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Revised Rules on Anti-Bribery and Corruption Law – Increased Duties for Companies and Their Boards of Directors

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On 1 July 2016 revised rules on anti-bribery and corruption law entered into force. The revisions aim at improving the basis to combat corruption in the business sector (so-called private sector bribery). Notably, individuals and companies may be punished cumulatively. Under the new rules, companies and their boards of directors should take appropriate internal measures to prevent private sector bribery.

By Tino Gaberthüel

1) Overview

For years the fight against corruption has been in constant progress, in Switzerland as well as abroad. The current revisions of the anti-bribery and corruption law have been triggered in particular by corruption scandals in international sports organizations, such as FIFA. However, the scope of the new rules which entered into force on 1 July 2016 goes beyond the sports sector and covers all private business areas.

The key provisions of the revised anti-bribery and corruption rules can be summarized as follows:

– The Swiss Penal Code (**PC**) includes two new offenses regarding private sector bribery. First, any person who offers, promises or grants an undue advantage to an employee, agent, partner or other auxiliary person of a third party in the private sector in connection with such party's professional or commercial activity with the purpose to have such party carry out or abstain from carrying out an act contrary to duty or within the party's discretion will be liable to prosecution (so-called active private sector bribery; article 322^{octies} para. 1 PC). Second, any person (employee, agent, partner or other auxiliary person of a third party) in the private sector who solicits, accepts or takes an undue advantage (bribe) in connection with such person's professional or commercial activity will be liable to prosecution (so-called passive private sector bribery; article 322^{novies} para. 1 PC). Advantages that are contractually approved as well as minor advantages that are common social practice do not constitute private sector bribery and therefore will not be prosecuted (article 322^{decies} para. 1 PC).

– Until now private sector bribery was regulated by the Unfair Competition Act (**UCA**). A punishment under the UCA required that the bribery lead to a distortion of competition. As a consequence, under the UCA, the supplier of automotive components who – after the conclusion of a supply contract – paid a bribe to the customer's employee responsible for quality control in order that such employee ignored the deficient quality of the delivered components would not be liable to prosecution. Under the new rules on anti-bribery and corruption law, this link between private sector bribery and unfair competition has been removed. Under the revised rules, bribery of private individuals therefore constitutes a criminal offense regardless of whether it has any effect on competition. Under the new rules, the above-mentioned supplier of automotive components will therefore be liable to prosecution, regardless of whether the supplier is in competition with other suppliers.

– The new private sector bribery offense generally is a so-called public offence (*Offizialdelikt*), which means that it will be prosecuted *ex officio*. Only in "light" cases (*leichte Fälle*) prosecution will require a complaint by the injured party (articles 322$^{\text{octies}}$ para. 2 and 322$^{\text{novies}}$ para. 2 PC). The new rules do not contain a definition for "light" cases. In the parliamentary debate on the revised rules it was mentioned that a "light" case requires that the crime amount is only a few thousand Swiss francs, the safety and health of other persons is not affected, the crime is not conducted repeatedly or by a gang and the bribery is not linked to the forgery of documents. The size and financial state of a company should not be relevant to determine whether a "light" case exists or not. Until a judicial practice will have been developed, there remains some uncertainty regarding this element.

– Besides the individuals involved in the bribery who may be punished with imprisonment of up to three years or a fine, the business itself (irrespective of its legal form) may also incur criminal liability in case of active private sector bribery, provided that the business failed to take all reasonable and necessary organizational measures to prevent corruption (article 102 para. 2 PC). The risk of insufficient anti-corruption measures may be of particular relevance for businesses that do not entertain business relationships with public or publicly controlled enterprises and therefore have not been exposed so far to the risk of bribery of public officials (*Beamtenbestechung*).

– Prosecution requires that the bribery act took place in Switzerland (articles 3 and 8 PC), whereby it is sufficient that the bribery is performed only partially in Switzerland (*e.g.*, if the promise, offer or acceptance of an undue advantage (bribe) is made in Switzerland). The required link to Switzerland may already be established if the bribing person is staying in Switzerland at the time when such person instructs a money transfer. Further, depending on the specific circumstances, the use of a Swiss bank account may already be sufficient for a punishable offense in Switzerland.

2) Increased risk of prosecution

Under the previous rules of the UCA hardly any procedures relating to private sector bribery were undertaken. The main reason for this may have been that under the UCA a complaint by the injured party was required to start a procedure. Such complaint was rarely made, not least because the affected companies preferred an internal solution.

Because of the revised rules on private sector bribery (now prosecuted *ex officio*) there is an increased risk that the public prosecutor will initiate a procedure. Pursuant to the dispatch of the Federal Council (*Botschaft*) on the revised anti-bribery and corruption law, the Federal Council expects prosecution relating to private sector bribery to increase.

3) What does this mean for organizations doing business in Switzerland?

Under the new rules, in addition to the individuals offering (or receiving) bribes, the business organization itself might be held directly liable to prosecution if the business failed to take all organizational measures that are required and reasonable to prevent bribery (or if the responsible person within the business cannot be identified; article 102 para. 1 and 2 PC). Consequently, business organizations themselves are exposed to a prosecution risk that is not insignificant. However, unlike the UK Bribery Act, which puts the burden of proof on the business organization to demonstrate adequate policies and procedures, Swiss law requires the prosecutor to prove the organizational deficiency.

In case of a conviction, a business may be subject to a fine of up to CHF 5 million (article 102 para. 1 PC). In addition, profits stemming from a business deal concluded through bribes may be seized (article 70 para. 1 PC). In any event, a criminal investigation on private sector bribery may entail serious reputational damage for the affected business as well as an internal loss of confidence.

4) What should Swiss companies and their boards do?

The requirements for the measures to be taken by business organizations to prevent corruption are high. The public prosecutors set far-reaching requirements for compliance programs of internationally operating business organizations. The mere existence of a control system is not sufficient; it is crucial that such system is effectively implemented in the day-to-day operations and monitored.

Within a company, the board of directors (or equivalent for other legal forms) is responsible for the overall management of the company (article 716a of the Code of Obligations). This task may not be delegated. According to Swiss corporate law, the board of directors must take the necessary measures to ensure that the applicable laws and internal regulations and guidelines are complied with by the entire corporate organization.

Specifically this means:

- The board of directors should conduct a risk analysis which includes, among others, the business model, the business processes and the distribution channels, the business partners as well as the geographic field of activity of the corporate group.
- Based on the risk analysis, the internal corporate structures of the group should be defined and the necessary guidelines and compliance manual or code of conduct should be implemented, covering not only employees, but also agents, representatives and suppliers of the company.
- Further, it should be ensured that the employees are made aware of the risks, are adequately informed about the guidelines and manuals and are trained accordingly (so-called staff trainings).
- Finally, monitoring systems and control mechanisms should be implemented that are appropriate for the company's risk profile (this may include the set-up of a reporting office for whistleblowers).
- If in spite of compliance and monitoring systems a breach occurs, the board of directors will have to ensure that the cause and dimension of such breach are discovered promptly (to do so may require a so-called internal investigation) and that the necessary measures are taken (including any disciplinary sanctions, revisions to policies and procedures etc.). Regulated entities (such as banks, financial intermediaries, insurers or pharmaceuticals) may have to inform, and involve, the competent regulator.

Besides large multinationals spanning the globe, also small and mid-sized companies (SMEs) have a need for action, whether they operate internationally or not. For internationally operating companies having foreign subsidiaries or distributors and business partners, the challenge is that they need to comply not just with Swiss law, but also with foreign regulations (such as the UK Bribery Act and the US Foreign Corrupt Practices Act).

5) Ongoing review and adaptation; ISO certification

The set-up and implementation of a compliance system which is appropriate for an internationally operating company is a complex and demanding process that needs to be continuously monitored, improved and adapted to the changing landscape. When expanding its business activities, a company will have to assess whether the measures already implemented need to be amended.

Certification of anti-bribery compliance programs will soon be possible under the proposed draft ISO 37001 anti-bribery management systems standard, to be published later in 2016. The ISO standard requires that anti-bribery measures be implemented in a reasonable and proportionate manner taking into account the size, structure, location and sector of activity in which a company operates. Certifiers will assess, among others, whether the organization has adopted a written anti-bribery policy, demonstrates leadership from the top, engages adequate, qualified anti-bribery compliance staff, introduced training programs, conducts bribery risk assessments and due diligence on projects and business associates, adopted financial and business controls, and put in place procedures for reporting and investigation.

While ISO certification is not a guarantee against bribery, it provides evidence that an organization has taken measures to prevent it. As such, certification can be a strong defense against allegations of bribery and better protect the business from the risk of corporate criminal liability.

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Swiss Federal Council Adopts Amendments to the Swiss TBTF Framework

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On 11 May 2016, the Swiss Federal Council adopted an amendment to the Capital Adequacy Ordinance which sets out the new capital requirements for systemically important banks and introduces a new gone concern requirement for globally systemically important banks in line with G20 standards as promulgated by the Financial Stability Board. It further defines the required features for capital instruments qualifying for the gone concern requirement (so-called "Bail-in Bonds") and sets out grandfathering provisions for outstanding instruments. The revised Capital Adequacy Ordinance came into effect on 1 July 2016, subject to phase-in and grandfathering provisions as described hereinafter.

By Daniel Hulmann / Stefan Kramer / Benjamin Leisinger

1) The Revised Capital Adequacy Ordinance

Article 52 of the Swiss Banking Act (**Banking Act**) requires the Swiss Federal Council to periodically evaluate the recently enacted too-big-to-fail (**TBTF**) provisions of the Banking Act in respect of their comparability and degree of implementation when compared to corresponding international standards, report thereon to the Swiss Parliament and propose legal changes if appropriate.

The Federal Council delivered its first evaluation report in February 2015. Subsequently, a working group under the leadership of the Federal Department of Finance with representatives of the Swiss Financial Market Supervisory Authority FINMA (**FINMA**) and the Swiss National Bank (**SNB**), in consultation with the concerned banks, drew up proposals for the necessary legal amendments. The Federal Council published a draft revised Capital Adequacy Ordinance (**CAO**) in December 2015 and, after a consultation period, approved the revised CAO on 11 May 2016. The ***date of entry into force was 1 July 2016***.

The revised CAO recalibrates the existing TBTF framework by amending the capital requirements for systemically important banks (**SIBs**) and introducing a new gone concern requirement for global SIBs (**G-SIBs**) which may be fulfilled with so-called "Bail-in Bonds", a newly introduced type of instruments that must meet specific criteria as further set out below.

a) Enhanced Going Concern Requirements for SIBs

SIBs are subject to a going concern capital requirement which seeks to ensure that SIBs have sufficient capital to ensure continuity of service even in a stress scenario without requiring state support or having to be restructured or wound up by FINMA. The ***going concern capital requirement*** is set with respect to both the bank's leverage ratio (**LR**) and its risk-weighted assets (**RWA**) (article 128(2) CAO).

The basic *going concern capital requirement* of a SIB consists of (i) a base requirement of 4.5% LR and 12.86% RWA (article 129(2) CAO) and (ii) a surcharge (annex 9 of the CAO, which replaces the progressive component set out in article 130 CAO until 30 June 2016). The size of the surcharge is set with respect to the degree of systemic importance (*i.e.*, the total exposure and the market share) of the relevant SIB (article 129(3) CAO). This currently translates into a going concern capital requirement for the two Swiss G-SIBs (Credit Suisse and UBS) of 5% LR and 14.3% RWA. The going concern requirement is further split into a ***minimum requirement component*** of 3% LR and 8% RWA which the SIB has to maintain at all times, and a ***buffer component*** which a SIB, *e.g.*, in case of losses and under strict conditions, may temporarily fall short of. The going concern capital requirement may be fulfilled with Common Equity Tier 1 (**CET1**) capital and, to a certain extent (1.5% for the LR minimum requirement, 3.5% for the RWA minimum requirement, 0.8% for the RWA buffer requirement, but none for the LR buffer requirement), with Additional Tier 1 (**AT1**) capital with a high (7%) write-down / conversion trigger (article 131 CAO).

Additionally, as is the case for all Swiss banks, SIBs may be obliged to maintain a countercyclical buffer and a supplementary countercyclical buffer (which together form the countercyclical buffer as promulgated by the Basel III framework in §§ 136 et seq.), calculated on a RWA basis. Finally, FINMA may, in extraordinary circumstances and, on a case-by-case basis, oblige a SIB to hold additional capital or demand that the going concern capital requirement is fulfilled with higher quality capital.

b) Additional Gone Concern Requirements for G-SIBs

In accordance with international standards adopted by the Financial Stability Board (**FSB**), G-SIBs are subject to a ***new additional gone concern requirement*** which aims to ensure either an orderly restructuring of the G-SIB or the continuation of systemically important functions in a surviving entity without requiring state support. G-SIBs for purposes of the CAO are defined as banks which the FSB designates as Global Systemically Important Banks, in Switzerland currently Credit Suisse and UBS. FINMA may, however, continue to designate a bank as G-SIB even after the FSB has withdrawn such qualification if so required due to a strong engagement of such bank outside of Switzerland but it cannot designate a bank as a G-SIB without the FSB having designated the relevant bank as such before.

The gone concern requirement of a G-SIB quantitatively ***corresponds to its total going concern capital requirement*** (article 132(2) CAO), *i.e.*, minimum 4.5% LR and minimum 12.86% RWA plus any surcharges applicable to the relevant G-SIB (but does not include any countercyclical buffers), which currently translates into a gone-concern requirement for Credit Suisse and UBS of 5% LR and 14.3% RWA. FINMA, after consultation with the SNB, may grant rebates in relation to this requirement based on the effectiveness of measures taken to improve the global resolvability of the relevant G-SIB group (article 133 CAO) and in consideration of the interdependencies with other rebates. However, the gone concern requirement must not fall below (i) 3% LR or 8.6% RWA (article 133(2) CAO) or (ii) if higher, applicable international standards, and any rebate must not jeopardize the implementation of the G-SIB's emergency plan (article 133(3) CAO)).

c) Qualitative Requirements for Bail-in Bonds

The gone concern requirement should primarily be fulfilled with so-called Bail-in Bonds that are designed to, in a restructuring of a G-SIB, absorb losses after regulatory capital of the G-SIB but before other (senior) obligations of the G-SIB. This ranking in restructuring proceedings intends to protect the creditors of operating liabilities and to allow the operating bank to continue its business without interruption. Bail-in Bonds do not constitute regulatory capital instruments and should not be mashed up or confused with them. In particular, Bail-in Bonds do not feature capital triggers that may lead to a write-down and/or a conversion into equity outside restructuring, but only start to bear losses once the G-SIB is formally in restructuring and FINMA orders capital measures (*i.e.*, a write-down or a conversion into equity) in the restructuring plan. Bail-in Bonds may also be structurally subordinated, *e.g.*, in the case of an issuance via the top-tier holding company or a special purpose vehicle and when applying a single-point-of-entry resolution strategy.

According to the revised CAO, Bail-in Bonds have to fulfill ***a number of criteria*** in order to qualify for the gone concern requirement. In particular, they:

- have to be fully paid in;
- have to be issued by a Swiss entity or, with the approval of FINMA and until 31 December 2021, by a (Swiss or foreign) special purpose vehicle (**SPV**);
- have to be subject to Swiss law and jurisdiction of Swiss courts; FINMA may, however, grant an exemption if it is established – *e.g.*, by means of a legal opinion of a reputable law firm – that a write-down and/or conversion mandated by FINMA pursuant to its resolution powers is recognized in the relevant jurisdictions;
- have to be issued by the top holding company of the relevant G-SIB group or, with approval of FINMA and until 31 December 2021, by a Swiss or foreign SPV if it is ensured that the bonds issued by such SPV may be used to bear losses in a restructuring of the G-SIB;
- have to be (i) legally or contractually subordinated to other obligations of the issuer or (ii), in line with a single-point-of-entry resolution strategy where the Bail-in Bonds are issued by the ultimate parent company (or an SPV owned by it), structurally subordinated to obligations of other group companies;
- must not provide for an early redemption option of the creditors (*i.e.*, must not contain an exercisable put, which is also prohibited by the FSB TLAC term sheet, but, taking the requirements for tier 2 instruments into account, standard event of default provisions and related acceleration rights, *e.g.*, in the case of non-payment of interest or in the case of bankruptcy, can be included);
- must not be subject to set-off or be collateralized or guaranteed in a manner that would restrict their loss absorbing capacity in case of restructuring proceedings;
- have to provide, in their terms and conditions, for an unconditional and irrevocable provision pursuant to which the creditors acknowledge to be bound by a potential write-down / conversion ordered by the regulator in restructuring proceedings (so-called ***bail-in acknowledgement***);
- must not contain derivative transactions or be linked to derivative transactions, except for hedging transactions;
- must not be financed, directly or indirectly, by the issuer or any of its group companies;
- have to be issued with the approval of FINMA which may also approve loans that have the same features as Bail-in Bonds; and

– may not be redeemed before their maturity date without FINMA's approval if the redemption would cause the G-SIB to fall below the gone concern requirement, and otherwise only after giving notice to FINMA.

Bail-in Bonds qualify for the gone concern requirement (i) at their principal amount if the remaining time to maturity is at least two years, and (ii), imposing stricter rules than the FSB, at 50% of their principal amount if the remaining time to maturity is between one and two years. Bail-in Bonds cease to qualify one year prior to maturity (article 127a(1) CAO). Furthermore, in line with Section 9 of the FSB TLAC term sheet, the maturity dates of Bail-in Bonds have to be staggered in a manner which enables the G-SIB to hold sufficient Bail-in Bonds even if it should temporarily be restricted in its capacity to issue Bail-in Bonds (127a(2) CAO).

In addition to Bail-in Bonds, the gone concern requirement may further be fulfilled with Additional Tier 1 or Tier 2 capital instruments with a low (5.125%) trigger for up to 2% LR and 5.8% RWA. The gone concern requirement is reduced by the factor 0.5 to the extent that such instruments are used. This means that the gone concern requirement may be reduced by up to 1% (*i.e.*, 4% instead of 5% requirement) for LR and up to 2.86% (*i.e.*, 11.4% instead of 14.3% requirement) for RWA purposes. The reason for this treatment is the fact that such instruments are of better quality than Bail-in Bonds.

Furthermore, if the G-SIB has CET1 capital instruments and/or high-trigger Additional Tier 1 capital instruments (either newly issued or grandfathered) in excess of its going concern requirements (with respect to both LR and RWA) outstanding, such capital instruments can be used to meet the gone concern requirement (article 132(5) CAO). Similarly, pursuant to the explanatory report issued by the Federal Administration in relation to the revised CAO, Tier 2 capital without a trigger (*i.e.*, "old style" pre-Basel III instruments) may also be used to satisfy the gone concern requirement. Even though they do not meet the requirements for Bail-in Bonds as set forth in article 126a CAO, they are held to be of better quality with respect to loss absorbency compared with Bail-in Bonds and deserve such treatment. Finally, Tier 2 capital which has a remaining time to maturity between five and one years may, in accordance with international standards, qualify in the same manner as Bail-in Bonds to the extent that it no longer qualifies as regulatory capital.

2) Transitory Provisions

The CAO provides for a number of grandfathering provisions for the going concern requirements with regard to the qualification of previously issued Tier 2 capital instruments and Additional Tier 1 capital instruments:

– Tier 2 capital with a high (*i.e.*, 7%) trigger qualifies as high-trigger Additional Tier 1 capital until the earlier of (i) its maturity date or the first call date and (ii) 31 December 2019; Tier 2 capital that no longer qualifies pursuant to this provision qualifies for the gone concern requirement until one year before maturity;

- Additional Tier 1 capital with a 5.125% trigger qualifies as high-trigger Additional Tier 1 Capital until the first call date; Additional Tier 1 capital that no longer qualifies pursuant to this provision qualifies for the gone concern requirement until the call is exercised;

- Tier 2 capital with a 5% trigger qualifies as high-trigger Additional Tier 1 capital until the earlier of (i) its maturity date or the first call date and (ii) 31 December 2019; Tier 2 capital that no longer qualifies pursuant to this provision qualifies for the gone concern requirement until one year before maturity; and

- Additional Tier 1 capital with a 5% trigger qualifies as high-trigger Additional Tier 1 capital until the first call date; Additional Tier 1 capital that no longer qualifies pursuant to this provision qualifies for the gone concern requirement (until one year before maturity, according to the CAO, but which should not apply in the case of perpetual instruments such as Additional Tier 1 instruments).

Furthermore, FINMA approves eligible Bail-in Bonds issued before 1 July 2016, including that FINMA may approve Bail-in Bonds issued or to be issued by a foreign (or Swiss) SPV before 1 July 2016.

Both the going concern requirement and the gone concern requirement are subject to a phase-in with gradually increasing requirements and have to be fully applied by 1 January 2020.

3) Assessment and Outlook

With the new provisions, Switzerland will be one of the countries with the highest capital requirements in the world for G-SIBs and will meet – and even go beyond – the capital standard and TLAC requirements for such banks as approved by the G20 countries.

The next evaluation report by the Federal Council is due by the end of February 2017. According to the Federal Administration, it is expected to also address the question if and to what extent SIBs that do not qualify as G-SIBs (currently, Zürcher Kantonalbank, Raiffeisen and PostFinance) shall become subject to a gone concern requirement as well.

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The EU Market Abuse Regulation

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July 2016 will see the entry into force in member states across the EU of Regulation (EU) No 596/2014, the so-called Market Abuse Regulation or **MAR** to replace the outgoing Market Abuse Directive. As set out in its recital (5), MAR removes a number of *"divergences between national laws"*. The EU legislator found it necessary to *"adopt a Regulation establishing a more uniform interpretation of the Union market abuse framework, which more clearly defines rules applicable in all Member States."*

By Thomas Werlen / Matthias Wühler

1) The regulation of financial markets in the EU

An awareness of the peculiar nature of the EU's multilevel system of governance is essential for a full grasp how EU law has evolved to regulate any given sector of the economy, and capital markets are no exception.

The balancing of power along the vertical plane between the European Union and its Member States is less of a concern in those areas of law that, like financial market regulation, are of manifest and paramount relevance to the functioning of the internal market. Still, the vertical delineation of competence retains significance in the area of capital market regulation, both in terms of enforcement and in terms of legislation. It explains why the criminal sanctions triggered by market abuse are not set out in MAR but in an accompanying directive.

In addition to the vertical dimension, there is a "horizontal" dimension. In the capital markets context, this is primarily to say that law-making powers within the EU are spread across the legislative and executive bodies in a complex chain of delegation(s). To set out the full spectrum of statutory provisions, delegated rules, guidance and other forms of soft law that inform the activity of issuers and other market participants is beyond the scope of this brief contribution. We shall limit ourselves to MAR as the new cornerstone of the *"Union market abuse framework"* and will only explore some of its more prominent features.

2) Topics covered

In illustrating some of the key features of MAR, we shall discuss in turn: MAR's scope of application, the notion of inside information, ongoing disclosure obligations (ad-hoc publicity), insider dealing, directors' dealings / managers' dealings and the prohibition of market manipulation. We will not discuss the new sanctions regime. Suffice it to note here that MAR will come into force jointly with Directive 2014/57/EU on criminal sanctions for market abuse (**"CSMAD"**) which for the first time provides for minimum harmonisation of criminal liability for market abuse and that MAD provides for much more severe regulatory sanctions with substantial fines and mandatory naming and shaming by the regulator in case of violations.

3) Scope of application

MAR will extend the full spectrum of market abuse regulation (*i.e.* the rules on market manipulation and insider law) to issuers of securities traded on a multilateral trading facility ("**MTF**"), admitted to trading on an MTF or for which a request for admission to trading on an MTF has been made, article 2 (1) (b), and to issuers of financial instruments traded on an organised trading facility ("**OTF**"), article 2 (1) (c).

MAR thereby mirrors the three types of trading venues foreseen in the Markets in Financial Instruments Directive ("**MiFID**"), namely the regulated market ("**RM**") and the aforementioned MTF and OTF and extends the import of market abuse regulation to cover all three. This is a substantial change for issuers of securities traded on the open market segments as well as their directors, not least in light of MAR's stricter rules on directors' dealings and the tougher sanctions regime (it also raises delicate issues of extraterritoriality).

4) The notion of inside information

Article 7 defines the notion of inside information. Already that base definition is notably more convoluted than its Swiss counterpart in article 2 (j.) Financial Market Infrastructure Act ("**FMIA**" or "**FinfraG**"). Whereas FinfraG defines inside information as

> *confidential information the disclosure of which would significantly affect the prices of securities admitted to trading on a Swiss trading venue,*

article 7 (1) a) MAR explicates that for the purposes of MAR, inside information shall comprise

> *information of a precise nature, which has not been made public, relating, directly or indirectly, to one or more issuers or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments.*

As evidenced in the reasoning of the CJEU's decision in *Lafonta v AMF*, what really matters is conceptual clarity. Whether one then opts for a comprehensive definition or more abstract terminology is of secondary importance.

The ECJ's reasoning in *Geltl v Daimler* is reflected in article 7 (2) 2 and (3) MAR which expand the base definition of inside information in respect of a so-called protracted process and intermediate steps in a protracted process.

> *2. (…) In this respect in the case of a protracted process that is intended to bring about, or that results in, particular circumstances or a particular event, those future circumstances or that future event, and also the intermediate steps of that process which are connected with bringing about or resulting in those future circumstances or that future event, may be deemed to be precise information.*
>
> *3. Any intermediate step in a protracted process shall be deemed to be inside information if, by itself, it satisfies the criteria of inside information as referred to in this article.*

MAR follows a one step approach where the notion of inside information underlying disclosure obligations is identical to the definition of inside information delineating the rules on insider dealing. An alternative would have been a functional definition of inside information depending on the context (disclosure obligations incumbent on the issuer on the one had, the rules on insider trading on the other, with the latter resting on a broader definition of inside information), see the Commission's Proposal (COM(2011) 651 final, recital 14).

5) Public disclosure of inside information

A notable change in MAR versus MAD is found in article 17 (4), which provides that

> *Where an issuer (…) has delayed the disclosure of inside information (…), it shall inform the competent authority (…) that disclosure of the information was delayed and shall provide a written explanation (…).*

Delayed disclosure of inside information is of great practical relevance. Prior to MAR, there were discrepancies in the secondary market regulation of EU member states on whether issuers that (temporarily) exempted themselves from their disclosure obligation(s) had to report to the supervisory authority (cf. CESR/09-1120, p. 40 et seq.). MAR removes the legislative discretion that was previously available under MAD.

Under article 17 (4) MAR, the issuer is permitted to delay disclosure without the need for the supervisory authority to consent (whether the governing bodies of the issuer must take an express decision to delay disclosure remains unanswered by the text of the regulation). Article 17 (5) is a novel and somewhat different exception from the obligation to disclose, without undue delay, material non-public information that relates to the issuer. Under this provision, financial intermediaries may, subject to the supervisor's consent, withhold inside information the disclosure of which would endanger the stability of the financial system.

6) Insider dealing, unlawful disclosure of inside information, market soundings

Article 8, 14 (a) MAR set out the prohibition against insider dealing. Article 8 (1) 2 MAR is a change over MAD in that it expressly prohibits the cancellation of an order placed in good faith:

> *The use of inside information by cancelling or amending an order concerning a financial instrument to which the information relates where the order was placed before the person concerned possessed the inside information, shall also be considered to be insider dealing.*

Recital 25 provides additional context:

> *Orders placed before a person possesses inside information should not be deemed to be insider dealing. However, where a person comes into possession of inside information, there should be a presumption that any subsequent change relating that information to orders placed before possession of such information, including the cancellation or amendment of an order, or an attempt to cancel or amend an order, constitutes insider dealing. (…).*

This novel provision can be relevant especially in the context of a stakebuilding process where the acquirer learns of material non-public information at the target company.

Also new is the explicit list of activities constituting legitimate behaviour set out in article 9 MAR. This provision comes against the background of the ECJ's decision in *Spector Photo Group*. The ECJ established a presumption to the effect that a primary insider trading in the financial instruments to which the inside information relates did so illegally. However, the ECJ also noted that certain sets of facts should be exempted from such a presumption, and article 9 MAR elevates these judicial considerations to the level of statutory exceptions. Article 9 (6) clarifies that article 9, although setting out exceptions from the presumption of insider dealing, is not to be misunderstood as a complete carveout or rather a safe harbour.

Article 10, 14 (c) MAR stipulate the prohibition against unlawful disclosure of inside information. MAD was silent on the disclosure of inside information occurring in the context of market soundings, and MAR now features an explicit and detailed provision in its article 11. Where its conditions are met, article 11, unlike article 9, provides a safe harbour and shields market soundings from liability under MAR. The underlying considerations are summarized in recitals 32 and 34:

> *Market soundings (…) are a highly valuable tool to gauge the interest of potential investors, enhance shareholder dialogue, ensure that deals run smoothly, and that the views of issuers, existing shareholders and potential new investors are aligned.*

> *They may be particularly beneficial when markets lack confidence or a relevant benchmark, or are volatile. Thus the ability to conduct market soundings is important for the proper functioning of financial markets and market soundings should not in themselves be regarded as market abuse.*
>
> *Conducting market soundings may require disclosure to potential investors of inside information. (…) Before engaging in a market sounding, the disclosing market participant should assess whether that market sounding will involve the disclosure of inside information.*

Issuers and persons acting on their behalf in the context of a market sounding are referred to as *disclosing market participants*. Article 11 (3) requires that any disclosing market participant,

> *prior to conducting a market sounding, specifically consider whether the market sounding will involve the disclosure of inside information. The disclosing market participant shall make a written record of its conclusion and the reasons therefore.*

Thus, even where a piece of information is ultimately deemed not to constitute inside information, the reasoning leading to this conclusion must still be kept in the written record. Detailed obligations vis-à-vis the receiving party and relating to the disclosure of information as well as accompanying record-keeping obligations are set out in article 11 (5).

7) Directors' dealings / managers' dealings

The rules on managers' transactions (article 19) are substantially tougher than under MAD. The rules apply to persons discharging managerial responsibilities ("**PDMR**") and persons closely associated with them. The rules on managers' transactions now cover shares as well as debt instruments (article 19 (1) (a)). Notably, transactions that must be notified now also include the pledging or lending of such instruments (article 19 (7) (a)) as well as transactions undertaken by asset managers (article 19 (7) (b)), including where discretion is exercised by said asset manager, and transactions made under a life insurance policy (article 19 (7) (c)).

In article 19 (11), MAR now provides for closed periods, *i.e.* a complete ban of any relevant transaction during a period of 30 calendar days before the announcement of an interim financial report or a year-end report. Exceptions may be granted, but only under restrictive conditions. The practical consequence is that for issuers with high frequency period disclosure obligations, an even stricter regime on managers' dealings will apply for extended periods of the year.

8) Prohibition of market manipulation

MAR extends the prohibition against market manipulation to capture attempted manipulation. Another revision is the inclusion of benchmark manipulation, with recital 44 making clear that this revision was inspired by recent events:

> *Many financial instruments are priced by reference to benchmarks. The actual or attempted manipulation of benchmarks, including interbank offer rates, can have a serious impact on market confidence and may result in significant losses to investors or distort the real economy. Therefore, specific provisions in relation to benchmarks are required in order to preserve the integrity of the markets and ensure that competent authorities can enforce a clear prohibition of the manipulation of benchmarks. Those provisions should cover all published benchmarks including those accessible through the internet whether free of charge or not such as CDS benchmarks and indices of indices.*

MAR is silent (as was MAD) on one of the most interesting doctrinal questions, namely whether market participants can seek redress in civil litigation for losses resulting from market manipulation, *i.e.* the question of private enforcement. Most arguments in favour of private enforcement *de lege lata* will come under the rubric of the so-called *effet utile*, a rule of interpretation often invoked to broaden the import of European Union law.

9) Private enforcement of secondary market regulation

Taking a broader view, the real question is whether MAR should have explicitly provided for private enforcement. In this respect, the legal thinking in most if not all EU member states is likely to continue to deviate from the approach in more plaintiff-friendly jurisdictions for the foreseeable future, with private enforcement in a secondary market context constituting a narrow exception rather than the norm.

The efficient litigation of mass torts (and by extension, the incentive effect on issuers emanating from private enforcement) depends as much on the rules governing civil proceedings as it presupposes strong causes of action in the substantive rules. Thus, even where the law provides for private causes of action, the civil procedure codes of EU member states are not always adequate to ensure the efficient litigation of mass claims. In the wake of the Supreme Court's decision in *Morrison v. National Australia Bank*, some of the smaller EU member states have tried to capitalize on the declining attractiveness of the Unites States as a forum for claims against non-US issuers. In practice, however, their novel tools are best put to work in a consensual context; they do not substantially enhance the resolution of mass securities claims in a truly litigious context.

10) Conclusion

MAR is an important step forward in the harmonization of capital market law in the EU. MAR provides important updates to account for changed market practices since the enactment of MAD (such as the proliferation of new trading venues and the spread of new technologies). MAR also contains new rules (such as the duty to notify the supervisor about a decision to delay the disclosure of inside information, the compliance requirements to benefit from the market sounding safe harbour and closed periods for managers' transactions) to which issuers will need to adapt. In sum, it is fair to say that MAR will likely enhance the Union market abuse framework and have a positive impact on market integrity.

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Emissions- und Finanz AG (EFIAG) issuance Platform and Inaugural Bond Issued

Reference: CapLaw-2016-27

Emissions- und Finanz AG (EFIAG) is an issuance platform which is owned by 14 Swiss banks and the purpose of which is exclusively to issue bonds and grant loans to the participating banks from the proceeds of the bonds. This enables small and mid-sized banks to finance themselves indirectly in the capital market by means of this platform.

On 6 May 2016, EFIAG issued its first bond, lead managed by Bank Vontobel AG and Regiobank Solothurn AG. It is a fixed rate bond in an amount of CHF 100 million, paying an annual interest of 0.375%. and with a duration of 5 years.

With its successful inaugural bond issuance, the platform has introduced itself in the market and provides the participating banks with an innovative way to finance themselves in the capital market efficiently and in a tailor-made way to meet their respective financing requirements.

EFG International AG conducts CHF 295 million rights offering in connection with the proposed acquisition of BSI SA

Reference: CapLaw-2016-28

On 11 May 2016, EFG International AG, a global private banking group offering private banking and asset management services headquartered in Zurich, announced the results of its rights offering further to the ordinary share capital increase approved by the Annual General Meeting on 29 April 2016.

46,465,975 new shares were subscribed for by existing shareholders in the rights offering, and 1,700,000 new shares were purchased by investors in the international offering, resulting in a total amount of 48,165,975 new shares. Based on the offer price of CHF 6.12 per new share, EFG International raised gross proceeds of approximately CHF 295 million. The listing of the new registered shares became effective on 13 May 2016.

This transaction was part of the overall financing of the acquisition of BSI SA. Post-closing of the acquisition of BSI SA, EFG Bank European Financial Group SA (EFG Group) and BTG Pactual are expected to own a stake in EFG International of 44.4% and 30.0%, respectively.

Swiss Capital Group Launches the Swiss Capital Investment Foundation I

Reference: CapLaw-2016-29

On 11 May 2016, the Swiss Capital Group successfully launched the Swiss Capital Investment Foundation I. In this context, two innovative investment groups in the asset class Private Debt (Private Debt Allocator I and II) were launched. The setting-up of the investment foundation comprised a regulatory product approval proceeding before the Occupational Pension Supervisory Commission (OPSC).

Bellevue Group conducts CHF 33 million rights offering in connection with the acquisition of German-based asset manager StarCapital

Reference: CapLaw-2016-30

On 25 April 2016, Bellevue Group, an independent Swiss financial boutique listed on the SIX Swiss Exchange (ticker symbol: BBN) and headquartered in Küsnacht, Switzerland, announced the result of its rights offering with Bank am Bellevue as lead manager to finance the acquisition of German-based asset manager StarCapital and to maintain its strategic flexibility. Based on an offer price of CHF 11.00 per share, Bellevue Group raised gross proceeds of approximately CHF 33 million. The listing of the new shares became effective on 26 April 2016. The acquisition of StarCapital was closed on 6 June 2016.