CAPLAW
SWISS CAPITAL MARKETS LAW

No. 3/2023

Securities

Regulatory

News | Deals & Cases

Blackout Periods & Trading Plans – An Examination of an Underutilized Tool to Prevent Insider Trading

Reference: CapLaw-2023-23

Blackout periods are an important, though lightly regulated, component of the insider trading compliance programs of Swiss listed companies. We analyze a number of trends that are inherent to the design of blackout periods in Switzerland. We also examine the use of trading plans, known as "Rule 10b5-1 plans" in the United States, which may also form part of a well-designed insider trading compliance program but which appear to be less popular in Switzerland.

By Sandro Fehlmann / Deirdre Ní Annracháin

1) Blackout Periods

a) Overview and Legal Basis

While not mandated under Swiss securities or corporate law[1], blackout periods are an important component of insider trading compliance programs for (Swiss) listed companies. Blackout periods are an integral part of companies' efforts to create an environment in which employees are discouraged from insider trading. However, the specific design of the blackout periods is nuanced, particularly in considering who should be subject to them, which transactions should be restricted and how long the blackout periods should last.

In 2021 (and applicable for the first time for the 2021 business year), SIX Swiss Exchange introduced a requirement that information on general blackout periods must be provided in the corporate governance report of SIX listed companies. These rules require the disclosure of deadlines, addressees, scope and any exceptions to the general blackout periods, among other things (cf. item 10, Annex of the SIX Directive on Corporate Governance (DCG)). Special blackout periods, e.g. due to the postponement of ad hoc disclosure, or quiet periods during which corporate executives generally do not engage with market participants and analysts, do not need to be published.

As with all information in the corporate governance report, the information is retrospective and covers the period prior to the relevant balance sheet date, and issuers are not required to publish planned blackout periods.

[1] Swiss law only provides for a blackout period under the safe harbor for buybacks of shares or other equity or equity-linked securities (art. 124 FinMIO). Such blackout periods apply and the issuers cannot announce a buyback program, purchase under the program or issue put options under the program, either: (i) while price-sensitive information is available to the offeror but not yet disclosed under the relevant listing rules; (ii) during ten trading days before publication of the offeror's financial results; or (iii) if the offeror's latest consolidated financial statements date back more than nine months. However, exemptions apply e.g. if a buyback program is executed through a third party bank or broker dealer.

b) Trends among Swiss Companies (and Internationally)

A brief analysis of the general blackout periods disclosed by major SIX listed companies in their corporate governance reports for 2021 and 2022 reveals certain interesting facts and trends:

Trend #1: As with other corporate governance disclosures, the "comply or explain principle" applies. Therefore, companies may decide not to release information on their blackout periods but do need to explain this decision (art. 7 DCG). However, within the analyzed group, all companies released information on their blackout periods. In our view, this observation is not surprising as – from a practical point of view – it would be challenging to offer a credible explanation as to why a company would not disclose its general blackout periods.

Trend #2: Board members and senior executives are subject to blackout periods at virtually all SIX listed companies. According to the disclosed information, most SIX listed companies use quarterly blackout periods which are in most cases applicable to the following groups of individuals: (i) board members, (ii) senior executives and (iii) employees who have access to financial or material non-public information (such as members of the finance department who have access to consolidated accounts of the group or assistants and secretaries to board members and senior executives).

Trend #3: Only a limited number companies subject their lower-ranking employees to blackout periods. In general, lower-ranking employees at smaller listed companies are more likely to be subject to blackout periods compared to their peers at larger companies. However, there is one prominent exception to this rule: Swiss Re, one of the largest SIX listed companies, applies its blackout periods not only to board and senior executive members, but to all Swiss Re employees.

Trend #4: The beginning of blackout periods varies significantly among the analyzed companies, starting from 15 days prior to the last trading day of each quarter (or even one month prior to the end of any half-year or full-year reporting period) to two weeks before the release of relevant (quarterly) results with the majority starting their blackout periods on the first day after any (calendar) quarter (i.e. 1 January, 1 April, 1 July and 1 October). In light of the above, the duration of blackout periods may amount to more than 60 days (with average between roughly 45-55 days for the annual results and roughly 30-40 days for quarterly and half-year results). However, some are less explicit, and refer to the time when half-year or full-year profit figures become internally available. In our view, this more flexible approach is less preferable as it might be difficult to exactly define the date when such data become internally available, and it includes an element of discretion with no safety margin (which otherwise exists if the window closes before or by the end of a (calendar) quarter).

Trend #5: The end of the blackout period is more aligned among the analyzed group: all companies allow trading to recommence between the day of publication and two days after publication, with the majority allowing trading as of the first full trading day after publication. In our view, a "cooling-off period" of one full trading day is sensible: it avoids exposure to insider trading allegations which otherwise might exist if a director or employee trades minutes after market opening on the publication date (i.e. before the market could digest the information), but nevertheless provides enough flexibility for the issuer to e.g. carry out a capital market transaction after market close on the publication date (e.g. through an accelerated book-building transaction).

2) Trading Plans

a) Overview and Pros & Cons

Under U.S. securities laws, so-called "10b5-1" trading plans provide an affirmative defense for directors and employees to trading in securities of the company on the basis of material non-public information. Such trading plans may be structured as a contract, instruction or written plan for purchases, sales and other transactions in relevant securities. Transactions are executed by either (i) a broker carrying out transactions in accordance with the contract, instruction or written plan, or (ii) an independent person (*e.g.* a broker, trustee or asset manager), who, in accordance with the contract, instruction or written plan, is vested with all discretion as to how, when or whether to effect transactions and who does not possess any material non-public information relating to the company at the time of effecting the transaction. The trading plan can, however, be designed in a variety of ways. It can be as simple as an instruction to a broker to buy a specific number of shares on a specific date at the then-prevailing market price or, if more complex, it may instruct a broker to sell a certain percentage of the executive's then-current holdings of the share, at a price that does not fall below a certain price floor.

While such plans seem less popular among companies listed in Switzerland[2], in our view there are compelling reasons why they might become an additional component of well-designed insider trading compliance programs of Swiss companies to further discourage insider trading among directors and employees. These reasons include the following:

– <u>Trading plans provide a defense to insider trading liability</u>: If a transaction in relevant securities is made under a pre-existing trading plan, even if the individual possessed

[2] Under Swiss law, only FINMA-supervised entities are required to monitor the transactions of their employees in a manner that is suitable for preventing or detecting the misuse of insider information through the employees' own transactions (FINMA Circular 13/8, para. 53). This duty applies to directors and management personnel (FINMA Circular 13/8, para. 54). The monitoring measures are to be regulated in an internal policy and FINMA requires that the policy constitutes part of the employment or mandate contract with such person.

material non-public information relating to the company at the time of the transaction, this can be used as defense against insider trading liability. Under Swiss law, the charge of insider trading requires that knowledge of the relevant insider information has at least been a contributing cause for the transaction[3]. Typically, there is insufficient causality if a transaction is carried out on the basis of an investment decision that was made prior to gaining knowledge of the applicable insider information.[4,5] As the Swiss regulator FINMA increasingly focuses on insider trading, we may see an increase in the importance of trading plans as a defense to potential insider trading cases.

– Less complication and more security: Once a trading plan is established, a plan participant is not forced to take time to analyze the circumstances surrounding each of his or her transactions in relevant securities to determine if he or she is in compliance with applicable insider trading laws, nor would such person be concerned that he or she may have erred in their analysis of the circumstances surrounding a particular transaction. Furthermore, the individual could also sell relevant securities at a time when he or she may need liquidity for personal reasons, but typically would have been barred from trading due to, for example, a trading window being "closed" or his or her possession of material non-public information relating to the company. Finally, if companies require e.g. directors or executives to pre-clear transactions, no such pre-clearance would typically be required for transactions executed under an established trading plan.

However, the lack of popularity of such plans among Swiss listed companies might, among other things, be owed to the following drawbacks:

– Once adopted, trading plans might be difficult to be terminated or changed: The U.S. Securities and Exchange Commission has taken the view that early or frequent termination or modification of 10b5-1 trading plans may call into question whether the plan participant adopted the trading plan merely to circumvent insider trading laws and, consequently, whether the 10b5-1 affirmative defense should be available to the person. In our view, similar considerations would apply under Swiss laws. Hence, to avoid any possible suspicion of bad faith, plan participants should be slow to terminate or modify their trading plans once they have been adopted, even though most plans would provide the individual with a unilateral right to terminate or modify the plan.

– Not an absolute defense: Showing that an individual established a trading plan is not a *carte blanche* against all insider trading allegations. The plan must have been adopted

[3] BSK FinfraG-Wohlers/Pflaum, Art. 154 N54.
[4] SK-Sethe/Fahrländer, Art. 154 N140.
[5] However, causality can be affirmed e.g. if an individual already before the knowledge of the insider information agreed on subscription rights and/or options, but exercises such rights or options only after the knowledge of the insider information.

in good faith, not as part of a scheme or plan to evade insider trading laws and it must be demonstrated that the independent broker or third person adhered to the plan when such broker or third person executed the transaction in question.

b) Requirements

To provide an effective defense against a claim of insider trading, trading plans, whether in the form of a contract, plan or written instruction, should cover the following aspects:

– Number of securities: The plan typically specifies the number of securities that will be traded under the plan. However, the number of securities does not necessarily need to be expressed as a fixed number. For example, a plan participant could choose to specify a percentage of shares and/or options owned by such person or the number of securities equal in value to a fixed monetary amount or a percentage of the person's salary. The number of securities may also accommodate one or a number of transactions under the plan.

– Price: The trading plan often indicates the price of the relevant securities that will be traded under the plan, but the price may be fixed according to any formula. For example, an individual may choose to select a fixed monetary amount, a price floor, the market price or a series of price targets. If the trading plan envisions multiple transactions, the prices may be different for each transaction.

– Date: Usually, the date of any transaction to be effected under the plan is set out in the plan, whether by formula or otherwise. For example, a plan participant may specify:

  o a particular date or series of dates, the date by which a certain number of securities are to be sold;

  o the date by which a certain monetary amount of proceeds are to be obtained from sales under the plan;

  o a date tied to a market event, such as a significant rise in the trading price over the course of a day;

  o a date tied to a personal event, such as a home purchase or tax deadline;

  o the date on which a certain market indicator reaches a set target;

  o the date on which the price of a competitor's securities rises to a certain level; or

  o the date on which the price of an industry benchmark index exceeds a certain goal.

– Discretionary plan: In lieu of delineating the amount of securities, price and date of a transaction, the plan participant may give an independent person (such as a broker) discretion to execute trades as the broker sees fit as part of an investment strategy agreed upon in advance by the person and the broker. A discretionary trading plan can be designed in any way that ensures that the individual does not exercise any subsequent influence over how, when or whether to effect purchases or sales, and that the independent person managing the plan does not possess material non-public information relating to the company at the time of any transaction under the plan.

– Duration: A trading plan can have any term (from the time required to complete one transaction to an unlimited amount of time) but it is generally advisable to avoid using too short a term, which could lead to accusations that the trading plan was put in place as a temporary measure to skirt insider trading rules.

– Modifications: It is important that trading plans may be adopted, modified or terminated only at a time when (i) the individual does not possess any material non-public information relating to the company and (ii) no trading blackout period, as typically defined in internal insider trading policies, is in effect.

Trading plans often allow individuals to execute transactions outside of his or her plan. Of course, any trade made outside of a such trading plan would not have the benefit of an effective defense against insider trading claims.

c) Disclosure of Trading Plans in General and under Management Transaction Reporting Obligations in Particular

The adoption of a trading plan by a plan participant, even if institutionally offered by the company as part of its insider trading compliance program, does not result in the director or employee being deemed to act in concert with the company (i.e. qualify as "purchaser or selling group") under Swiss securities laws. Hence, the adoption of a trading plan is usually not subject to reporting or disclosure requirements under Swiss disclosure rules, subject to applicable management transactions reporting rules (see below). However, there are other circumstances in which the trading plan may be publicly disclosed on a voluntary basis, including the following:

– Announcement: In appropriate circumstances, the company may choose to publicize the adoption, modification and termination of a trading plan, e.g. by issuing a press release and/or posting an announcement on the company's website (such announcements are in particular common in the United States);

– Compensation report: As part of the disclosure of shareholdings in the shareholding table included in the company's compensation report for directors or senior executives, the company may consider disclosing any trading plan adopted by such person in a footnote to that table.

For non-discretionary trading plans of directors or senior executives, the applicable management transactions reporting rules of SIX Swiss Exchange offer two alternative reporting options (as set out in SIX's commentary to article 56 of the SIX Listing Rules and the SIX Directive on the Disclosure of Management Transactions (DMT)). The transactions carried out under a trading plan may be reported all at once with one single notification. In this case, the notification must include the total value of all transactions contemplated under the plan. If, for example, a sale plan provides for a minimum price for a sale, the total number of securities to be sold must be multiplied by this price and the result reported as the total value of the transaction. If the total value cannot be calculated, it may be stated as CHF 1 *pro memoria*. In any case, the key points of the trading plan (e.g. duration, ranges of transaction prices, etc.) must be notified. The notification must take place within two trading days of conclusion of the plan. If, after the conclusion of the trading plan, the person subject to the reporting obligation has the possibility of exerting an influence or actually exerts an influence on the subsequent transactions, these transactions must nevertheless be notified individually. If the terms and conditions of a reported trading plan are modified or changed, a new notification with the amended, current conditions must be submitted by the respective individual. In the notification of a plan revocation, the volume of the transactions carried out up to the date of revocation and the fact of the revocation must be notified.

Alternatively, it is also possible to report the individual transactions separately (i.e. no reference to any trading plan). If the transactions are reported separately, the period of two trading days pursuant to art. 56 para. 2 SIX Listing Rules begins with the execution of the transaction (in the case of transactions executed via the stock exchange) or upon entering into the respective commitment (art. 7 DMT).

Sandro Fehlmann (sandro.fehlmann@advestra.ch)
Deirdre Ní Annracháin (deirdre.niannrachain@nkf.ch)

Annual Report 2022 of the Disclosure Office of the SIX Exchange Regulation AG

Reference: CapLaw-2023-24

In its annual report, the Disclosure Office of SIX Exchange Regulation informed the public about its practice and provided an overview of its activities in the reporting year 2022. It further developed its disclosure practice by issuing new recommendations, some of which are summarized herein. In 2022, the Federal Supreme Court also issued a decision relevant to disclosure law confirming the practice of the Disclosure Office.

By Joey Weber

1) Recommendations

a) Indirect participation: Recommendation OLS-03/22-A: Facilitation in connection with changes in reported information and disclosure by direct participants

The applicant in Recommendation OLS-03/22-A was a company providing asset management services worldwide. They manage assets for clients and investment funds in various countries. They are subject to Swiss disclosure requirements but have technical difficulties identifying and reporting direct holders of positions by using their automatic systems. They argued that manual monitoring of these positions is impractical and cumbersome and that the entities that hold the legal title to the funds' assets do not have any decision-making power regarding voting or disposition of shares. They requested an exemption from direct holder disclosure because knowing the identity of these entities would not provide significant benefit to investors and would hinder market transparency due to the complex disclosures within short periods of time. The Disclosure Office agreed with the applicant, considering the potential negative impact of a large number of reports without material content. It stated that a relaxation of disclosure requirements is warranted in this case to balance the interests of market participants and the applicant. The exemption would apply to sponsored funds that are not authorized for sale and would reduce the need for disclosure by direct holders, which would reduce the administrative burden on both the applicant and issuers. The Disclosure Office, accordingly, shared the applicants' view, that the exemption should also apply to funds covered by article 18(2) of the FINMA Financial Market Infrastructure Ordinance (FMIO-FINMA).

The applicants were granted relief from the reporting obligation pursuant to article 18(1), article 18(4) and article 22(3) FMIO-FINMA to the extent that only the aggregated group positions had to be disclosed, but no direct shareholders pursuant to article 11(b) in connection with article 22(1)(e) and 22(3) FMIO-FINMA. However, an obligation to notify arises if a collective investment scheme within the meaning of article 18(2)(a) FMIO-FINMA individually reaches, exceeds or falls below a threshold. This obligation also applies if the holdings of the group's independent fund management companies are consolidated with the holdings of the group. The fact that an approved collective investment scheme under CISA individually reaches, exceeds or falls below a threshold is to be integrated in the consolidated notification of the group of companies, if the fund management company decides to consolidate its holding with the holding of the group of companies. The Disclosure Office also required a legend to be included as part of respective disclosure notifications on the electronic publication platform.

b) Capital market transactions: Recommendation OLS-04/2022-A: Facilitations and exemptions in connection with legal transactions regarding a capital increase

In order to partially finance a transaction in which the applicant in Recommendation OLS-04/2022-A was to acquire assets of company [C], the applicant planned to create new shares from authorized capital. The new shares were to be subscribed by company [D] as part of the capital increase and sold back to the applicant on the same day. In order to partially pay the purchase price for the assets of company [C] to be acquired as part of the transaction, the newly issued shares of the applicant were to be transferred to company [C] within a few days.

The applicant requested the Disclosure Office to release it from the reporting obligation regarding the newly issued treasury shares, which were to be held for only a few days prior to the transfer to company [C]. The applicant sought an exemption from the notification duty for the purchase of these shares, as they would only be held temporarily before the completion of the transaction. The applicant argued that the lack of transparency regarding the interim shareholding would not impact control of the company and that it could not exercise its voting rights. The Disclosure Office, however, rejected the argument that the issuer could not exercise the voting rights with respect to its own shares. It stated that the legislator specifically made the companies themselves subject to the disclosure of shareholdings and that, in principle, the market participants have an interest in knowing how many of its own shares a company holds – regardless of whether the voting rights can be exercised. But the Disclosure Office agreed that an exemption can be granted, considering the short-term nature of the transaction and the fact that a disclosure notification of the issuer in own shares as purchase position would be reflecting a situation that is a mere technicality to ensure a smooth closing of the transaction. It stated that it can be assumed that the market might not understand a possible disclosure notification of the issuer regarding the purchase of newly issued shares and that such a publication could lead to a considerable amount of explanation.

c) Capital market transactions: Recommendation OLS-05/2022-A: Facilitation for underwriters in connection with an acquisition of shares for stabilization purposes in an IPO (capital increase)

Recommendation OLS-05/2022-A was requested, and issued, in connection with an IPO in which all outstanding and a number of newly issued shares should be listed. For stabilization purposes of the new shares of the issuer to be issued in the course of the PO, the applicants planned to enter into a share lending agreement with the parent company of the issuer. This agreement allowed the applicants to borrow the shares for a limited period of time. In order to procure the shares for return under the stock lending agreement, the applicants were permitted, up to the number of shares borrowed, to purchase shares of the issuer in the open market or to request a capital increase from the issuer and to subscribe for the new shares ("over-allotment option").

The applicants requested the Disclosure Office to exempt them from the reporting obligation in connection with the share lending as well as the over-allotment option and purchases made on the market for stabilization purposes (both up to a maximum of the number of shares borrowed), stating that the transactions are short-term in nature and do not involve exercising voting rights. The applicants intended to borrow shares until the over-allotment shares are delivered or, if the over-allotment option is not exercised, until 35 calendar days after the first day of trading at the latest. The 35 calendar days were merely driven by the stabilization period of 30 calendar days (and the additional five days would give the issuer the possibility to conduct the over-allotment capital increase and deliver them. Both, the over-allotment option and the share lending would be disclosed in the prospectus in connection with the IPO. The Disclosure Office considered the applicants' request, as always weighing the interests of market participants in disclosure against the applicants' need for an exemption. It concluded that granting the exemptions was justified due to the short-term nature of the transactions and the applicants' intent to stabilize prices and that notifications would not provide significant added value and could be even confusing to investors. In addition, the applicants would not exercise voting rights and will complete the transactions within a limited timeframe. It is noteworthy that the Disclosure Office noted in its considerations that information contained in a prospectus can be taken into consideration and serve transparency. But it also stated that only limited significance can be attributed to the publication of any stabilization activities in accordance with article 126 of the Financial Market Infrastructure Ordinance since such publication constitutes an independent obligation unrelated to the disclosure of shareholdings.

d) Capital market transactions: Recommendation OLS-10/22-A: Exemption and relief regarding disclosure in the prospectus for (sub)underwriters

The applicant in Recommendation OLS-10/22-A were the (sub-)underwriters in a capital increase. The shares were offered to existing shareholders through a right offering, and any remaining shares offered to the public or purchased by the applicants or any other underwriters. The applicants sought exemptions from certain disclosure requirements related to the underwriting and notification obligations. They argued that the underwriting is a short-term transaction with no intention to influence the company's management through voting rights. The applicants stated that the necessary information regarding the underwriting will be provided in the prospectus, which will disclose the consortium members, the number of shares underwritten, the associated voting share percentage, and the expected holding period for each member. The Disclosure Office agreed that the transaction constituted an underwriting falling within the scope of the leaflet regarding applications for exemptions and easing provisions concerning disclosure in the prospectus for lock-up groups and (sub-)underwriters of 1 February 2022 (Leaflet) although the duration of the transaction (42 days after the execution of the underwriting agreement) might be deemed longer than average. The actual holding period of the applicants was presumed to be short. The Disclosure Office agrees with the applicants that in particular the intended prospectus wording disclosed (or will disclose once all the parameters of the transaction are clear) the essential information collectively in one single place (article 22 FMIO-FINMA), as requested by the Leaflet. The Disclosure Office concluded that, in principle, no or no significant information is withheld from market participants through disclosure in the prospectus. Thus, the applicants were granted their request to the effect that the reporting obligations arising in the context of the underwriting may be fulfilled in the prospectus. However, as usual, the Disclosure Office also stated that if one member of the underwriting consortium individually (or the consortium as a group as defined in article 12 FMIO-FINMA) holds any shareholding requiring notification in the issuer on the day the newly created shares are listed, then such shareholding must be disclosed within four trading days, at the latest, by means of notification to the Disclosure Office and to the issuer (in accordance with the provisions of FMIO-FINMA).

e) Capital market transaction: Recommendation OLS-12/22-A: Exemption and relief regarding disclosure in the prospectus for (sub)underwriters

The applicants were underwriters and sub-underwriters in a capital increase of a listed company. In the context of the planned capital increase, the applicants requested an exception or relief to the effect that the reporting obligations arising in connection with the underwriting can be fulfilled in the prospectus. Furthermore, it was requested that any sub-underwriters may make a disclosure notification within two trading days from the time when the contractual obligation to effectively buy a portion of the shares becomes effective for the relevant sub-underwriter; this was subject to the condition that the company and any further managers yet to be appointed provide certain information to the Disclosure Office within one trading day after the signing of any sub-underwriting agreement to the Disclosure Office. In addition, it was requested that the information contained in the prospectus not be need not be published by the issuer.

The Disclosure Office stated that, in fact, in the case of a capital increase with a firm underwriting, the function of a bank or consortium of banks is generally reduced to that of a "sales agent". The shares are held exclusively for the purpose of subsequent placement with the shareholders of the company or on the capital market. The placement phase is generally of short duration and there is no intention to influence the management of the company by exercising voting rights.

The Disclosure Office confirmed that the Leaflet was applicable. According to its practice (see also above Recommendation OLS-10/22-A), the applicants were granted their request to the effect that the reporting obligations arising in the context of the underwriting may be fulfilled in the prospectus. Again, the Disclosure Office also stated that if one member of the underwriting consortium individually (or the consortium as a group as defined in article 12 FMIO-FINMA) holds any shareholding requiring notification in the issuer on the day the newly created shares are listed, then such shareholding must be disclosed within four trading days, at the latest, by means of notification to the Disclosure Office and to the issuer (in accordance with the provisions of FMIO-FINMA).

With respect to the sub-underwriters, the Disclosure Office stated that from a balancing of interests, it is clear that there are no insurmountable reasons against the granting of relief. The applicants and the possible sub-underwriters were therefore granted relief to the effect that the conclusion of a sub-underwriting agreement does not have to be reported within four trading days after conclusion, but only at the time when the contractual obligation to effectively take over a portion of the shares is realized for the sub-underwriter concerned. This notification must be received in writing by the company and the Disclosure Office within two trading days. This facilitation is subject to the condition that the applicants, after conclusion of any sub-underwriting agreements, notify the Disclosure Office in writing of the name and registered office of the respective sub-underwriters as well as the maximum shareholding to be taken over by the respective sub-underwriter within one trading day after conclusion of the sub-underwriting agreements.

2) Federal Court Decision 2C_546/2020

A manager of collective investment schemes and its parent company inquired whether they were subject to article 120 FMIA and therefore had to report if the equity securities held by their investment funds in listed Swiss companies reached certain thresholds. FINMA ruled that this was the case. The Federal Supreme Court ultimately had to rule on the matter and stated that the purpose of article 120 FMIA is to require notification of any significant increase or decrease in voting rights. Article 120(3) FMIA covers situations which are not already covered by article 120(1) FMIA. This is the case, for example, if the voting rights of the beneficial owner are transferred to a third party without an acquisition or sale of securities having taken place. However, in the case of collective investment schemes, there is no beneficial owner, which is why article 120(1) FMIA is not limited to the beneficial owner pursuant to article 10(1) FMIO-FINMA. In the course of their business activities, investment funds regularly carry out transactions for the acquisition or sale of participations, which may also have an impact on voting rights. This therefore falls within the scope of article 120(1) FMIA. Thus, it is correct that FINMA in article 18(1) of its implementing ordinance (FMIO-FINMA) regulates collective investment schemes as subject to the reporting obligation, especially since it has considerable discretion in determining the scope of the reporting obligation. Thus, FINMA has not violated its scope of authority pursuant to article 123(1)(a) FMIA to issue implementing regulations also does not violate the principle of legality.

3) Assessment

The Disclosure Office's practice published in its Annual Report 2022 serve as a good example of where the "hot topics" in disclosure under article 120 FMIA are: disclosure of underwriters and sub-underwriters in the prospectus (as was permissible based on the former Disclosure Office Notice I/09 on the fulfilment of the notification obligations in the prospectus) and disclosure of positions held by collective investment schemes.

It is expected that these topics will also be addressed in the revision of the FMIA which the Federal Department of Finance was instructed to prepare and for which the public consultation is expected by the first half of 2024.

Joey Weber (joey.weber@homburger.ch)

FINMA's enforcement tools to uphold supervisory law: Current toolkit and proposed additions

Reference: CapLaw-2023-25

During the current debate on the supervision of financial institutions, FINMA's enforcement instruments have repeatedly been accused of being ineffective, especially when compared to other foreign financial market supervision authorities' tools. While FINMA has long been opposed to additional enforcement instruments, this has now changed and FINMA has recently proposed three additional tools to strengthen the authority's enforcement activities.

The following article discusses the enforcement instruments currently at FINMA's disposal and the possible additional instruments proposed by FINMA, especially taking into account the supervisory toolkit of foreign enforcement authorities.

By Lukas Roesler / Stephanie Walter

1) Introduction

FINMA has a broad range of enforcement tools to uphold supervisory law. When applying these tools, it is bound to observe constitutional principles and the rules governing administrative law. The term "enforcement" covers all investigations, proceedings and measures carried out by FINMA in relation to violations of the law. The main purpose of a FINMA enforcement proceeding is to uphold supervisory law and to restore compliance.

The enforcement tools at FINMA's disposal include remedial measures to restore compliance with the law, declaratory rulings, industry bans, activity bans, publications of rulings, the confiscation of profits, the revocation of license or withdrawal of recognition. Contrary to most foreign enforcement agencies, FINMA does not have the competence to impose fines on entities or individuals under supervision.

As a result of the current discussion about the effectiveness of the existing instruments, FINMA has proposed possible additional enforcement tools to further strengthen the enforcement of financial markets law. These are in particular the possibility to impose fines against institutions and individuals, a senior management regime to hold senior individuals accountable, and more leeway regarding the information of the public about individual enforcement proceedings. These proposals are not new; in recent years, there have been repeated discussions and several political proposals to equip FINMA with further enforcement instruments. However, these efforts did not find the necessary support and until recently FINMA itself was of the opinion that its toolkit was sufficient and that there was no need for further measures. Due to recent events, further instruments are however under serious consideration in Swiss parliament again.

2) FINMA enforcement proceedings

a) Persons subject to enforcement proceedings

As a matter of principle, entities and businesses engaging in an activity requiring a license under financial markets regulations are subject to the supervision of FINMA (art. 3 Federal Act on the Financial Markets Supervisory Authority ("FINMASA")). Controlling shareholders and persons holding a substantial shareholding in a supervised entity ("Qualified Shareholders") as well as directors and senior managers of supervised entities ("Key Individuals") are also subject to FINMA's supervision in two capacities. Indirectly, as FINMA requires from a licensed entity that its Key Individuals and Qualified Shareholders are fit and proper for their role (e.g., art. 3 para. 2 cif. c or c^{bis} Banking Act). Directly, as FINMA can initiate enforcement proceedings against Key Individuals or Qualified Shareholders if it intends to take measures against them personally.

b) Opening of formal enforcement proceedings

FINMA's enforcement division takes action if there are indications of a possible violation of supervisory law. FINMA initially launches a preliminary investigation to establish the facts. If there is concrete evidence of a breach of supervisory law and if there is no other possibility to restore compliance, FINMA opens a formal enforcement proceeding.

When deciding whether to initiate enforcement proceedings, two main criteria are relevant: The seriousness of the violation of supervisory law on the one hand and the "enforcement-interest" on the other. When determining the seriousness of the violation, FINMA particularly considers (i) the risk created for investors or insured persons, (ii) whether the violation occurred systematically, (iii) the duration of the violation and (iv) the knowledge of management (art. 30 FINMASA). From the point of view of enforcement interest, FINMA examines whether there is a need to restore compliance and makes considerations regarding prevention and the impact on the reputation of the financial center.

c) Applicable procedure

Enforcement proceedings are formal administrative proceedings and as such governed by the Federal Act on Administrative Procedure ("APA"). FINMA is entitled to certain specific rights under FINMASA, including the right to request supervised entities, their auditors and their qualified shareholders to provide any information or documents required by FINMA to carry out its task (art. 29 para. 1 FINMASA). Notably, supervised persons have a duty to cooperate in such administrative proceedings. Statements made by respondents in such proceeding cannot be used against them under criminal law unless they were also granted the right to remain silent and have not been subjected to any undue coercion.

If as a result of its enforcement proceedings FINMA concludes that a breach of financial markets law has occurred, FINMA may take different types of measures, depending on the severity of the violation. FINMA generally concludes the proceedings by issuing a ruling in which it sets out measures to restore compliance with the law.

3) FINMA enforcement tools

a) Restoration of compliance with the law (art. 31 FINMASA)

In case of ongoing violations of supervisory provisions or other irregularities, FINMA may order specific measures to restore compliance with the law (art. 31 FINMASA). In principle, FINMA will only order remedial measures if the supervised entity has not implemented adequate mitigating measures itself. FINMA has broad discretion regarding the measures to be imposed on the supervised entity. It can order any measure it deems necessary and appropriate. FINMA may, *inter alia*:

– temporarily or permanently restrict the supervised entity's business activities by prohibiting the supervised entity from performing certain transactions or acquisitions;

– impose conditions on the organization or internal processes of the supervised entity;

– order the supervised entity to remove certain Key Individuals (board of directors and executive management) or certain Qualified Shareholders; or

– suspend the voting rights of shareholders and partners with a qualified participation (art. 23ter Banking Act).

b) Declaratory ruling and substitute performance (art. 32 FINMASA)

Where the proceedings reveal that the supervised entity has seriously violated the law, but there is no longer a necessity to order remedial measures, FINMA may issue a declaratory ruling (art. 32 para. 1 FINMASA). The purpose of such a ruling is merely to hold that FINMA found that the supervised entity has committed serious violations of regulatory provisions. A declaratory ruling may not be published unless the conditions for a publication in accordance with art. 34 FINMASA (see lit e) hereafter) are met (and under certain circumstances in accordance with art. 22 FINMASA).

Further, FINMA has the power to perform the required act itself or have it performed at the expense of the defaulting party (art. 32 para. 2 FINMASA) if an enforceable ruling of FINMA is not observed within a set deadline and after a prior warning.

c) Prohibition from practicing a profession (managers) (art. 33 FINMASA)

FINMA can also take measures against Key Individuals such as prohibiting them from acting as a director or in a senior management capacity for a period of up to five years, if she/he is responsible for a severe breach of a supervisory provision (art. 33 FINMASA). To issue an industry ban, FINMA must be able to prove direct, individual, and causal responsibility for the violation of supervisory law. There must be a proven breach of duty that has led to these violations. Furthermore, FINMA can confiscate undue profits realized by Key Individuals and Qualified Shareholders (art. 35 FINMASA, see lit. f) (hereafter for further details).

d) Prohibition from performing an activity (traders and client advisors) (art. 33a FINMASA)

Art. 33*a* FINMASA enables FINMA to ban individuals temporarily or permanently (in the case of repeated offences) from trading in financial instruments or from acting as a client adviser at a supervised institution in case of a serious violation of the provisions of the financial market acts, the implementing ordinances, or in-house directives. Hence, all employees who perform a respective activity can be sanctioned in addition to staff in senior functions and those bound by proper business conduct rules.

e) Publication of the supervisory ruling (art. 34 FINMASA)

FINMA may publish its ruling as a "naming and shaming" measure provided that a serious violation of supervisory provisions by the supervised entity or a Key Individual in the sense of art. 34 para. 2 FINMASA has occurred. The publication may disclose the names and personal data of the supervised entity and individuals concerned (art. 34 FINMASA). Due to the potentially serious sanctioning effect on such persons, the publication must comply with the administrative law principle of proportionality (*Verhältnismässigkeitsprinzip*), i.e. it must be suitable, necessary and in reasonable proportion to its goals.

While this instrument was initially mostly used in relation to authorized institutions who had seriously violated supervisory provisions, these days, the vast majority of rulings published under art. 34 FINMASA concern cease or desist orders, i.e. bans on specific individuals conducting unauthorized activities.

It shall be noted that FINMA may also publish a ruling or otherwise issue a press release based on art. 22 para. 2 FINMASA, i.e. in the course of its general duty to inform the public on individual proceedings if it sees a particular need to do so from a supervisory point of view (i.e. not as a punishing measure in accordance with art. 34 FINMASA). Such communications may also take place while the respective FINMA proceedings are ongoing. According to Art. 22 para. 2 FINMASA a particular need for such a publication is namely given if the information of the public is necessary (i) to protect market participants or supervised persons, (ii) to correct false or misleading information or (iii) to safeguard the reputation of the financial centre.

f) Confiscation (art. 35 FINMASA)

FINMA is entitled to confiscate any profit that was made through a serious violation of supervisory provisions (art. 35 FINMASA). In this context, FINMA enjoys a certain discretion regarding the determination of the amount of the profits concerned (in particular if the amount cannot be determined or can only be determined with inadequate efforts). However, a causal link between the profit and the severe breach of regulatory law must be shown.

g) Investigating agents (art. 36 FINMASA)

Pursuant to art. 36 para. 1 FINMASA, FINMA can appoint an independent and suitably qualified person (an investigating agent) to investigate circumstances relevant for supervisory purposes or to implement supervisory measures that it has ordered. Rulings issued by FINMA also state whether and to what extent investigating agents are empowered to act in place of the company's management. The individuals concerned have their authorization temporarily withdrawn while the agent is acting in their place. If a corresponding entry is made in the commercial register, FINMA additionally provides information on its website about the appointment of the investigating officer.

h) Revocation of licence, withdrawal of recognition (art. 37 FINMASA)

FINMA can revoke a supervised entity's licence, if it finds that (a) the supervised entity no longer satisfies the requirements to carry out its activity or (b) seriously violates supervisory provisions (art. 37 FINMASA). In both instances, based on the principle of proportionality, FINMA will only revoke the licence as *ultima ratio*, if it is necessary and no other measure would be sufficient and appropriate. Therefore, before revoking a licence, FINMA will consider whether other measures, e.g. remedial measures pursuant to art. 31 FINMASA, would be sufficient and appropriate. Whether an infringement of regulatory law constitutes a severe breach is assessed by FINMA on a case-by-case basis. Although past isolated breaches, regardless of their severity, are probably not sufficient grounds to revoke a licence, multiple and repeated breaches – even if they have been remediated – could be the cause for taking such action if they form a pattern that suggests that the supervised entity is not committed to put in place an appropriate organization to ensure effective compliance with the regulatory requirements and that, consequently, any other remedial measure will not be effective to prevent future breaches of supervisory regulations.

4) Proposed enforcement tools

a) Fines against financial institutions and individuals

One instrument that is currently being discussed is the authority to impose fines against financial institutions and individuals. Many foreign financial supervisory authorities such as the German BaFin or the British FCA are equipped with this competence. Both agencies use fines as a deterrent to prevent future violations.

As of today, FINMA cannot impose fines – whether as a criminal fine, regulatory fine or administrative sanction. When enacting the FINMASA, the legislator deliberately decided to strictly separate the responsibilities for criminal and administrative proceedings, focusing FINMA's role on prevention (i.e. on the identification of developments and initiation of adjustments at supervised institutions to avoid inadequate practices) whereas the criminal justice authorities, in turn, have the role of dealing with (criminal) acts that have already occurred. Therefore, providing FINMA with the competence to impose fines would constitute a fundamental.

Apart from the question whether such fines are effective and targeted at the right stakeholders, a particular concern of commentators in relation to the power to impose fines is that FINMA's enforcement proceedings may be slowed down and become less efficient, in particular because the (current) duty to cooperate in an administrative proceeding will be impacted by the right to remain silent of any individual threatened by a fine or penalty (art. 6 para. 1 European Convention on Human Rights). Due to this concern, FINMA has until recently only supported a competence to impose fines on supervised institutions, but not on individuals.

On May 2nd 2023, in the aftermath of the merger of Credit Suisse with UBS, the National Council accepted a postulate (Postulat Birrer-Heimo, 21.4628, "*Wirksame Sanktionen der Finma gegen fehlbare Finanzinstitute*"). The postulate calls on the Federal Council to examine how FINMA can be enabled to impose fines and/or further sanctions on errant financial institutions and individuals in addition to the existing supervisory instruments.

b) Senior Managers Regime

In March of 2022 a large majority of the Swiss National Council approved a postulate for an improvement of the instruments to hold executives of supervised institutions accountable (Postulat Andrey Gerhard, 21.3893, "*Schlanke Werkzeuge, um höchste Finanzmarktkader besser in die Pflicht zu nehmen*"). The Federal Council is currently mandated to indicate in a report which adjustments to FINMA's tools would be necessary to create incentives for stronger individual assumption of responsibility by the highest executives of financial institutions and to allocate the individual responsibilities of the management bodies. FINMA has declared its support for the initiative.

The postulate explicitly referred to the British Senior Managers and Certification Regime that has been in use in the United Kingdom since 2015. The most senior people in a firm who perform key roles (so-called Senior Management Functions or SMFs) need FCA approval before starting their roles. Every SMF must have a statement of responsibilities that clearly states what they are responsible and accountable for. Every SMF holder has a duty of responsibility under the UK Financial Services and Markets Act 2000. This means that if a financial institution is not in compliance with one of its requirements, the SMF responsible for that area could be held accountable if she/he did not take reasonable steps to prevent or stop the breach. SMFs must be fit and proper to do their jobs and financial institutions need to assess the SMF's ongoing fitness and propriety at least annually

Compared to FINMA's currently applied "fitness and propriety" (*Gewähr*) test, the British Senior Managers and Certification Regime is broader and also involves managers of the operative management. FINMA's systematic focus when either licensing an institution or approving individuals in executive positions is on the top management and the members of the board (and only under special circumstances on other key individuals and risk takers).

Further, a responsibility document along the lines of the Senior Management and Certification Regime is also advocated for. Such a responsibility document shall clarify the bank's organization and accountability structures. It would go beyond FINMA's currently practiced approval of (less detailed) organizational regulations. Further,a very detailed definition of roles and tasks of individual managers is contrary to the principle-based supervision practiced by FINMA that shall allow each supervised entity to define its own adequate organization.

Supporters hold that a more individual assignment of responsibilities may make it easier to hold the designated individuals accountable in case of mismanagement and, thus, raise awareness and have a preventive effect. More critical commentators hold that the focus of such a document on individuals may not be adequate in all circumstances for complex organizations with a high degree of division of labor and are critical of the expected results because many projects in supervised entities are already today subject to complex approval processes (that will also serve the individuals with assigned responsibilities as "due diligence defenses").

c) Information of the public

One further measure proposed by FINMA is the ability to inform the public more openly about its enforcement procedures, in particular with a focus on prevention. As shown previously (see particularly cif. 3, lit b) and e) hereinbefore), FINMA may inform the public about individual proceedings against financial market participants basically only in cases of serious violations of law or where a need for a publication from a supervisory point of view is given. The hurdles for such publications are relatively high. Therefore, in order to enable FINMA to inform more openly, such hurdles would have to be lowered.

5) Summary

The current enforcement instruments at FINMA's disposal cover a wide range of measures, including some directed at individuals. Compared to foreign financial market supervision authorities, the lack of the competence of FINMA to impose fines stands out and has repeatedly become an object of criticism.

Given the current circumstances, the call for more rigid enforcement action is receiving broader political support than in previous years. It remains to be seen whether the legislator will equip FINMA with further enforcement tools.

Lukas Roesler (lukas.roesler@baerkarrer.ch)
Stephanie Walter (stephanie.walter@baerkarrer.ch)

Highlights from FINMA's Annual Report 2022

Reference: CapLaw-2023-26

As every year, the Swiss Financial Market Supervisory Authority FINMA has released its annual report, which summarizes the authority's regulatory and supervisory activity during the past calendar year. This survey highlights a number of points of particular interest from a capital markets law perspective.

By Roland Truffer

1) The FINMA's Annual Report and other periodic reporting

Article 9 (1)(f) of the Financial Market Supervision Act (FINMASA) requires the board of directors of FINMA to draw up an annual report and submit it to the Federal Council for approval prior to publication. Furthermore, pursuant to article 22 (1) FINMASA, FINMA is mandated to inform the general public at least once each year about its supervisory activity and practices. The FINMA's Annual Report responds to both these requirements and is, thus, an instrument of its accountability to the political authorities as well as of information of the general public about its activity. It is usually published in late March or early April of the following year (this year, with a press release dated 27 March 2023).

Besides the Annual Report and its (formally separate) annual accounts, FINMA periodically issues other publications, such as an annual 'Risk Monitor', an 'Insurance market report' and a 'Resolution report' (online only). Further information is systematically published on the authority's website throughout the year, such as information on enforcement cases (short case reports, selected rulings, and court decisions; the annual publication of a separate 'Enforcement Report' has been discontinued), as well as - pursuant to a statutory mandate in article 49 of the Insurance Supervision Act - a database of court decisions on private insurance law.

2) Selected highlights of the Annual Report 2022 from a capital markets perspective

a) China-Switzerland Stock Connect

The SIX Swiss Exchange entered into a 'China-Switzerland Stock Connect' agreement with the stock exchanges of Shanghai and Shenzhen, which promotes the listing in Switzerland of Global Depositary Receipts (GDRs) based on shares of Chinese issuers with a primary listing on one of those Chinese stock exchanges (and, at least in theory, also *vice versa*). Amendments were made to the SIX Swiss Exchange's regulations to facilitate such listings; these amendments had to be approved by FINMA (p. 48 ff. of the Annual Report). GDR listings require a prospectus to be published in compliance with Swiss (or equivalent foreign) law and result in the application of the SIX Swiss Exchange's requirements of management transaction reporting, periodic financial reporting (including interim reports) and ad hoc publicity; on the other hand, corporate governance reporting and Swiss shareholding disclosure and takeover rules do not apply. The revised regulations entered into force on 25 July 2022, and instantly sparked a series of listings (cf. Schneiter, Listing and Trading of GDRs on the SIX Swiss Exchange …, CapLaw-2022-35). To ensure supervisory co-operation, FINMA signed a co-operation agreement with the China Securities Regulatory Commission (CSRC) (p. 73).

FINMA notes that, in the course of the approval process for the revised stock exchange regulations, it required amendments to safeguard investor protection, such as the disclosure in the prospectus of information about the depositary, the GDRs and the deposit agreement (rights of investors, insolvency protection, risk associated with the design), and the separate holding of underlying shares in safe custody to enable their segregation in favor of investors in the event of the depositary's default (p. 50).

b) No licensed DLT trading facilities as yet (but a 'classical' stock exchange for tokens)

Since 1 August 2021, the Financial Market Infrastructure Act (FMIA) has provided for the possibility to obtain a license to operate a 'DLT trading facility' (articles 73*a* ff. FMIA; introduced by the Federal Act of 25 September 2020 on the Adaptation of Federal Law to Developments in Distributed Ledger Technology). Unlike the situation for traditional trading venues, the law allows a DLT trading facility to also provide clearing, settlement and/or custody services. FINMA notes that there has been interest from market participants in this new type of license, but that no license has as yet been granted (p. 18 f.). During 2022, FINMA reports that it was in dialogue with ten project initiators, but did not receive any formal license applications. FINMA mentions that where a potential licenseholder would operate a trading facility and provide settlement services, but the actual custody of the traded assets would take place on a public blockchain and therefore without any determinable operator, the licenseholder would be expected to regularly check the correct functioning of the public blockchain.

Meanwhile, FINMA had in 2021 granted infrastructure licenses of a more 'classical' type to *SDX Trading AG* (as a stock exchange) and *SIX Digital Exchange AG* (as a central securities depository), who were established within the SIX group for the trading of DLT assets ('tokens'). Under their respective license types, the infrastructures may only admit supervised financial institutions as participants, while a DLT trading facility would be permitted to also admit other persons, including end clients (article 73*c* (1) (e) FMIA).

c) Enforcement action against a non-licensed entity for different types of market manipulation

FINMA briefly mentions, in the 2022 Annual Report (p. 3: "*2022 in milestones*"), the case of *Blackstone Resources AG*, on which further information was published in a media release of 12 April 2022. Blackstone is not an entity licensed by FINMA, but its shares were (until 2022) listed on the SIX Swiss Exchange. FINMA conducted an enforcement proceeding against Blackstone and one of its directors based on its role in enforcing the administrative (as opposed to the penal) provisions against market abuse (articles 142 f. FMIA), which apply to all market participants. In its decision, FINMA found that Blackstone had indeed committed instances of market manipulation. The case is interesting because the findings comprise not only cases of manipulative trades (on which the media release gives few details), but also of the less-known variant of market manipulation by dissemination of misleading information (article 143 (1)(a) FMIA: "… *publicly disseminates information which […] gives false or misleading signals regarding the supply, demand or price of securities* …"). In particular, Blackstone was found to have announced that it had made a large private placement of its shares at a price equivalent to a multiple of the prevailing stock price, but failed to disclose that the private investor involved was one of the company's directors, and to have claimed that the transaction had generated net proceeds for the company, although no new funds were in fact raised. Blackstone, reportedly, is challenging FINMA's enforcement decision in court; the case thus continues.

d) Status of recovery and resolution planning across sectors

FINMA reports that in 2022, for the first time, the recovery plans of the systemically important financial market infrastructures *SIX x-clear AG* and *SIX SIS AG* (as required by article 24 (1) FMIA) were approved without conditions (p. 63 ff.). In the banking sector, the 'Swiss emergency plans' of the (then) two global systematically important banks (G-SIBs) (outlining how they would ensure uninterrupted continuity of the systemically important functions for Switzerland in a crisis) were deemed effective, and their global resolvability further improved. On the other hand, FINMA considered in early 2022 that the emergency plans of the three domestic SIBs – PostFinance, Raiffeisen and Zürcher Kantonalbank – were not ready for implementation, because none of them had reserved sufficient gone concern capital (an assessment reversed, in the case of Raiffeisen, in FINMA's press release of 26 April 2023). Insurers, finally, will first become subject to a formal requirement of recovery planning (for insurance groups and, if so directed by FINMA, economically significant individual insurance companies) under the revised rules of the Insurance Supervision Act that will come into effect on 1 January 2024. FINMA has done preparatory work and held discussions with insurers in view of the future law, as well as setting up international crisis management groups (as they already exist for the G-SIBs and for *SIX x-clear AG*) for those insurers who have international activities (p. 65).

e) IOSCO supports the establishment of the International Sustainability Standards Board (ISSB)

In its capacity as the Swiss securities regulator, FINMA is represented in the International Organization of Securities Commissions (IOSCO). In 2021/2022, IOSCO supported the establishment of the International Sustainability Standards Board (ISSB), which is associated with the IFRS Foundation, and monitored the development of the ISSB's first two draft disclosure standards, pertaining to climate and to general sustainability disclosure (p. 72). Initiated at the COP 26 conference, the ISSB aims to develop global standards for sustainability reporting, thus countering the fragmentation of respective national and international initiatives. Some prior initiatives, such as the Climate Disclosure Standards Board (CDSB) and the Value Reporting Foundation, were consolidated into the ISSB. Its disclosure standards are to be known as "IFRS-S" standards.

3) Outlook

Overall, the FINMA's Annual Report 2022 gives the impression that last year was not an excessively eventful one for the regulator, at least in the field of capital markets. Because it is limited to occurrences in 2022 and does not contain any 'events after the reporting period' section, the Annual Report 2022 is silent on the build-up to and implementation of the UBS-Credit Suisse merger announced on 19 March 2023. Detailed reporting on that event, as well as FINMA's thoughts on the lessons to be learnt from it, may be expected to feature prominently in the next Annual Report.

Roland Truffer (roland.truffer@advestra.ch)

EUR 733 million Placement of Shares by DSM-Firmenich

Reference: CapLaw-2023-27

In June 2023, DSM-Firmenich successfully placed shares by way of an accelerated bookbuilding raising gross proceeds of approx. EUR 733 million. The proceeds will be used for the buy-out of shares not tendered in the exchange offer to DSM shareholders. Goldman Sachs, ABN AMRO and J.P. Morgan acted as joint global coordinators in this transaction.

CHF 275 million Placement of Convertible Loan Notes by Swiss Prime

Reference: CapLaw-2023-28

In June 2023, Swiss Prime Site issued convertible loan notes in the aggregate amount of CHF 275 million to ELM B.V., a repackaging vehicle. ELM in turn issued exchangeable notes, which were placed with investors and are exchangeable into shares of Swiss Prime Site. The use of the repackaging vehicle allows Swiss Prime Site to diversify its funding strategy at attractive terms.

EUR 216.3 million Issuance of Green Senior Unsecured Guaranteed Convertible Bonds by Meyer Burger Technology AG

Reference: CapLaw-2023-29

In May, 2023, Meyer Burger Technology AG (SIX: MBTN) (Meyer Burger) successfully issued green senior unsecured guaranteed convertible bonds due 2029 in the aggregate amount of EUR 216.3 m. The bonds were placed in a private placement with a coupon of 3.75% per annum. The bonds are issued by Meyer Burger's subsidiary MBT Systems GmbH and guaranteed by Meyer Burger.

CHF 489 million Rights Offering by Luzerner Kantonalbank

Reference: CapLaw-2023-30

In May 2023, Luzerner Kantonalbank AG (SIX: LUKN) announced that it had successfully closed its rights offering, raising gross proceeds of CHF 489 million. As part of the transaction, existing shareholders of Luzerner Kantonalbank were offered rights to subscribe for new shares at an offer price of CHF 69.00 per new share. New shares in respect of which subscription rights had not been exercised were placed in a rump placement. Zürcher Kantonalbank acted as global coordinator and joint-lead manager.

Liontrust Asset Management plc Public Exchange Offer for GAM Holding AG

Reference: CapLaw-2023-31

In May 2023, GAM Holding AG announced that it had entered into an agreement with Liontrust Asset Management plc relating to the launch by of a public exchange offer for all publicly held shares in GAM at a consideration of 0.0589 Liontrust shares per share of GAM Holding AG. The prospectus for the exchange offer was published on 13 June 2023. The offer is subject to a minimum acceptance ratio of 66⅔%. Completion is subject to customary regulatory approvals.

Ironwood Pharmaceuticals, Inc. Public Cash Tender Offer for VectivBio Holding AG

Reference: CapLaw-2023-32

In May 2023, Ironwood Pharmaceuticals, Inc. (Nasdaq: IRWD) and VectivBio Holding AG (Nasdaq: VECT) announced that they had entered into an agreement for Ironwood Pharmaceuticals to launch an all-cash public tender offer to acquire all outstanding shares in VectivBio Holding AG for USD 17.00 per share. The offer was successfully completed on 29 June 2023.

CHF 460 million Issuance of Senior Notes under its Euro Note Programme by UBS AG

Reference: CapLaw-2023-33

In May 2023, UBS AG, acting through its London branch, successfully completed its issuance of (i) CHF 310 million aggregate principal amount of 2.385 per cent. Notes due 2025, and (ii) CHF 150 million aggregate principal amount of 2.550 per cent. Notes due 2029, in each case under its Euro Note Programme.

EUR 500 Million Issuance of Bail-In Bonds by Raiffeisen USD 105 million Offering of GDR and Listing on SIX Swiss Exchange by Kunshan Dongwei Technology Co., Ltd.

Reference: CapLaw-2023-34

In June 2023, Kunshan Dongwei Technology Co., Ltd. whose A Shares are listed on Shanghai Stock Exchange, sold 5,888,000 GDRs representing two A-Shares each at an offer price of USD 17.80, raising gross proceeds of approximately USD 105.0 million from the offering. Trading in the GDRs on SIX Swiss Exchange commenced on 13 June 2023.

Reverse Share Split by Santhera

Reference: CapLaw-2023-35

In July 2023, Santhera Pharmaceuticals Holding AG (SIX: SANN) completed a 10:1 reverse split of its shares, which had been approved by the shareholders on June 27, 2023, with the listing and first day of trading of the post-split shares on the SIX Swiss Exchange.

USD 582.5 million Offering of GDR and Listing on SIX Swiss Exchange by Zhejiang Huayou Cobalt Co., Ltd.

Reference: CapLaw-2023-36

In July 2023, Zhejiang Huayou Cobalt, whose A Shares are listed on Shanghai Stock Exchange, sold 50,000,000 GDRs representing two A-Shares each at an offer price of USD 11.65, raising gross proceeds of approximately USD 582.5 million from the offering. Trading in the GDRs on SIX Swiss Exchange commenced on 7 July 2023.