weiterbildung/seminare/)

---

### Capital Investment Law 2013 (Kapitalanlagerecht 2013)

Thursday, 21 November 2013, 10.00–17.30, Business Center Balsberg, Zurich-Kloten

<http://www.academy-execution.ch/index.php/konferenzen>

### 9th Conference on Capital Market Transactions (9. Tagung zu Kapitalmarkttransaktionen)

Thursday, 28 November 2013, 9.15–16.10, Kongresshaus Zurich, Zurich

[www.eiz.uzh.ch/weiterbildung/seminare/](http://www.eiz.uzh.ch/weiterbildung/seminare/)

---

### 5th Conference on Restructuring and Insolvency of Companies: the new Swiss Reorganization Law (5. Tagung zur Sanierung und Insolvenz von Unternehmen: Das neue Schweizer Sanierungsrecht)

Wednesday, 4 December 2013, 10.45–17.30, Lake Side Casino, Zurich

[www.eiz.uzh.ch/weiterbildung/seminare/](http://www.eiz.uzh.ch/weiterbildung/seminare/)

---

### Conference on Financial Market Regulation: Current legal problems (Tagung zur Finanzmarktregulierung: Aktuelle Rechtsprobleme)

Friday, 6 December 2013, 8.30–15.40, SIX ConventionPoint, Zurich

[www.es.unisg.ch/de/programme/](http://www.es.unisg.ch/de/programme/)