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Prospectus Requirements for Public Offerings of Securities in Switzerland under the FinSA: Exemptions for Offerings to Employees

Reference: CapLaw-2023-56

Under the Financial Services Act (FinSA), Switzerland has enacted comprehensive rules governing prospectus requirements for public offerings of securities. This article aims to provide a brief overview of the prospectus requirement, focusing on two specific exemptions: Article 37 (1) (g) FinSA for offerings to current or former directors, officers, or employees, and the exemption from the requirement to prepare a key information document for employee options on equity securities.

By Benjamin Leisinger

1) Prospectus Requirement under the FinSA

The FinSA generally requires the preparation, approval by a Swiss review body, and publication of a prospectus for public offerings of securities in Switzerland. Such a prospectus follows the requirements of the FinSA and the annexes of the Financial Services Ordinance (FinSO) and provides detailed information about the issuer, the securities being offered, and the associated risks. The prospectus serves as a key document for investors, aiding informed decision-making and ensuring transparency.

2) Exemption for Offerings to Board Members, Management, or Employees

In many (if not most) cases, the allotment of shares or employee options with respect to shares of the employer or a company connected to the employer does not even qualify as an offering, let alone a public offering, within the meaning of the FinSA. The members of the board of directors (directors) or management (officers) or the employees simply receive an allocation of the shares as part of their compensation. However, if the relevant persons have a choice to participate in a share plan and can be seen as "investing" part of their compensation in securities of the employer, the analysis is less clear. If the company is large, the potential qualification as a public offering could become relevant, too. However, to avoid legal uncertainty in such situations, the FinSA provides for an explicit statutory exemption. This exemption even goes beyond the offering of ordinary shares and covers all securities (shares, participation securities, phantom stock, share options, structured products, bonds, etc.) allocated or offered to the relevant persons by the employer or by a "connected" company (*verbundene Unternehmen / entreprises liées / impresa collegata*) – a term that is intentionally broader than "affiliate" and also includes third parties, *e.g.*, a non-consolidated special purpose vehicle, that issues such instruments.

Article 37 (1) (g) FinSA provides an exemption from the prospectus requirement for (even public) offerings of securities in Switzerland to current or former members of the board of directors or management, as well as employees. This exemption acknowledges the close relationship between the issuer and these individuals, who are presumed to have, or have the possibility to get access to, sufficient information to make informed investment decisions. Requiring a prospectus for offerings to such individuals did not seem justified.

However, it is also important to note that this exemption has limits: Including agents (other than such that serve or served as members of the board of directors), consultants or other service providers or other similar persons in an offer is not covered by the statutory exemption and an analysis whether there is a public offer – or another exemption from the prospectus requirement – is required.

A further aspect that appears less clear when looking at the plain wording of the exemption is whether former (as opposed to existing) employees are also covered. The legislative history – and the purpose underlying the exemption – however show that also former employees receiving shares under or in connection with a share compensation program are meant to be covered by the exemption: The FinSA in relevant parts was inspired by the former Prospectus Regulation in the European Union. Its wording was rather clear that securities offered, allotted or to be allotted to ***existing or forme***r directors or employees by their employer were exempted from the prospectus requirement. The only debate in the Swiss legislative process was whether any additional information (about the number and type of securities as well as the reasons for and details on the offer) would still be required in order to rely on the exemption; a requirement that was deleted in the final legislation. The message of the Swiss Federal Council also generically referred to "allocations in connection with employee compensation schemes" and did not distinguish between former and existing employees. It also makes sense from a teleological perspective to distinguish between (existing or former) employees and the "general public" when it comes to the question of whether additional information about the issuer is required or not – existing and former employees have existing (special) knowledge or better access thereto and are less in need of further information. Doctrine also supports this interpretation.

3) Exemption for Employee Options on Equity Securities

Additionally, FinSA provides an exemption from the duty to prepare a key information document (*Basisinformationsblatt*) for employee options on equity securities of the employer or a company associated with the employer (article 59 (1) FinSA and article 86 (1) (c) FinSO). This exemption also recognizes the unique nature of employee options, which are typically granted as part of a company's incentive program, and the similarity to shares for which a Swiss key information document does not have to be prepared in the first place.

Employee options involve granting employees the right to purchase equity securities of the employer or a related company at a predetermined price within a specified period. Given the close relationship between the employee and the employer, Swiss regulation offers this exemption to streamline the process and minimize administrative burdens for both parties.

4) Conclusion

The FinSA in Switzerland establishes a robust framework for the prospectus requirement in public offerings of securities. While ensuring transparency and investor protection, FinSA also provides clear statutory exemptions for specific scenarios.

The exemption pursuant to article 37 (1) (g) FinSA recognizes the relationship between issuers and current or former board members, management, or employees, allowing them to benefit from a simplified process. The exemption from preparing a key information document for employee options on equity securities also acknowledges the unique nature of these offerings within an employer-employee context.

It is crucial for issuers to understand and comply with these exemptions. As with any legal matter, it is advisable, and standard course of action, to consult a qualified Swiss lawyer to ensure compliance with the specific requirements outlined in FinSA and its associated regulations.

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Update on Risk-Absorbing Capital Instruments under the Revised Insurance Regulations

Reference: CapLaw-2023-57

In this article, the authors provide an update on the changes with respect to the future treatment of risk-absorbing capital instruments under the revised Swiss insurance regulations, following the conclusion of the partial revision of the regulatory framework for the supervision of Swiss insurance undertakings earlier this year. This article serves as an update to the authors' previous article on risk-absorbing capital instruments, which was published in CapLaw 3/2022 based on an earlier draft of the revised Ordinance on the Supervision of Private Insurance Undertakings.

By Hansjürg Appenzeller / Vanessa Isler

1) Revision of Insurance Regulations

Several years in the making, the Swiss Parliament finally adopted the partial revision of the Insurance Supervisory Act (*Versicherungsaufsichtsgesetz*; Insurance Supervisory Act, the **ISA**, and as revised by the partial revision, the **nISA**) on 18 March 2022. After several iterations, the amendment of its implementing Ordinance on the Supervision of Private Insurance Undertakings (*Aufsichtsverordnung*, Insurance Supervisory

Ordinance, the **ISO**, and as revised by the amendment, the **nISO**) was published in its final form on 2 June 2023. The nISA and nISO will enter into force on 1 January 2024.

While the main focus of the ISA and ISO revisions was not on risk-absorbing capital instruments, it is important to note the significant changes that have been made in the new regulatory framework.

2) Treatment of Risk-Absorbing Capital Instruments under the Old and New Regime

a) Overview over capital requirements of insurers

Insurance undertakings are required to maintain sufficient free and unencumbered capital to cover all of their business activities (article 9 (1) ISA / articles 9 *et seq.* nISA). This requirement is assessed by way of the Swiss Solvency Test (**SST**), which, simply put, plots the capital an insurance undertaking ***should*** have, quantifying, among others, the market, credit and underwriting risks to which it is exposed (*Zielkapital*; target capital), against the available regulatory capital (*risikotragendes Kapital*; risk-bearing capital).

The results of the SST are expressed as the SST ratio (expressed as a percentage. In simplified terms, the SST ratio is calculated by dividing the available capital (*i.e.*, the risk-bearing capital) by the required capital (*i.e.*, the target capital) in a given year. The SST ratio must always be above 100%. In practice, the average SST ratio for insurance undertakings is much higher, amounting to, on average, 303% for non-life insurers, 243% for life insurers and 256% for reinsurers in 2022 (*cf.* Report on the Swiss Insurance Market 2022, published by the Swiss Financial Market Supervisory Authority FINMA (**FINMA**) on 7 September 2023).

b) Risk-absorbing capital instruments as part of risk-bearing capital

The risk-bearing capital consists of the core capital (*Kernkapital*) and the supplementary capital (*ergänzendes Kapital*).

i. Core capital (Kernkapital)

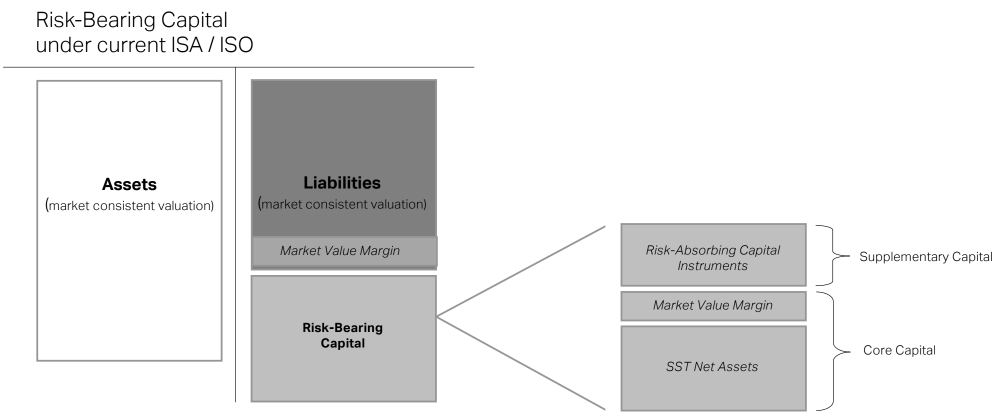
Unter both the old and new regime the core capital is calculated based on SST net assets which are determined using a total balance sheet approach (*i.e.*, the SST balance sheet contains all economically relevant balance sheet items of the insurance undertaking including off-balance sheet items but excluding any corporate tax items), minus certain deductions (article 48 (1) ISO / article 9a (1) nISA and article 32 (3) and (4) nISO).

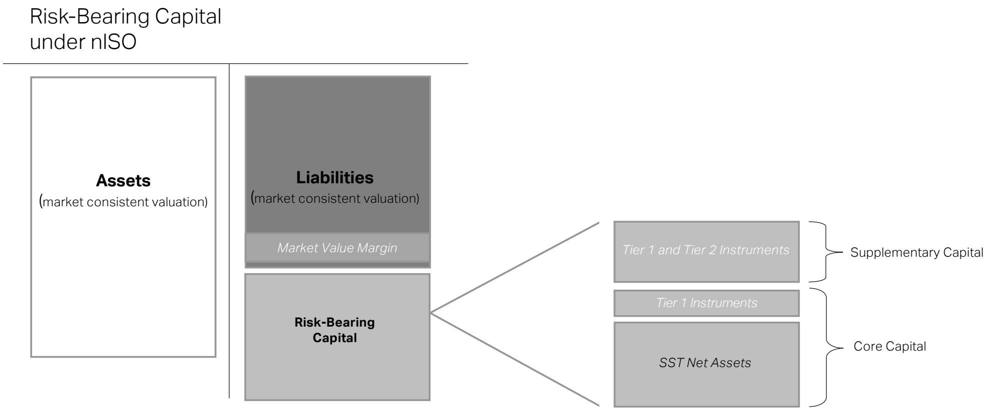
Although different terms are used to describe the valuation methodology applied to determine the value of the assets and liabilities in the SST balance sheet under the old and new regime (market consistent (*marktnah*) valuation and market consistent (*marktkonform*) valuation, respectively), no significant deviations are expected in the valuation of the insurance undertaking's assets and liabilities in practice.

Under the old regime, the market value margin (*Mindestbetrag*), which is also included in the determination of the market consistent (*marktnah*) value of liabilities (article 41 (3) and Annex 3 ISO), is added to the SST net assets, positively impacting the calculation of the core capital (article 48 (1) ISO). The market value margin is calculated as the sum of the expected values of the discounted capital costs of each one-year risk capital over the future one-year periods required by the insurance undertaking to fulfil its insurance liabilities. As such, the market value margin is intended to cover the cost of holding the regulatory required capital for the run-off of the in-force business in the event an insurance undertaking ceases business operations. However, it is important to note that, pursuant to the nISO, the market value margin will no longer be added to the SST net assets when calculating the core capital (but is still considered in the determination of the market consistent (*marktkonform*) value of liabilities, article 30 (4) nISO). Instead, under the nISO, the core capital equals the sum of the SST net assets plus the Tier 1 risk-absorbing capital instruments, to the extent eligible for inclusion in the core capital (*cf.* article 32 (2) nISO).

ii. Supplementary capital (ergänzendes Kapital)

Pursuant to Swiss capital regulation insurance undertakings have the flexibility to augment their regulatory capital by adding so-called supplementary capital (*ergänzendes Kapital*) to their core capital. This supplementary capital is comprised of risk-absorbing capital instruments (*risikoabsorbierende Kapitalinstrumente*), in particular subordinated bonds and loans, which possess certain specific equity-like characteristics (so-called hybrid capital). Risk-absorbing capital instruments can be included in the risk-bearing capital or considered in the target capital.





3) Previous Requirements for the Eligibility of Risk-Absorbing Capital Instruments

The previous regulatory framework distinguishes between upper and lower supplementary capital. Upper supplementary capital (*oberes ergänzendes Kapital*) is perpetual (*i.e.*, it does not have a fixed maturity date) and can be included in the risk-bearing capital up to a maximum of 100% of the core capital. Lower supplementary capital (*unteres ergänzendes Kapital*), on the other hand, has an original maturity of at least five years. It can be included in the risk-bearing capital up to a maximum of only 50% of the core capital. In addition, in the last five years of the relevant instrument's term, the amount eligible for inclusion in the risk-bearing capital is reduced annually by an amount equal to 20% of the original nominal amount of the instrument (articles 47 and 49 ISO).

In order to qualify as risk-absorbing instruments pursuant to article 22a ISO and therefore be eligible for inclusion in the insurance undertaking's risk-bearing capital or consideration in its target capital, the following requirements must be met:

– the instrument is actually paid-in and not secured with assets of the insurance undertaking;

– the terms of the instrument do not allow any set-off against claims of the insurance undertaking;

– the terms of the instrument irrevocably stipulate that it is either (i) subordinated to the claims of all other creditors in the event of liquidation, bankruptcy or restructuring procedures with respect to the insurance undertaking, or (ii) will be converted into statutory equity upon the occurrence of certain conditions;

– the terms of the instrument entitles or under certain circumstances forces the insurance undertaking to defer or cancel interest payments;

- the terms of the instruments stipulate that the debt and unpaid interest carry a loss without forcing the insurance undertaking to cease its activities;
- the terms of the instrument does not in any way require the debt to be repaid prior to the stated maturity date, other than in the event of a liquidation of the issuer; and
- the instrument may not be repaid voluntarily at the option of a holder of the instrument and any voluntary prepayment requires prior approval by FINMA (which shall be granted if the insurance undertaking can show that such prepayment will not jeopardize its solvency).

Not only the issuer of the risk-absorbing capital instrument can benefit from their inclusion in the risk-bearing capital or consideration in the target capital. Inclusion or consideration is also permitted at the group level with respect to the relevant consolidated group SST (article 198 ISO).

4) Changes Proposed for the Eligibility of Risk-Absorbing Capital Instruments

The inclusion of risk-absorbing capital instruments in the risk-bearing capital or consideration in the target capital will remain possible under the nISO. However, the nISO introduces several important changes, primarily aimed at integrating the new restructuring regime for insurance undertakings and increasing comparability with the capital requirements outlined in EU insurance regulation (*i.e.*, "Solvency II").

5) Separation of risk-absorbing capital instruments into Tier 1 and Tier 2 instruments

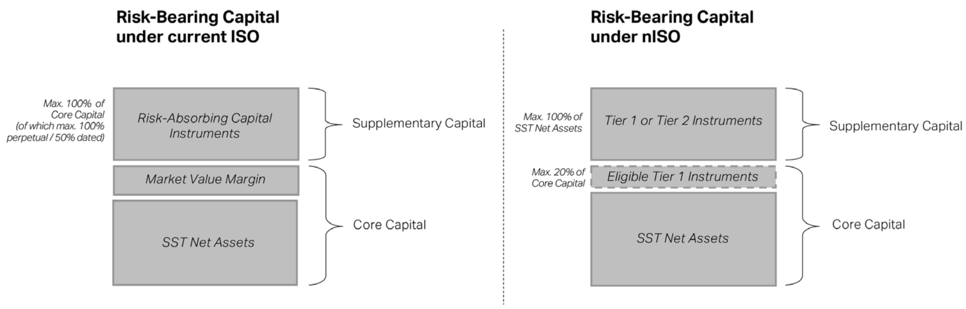
Similar to Additional Tier 1 Capital (AT1) and Supplementary Capital (Tier 2 Capital, T2) under the tiered capital requirements for banks set out in the Ordinance on the Capital Adquacy and Risk Diversification of Banks and Securities Firms (*Eigenmittelverordnung*; CAO), the nISO divides risk-absorbing capital instruments into Tier 1 instruments and Tier 2 instruments.

Tier 1 and Tier 2 instruments differ not only with respect to their maturity, but also based on their capacity to absorb losses while the (re-)insurer remains a going concern (cf. articles 34, 37 and 38 nISO):

	Tier 1 Instruments	***Tier 2 Instruments***
Maturity	Perpetual (*i.e.*, no fixed maturity date)	Perpetual or minimum maturity of five years
Principal loss absorption	Contractually defined conversion into statutory equity or complete or temporary write-down at least if (i) SST ratio falls below 80%, (ii) risk of insolvency exists or (iii) license is revoked	None (but see "Liquidity protection" and "Determination of over-indebtedness" in this table)
Liquidity protection	Contractually defined deferral of (re-)payment of nominal amount and interest at least if (i) SST ratio falls below 100% or (ii) there is a risk of insolvency	Contractually defined deferral of (re-)payment of nominal amount and interest at least if (i) SST ratio falls below 100% or (ii) there is a risk of insolvency
Inclusion in risk-bearing capital	Can either be included in the core capital (up to a maximum of 20% of the core capital) or be included in the supplementary capital (up to a maximum of 100% of the SST net assets)	Can only be included in the supplementary capital (up to a maximum of 100% of the SST net assets)
Determination of over-indebtedness	Treated as liability in determination of over-indebtedness pursuant to article 51a (4) nISA (see below 4) (b))	Excluded as liability in determination of over-indebtedness only if the requirements pursuant to article 51a (4) nISA are contractually defined and fulfilled (see below 4) (b))

Despite the explanatory report to the amendment of the ISO of the Federal Department of Finance dated 2 June 2023 (the **Explanatory Report**) extolling the virtues of Tier 1 instruments, we do not expect to see a large number of Swiss insurance undertakings issuing Tier 1 instruments in the near future, both due to the increased cost of capital for the issuance of Tier 1 instruments and the limited demand given that Tier 2 instruments can also be included in the risk-bearing capital up to 100% of the SST net assets.

In addition to the introduction of tiered risk-absorbing capital instruments, the nISO no longer includes the market value margin for the calculation of the core capital (see above 2)(b)(i)). Side-by-side the risk-bearing capital under the existing ISO and the nISO looks as follows:



b) Future requirements for the eligibility of risk-absorbing capital instruments

Under the nISO, risk-absorbing capital instruments must still satisfy specific requirements to be considered eligible for inclusion in the core capital or supplementary capital, as the case may be.

Eligibility Requirements under current ISO	*Eligibility Requirements under nISO*
Instrument is actually paid-in and not secured with assets of the insurance undertaking (art. 22a(1)(a) ISO)	Instrument is actually paid-in and not secured with assets of the insurance undertaking (art. 37(1)(a) nISO)
No set-off against claims of the insurance undertaking (art. 22a(a)(b) ISO)	No set-off against claims of the insurance undertaking (art. 37(1)(b) nISO)
Instrument either (i) subordinated to the claims of all other creditors in the event of liquidation, bankruptcy or restructuring procedures or (ii) will be converted into statutory equity upon the occurrence of certain conditions (art. 22a(1)(c) ISO)	Instrument either: (1) If Tier 2: includes trigger that entitles/forces insurance undertaking to defer capital payment and interest at least if (i) SST-ratio falls below 100% and (ii) risk of insolvency exists AND fulfils requirements of 51a(4) nISA so as to not be taken into account for determination of indebtedness; i.e. a) Claims for redemption and interest payments are subordinated to all non-subordinated claims and all subordinated claims arising from risk-absorbing instruments non-eligible for inclusion in the risk-bearing capital / target capital in the event of liquidation, bankruptcy or restructuring procedures; b) Claims for redemption and interest payments only satisfied to the extent all senior claims are covered, including in the event of liquidation, bankruptcy or restructuring procedures; and c) No redemption or interest payments if this would lead to serious liquidity issues (2) If Tier 1: in addition to the requirements for Tier 2 instruments, includes trigger that leads to complete write-down or conversion into equity if (i) SST-ratio falls below 80%, (ii) imminent overindebtedness and (iii) loss of license (art. 37(1)(c)(1) and (2) nISO)
New	Contract irrevocably states that FINMA may unilaterally determine that a trigger event as per the above has occurred by notifying the insurance undertaking and includes the creditors' consent with this and with any insolvency measures pursuant to art. 51a nISO ordered by FINMA (art. 37(1)(c)(3) and (4) nISO)
Insurance undertaking entitled to or, under certain circumstances, forced to defer or cancel interest payments (art. 22a(1)(d) ISO)	Instrument is intended to be permanent and voluntary prepayment requires insurance undertaking's consent and prior FINMA approval (art. 37(1)(d) nISO)
Debt and unpaid interest carry a loss without forcing the insurance undertaking to cease its activities (art. 22a(1)(e) ISO)	Repayment of dated instruments only permitted if (1) redemption does not lead to SST-ratio fallowing below 100% or a risk of insolvency, or (2) instrument is replaced by an instrument or equal or higher value (art. 37(1)(e) nISO)
No requirement that the debt to be repaid prior to the stated maturity date, other than in the event of a liquidation of the issuer (art. 22a(1)(f) ISO)	
No voluntary prepayment at the option of a holder of the instrument and any voluntary prepayment requires prior FINMA approval (art. 22a(a)(g) ISO)	

Although the eligibility requirements for risk-absorbing capital under article 37 nISO are partially aligned with the existing requirements under article 22a ISO, there are some notable differences to consider. The most significant change is obviously the introduction of two different tiers for risk-absorbing capital instruments (see above under 4) (a)). But article 37 nISO also introduces several other significant changes.

Firstly, in order to be approved by FINMA for inclusion in the risk-bearing capital or consideration in the target capital, risk-absorbing capital instruments have to fulfill the requirements set out in article 51a (4) nISA. This ensures that they be excluded for the purposes of determining the issuer's over-indebtedness, preventing a situation where somewhat ironically the claims arising from a risk-absorbing capital instrument might themselves trigger an over-indebtedness and undermine the instruments' loss-absorbing function. However, there is an important distinction with regard to the treatment of Tier 1 instruments. Article 37 (1) (c) (2) nISO states that Tier 1 instruments are treated as a liability in assessing the imminent risk of over-indebtedness and, consequently, whether a write-down or conversion into equity is triggered. As further set out in the Explanatory Report, on a timeline, the Tier 1 trigger event of "imminent over-indebtedness" occurs before the Tier 2 trigger event of "risk of insolvency" (*i.e.*, reasonable concern that on a statutory basis the legal entity's liabilities are no longer covered by its assets). For both Tier 1 instruments (to the extent they are not written down or converted into equity at that point in time) and Tier 2 instruments, the risk of insolvency triggers a deferral of the repayment of the nominal amount and of interest payments.

Secondly, article 37 (1) (e) nISO introduces a new requirement regarding the repayment of Tier 2 instruments with a fixed maturity. The terms of the instrument must state that repayment is only permitted to the extent that either (i) such repayment does not cause the SST ratio to fall below 100% and does not result in a risk of insolvency or (ii) the instrument is replaced by another (Tier 1 or Tier 2) instrument which is not only of equal or higher quality but also has an equal or more favourable impact on the SST calculation with respect to the amount included in the risk-bearing capital. However, article 37 nISO no longer *a priori* prevents prepayments prior to the stated maturity date of the relevant instrument (albeit still requiring prior FINMA approval). In this context, article 37 (1) (d) nISO should be understood as an editorial improvement to clarify article 22a (1) (g) ISO without introducing any substantive change.

Thirdly, article 37 (1) (c) (3) and (4) nISO introduce new contractual requirements. The underlying documentation must irrevocably state that FINMA has the unilateral power to conclusively trigger Tier 1 and Tier 2 instruments by notifying the insurance undertaking that a trigger event has occurred. The documentation must also include explicit consent by the creditors to FINMA's power to unilaterally trigger the risk-absorbing instrument and any other measures FINMA may choose to take in the event of insolvency risks (article 51a nISA).

Pursuant to FINMA's current practice, risk-absorbing capital instruments may contain a moderate incentive (*e.g.*, interest step up) for repayment without limitations as to the time when such incentive applies. Article 37 (3) nISO codifies this practice for Tier 2 instruments, but such incentive may only kick in ten years after the issue date of the instrument.

Finally, under both article 22a ISO and article 37 (8) nISO, FINMA has the ability to set additional eligibility criteria for risk-absorbing capital instruments to be included in the supplementary capital or considered in the target capital, in particular with regard to assessing the quality of the instruments, their legal enforceability, the fungibility of capital and the default risk of the respectively committed entity. In addition, pursuant to article 37 (8) nISO, FINMA may also impose additional requirements in individual cases. Taking into account the recent comprehensive revisions of the relevant provisions in the ISA and ISO with the legislators stated desire to increase legal certainty and clarity, FINMA should refrain from exercising this authority or at least codify any additional requirements in appropriate form.

c) Eligibility of risk-absorbing capital instruments on group level

Under the existing rules, article 198 ISO allows insurance groups to include risk-absorbing capital instruments in the group risk-bearing capital with respect to the consolidated group SST. Article 198d nISO will introduce more stringent eligibility requirements, but still allows the parent company or another group company to provide guarantees (the **Guaranteeing Group Entity**) in connection with such risk-absorbing capital instruments.

In order to be eligible on a group level, the instruments must fulfil the following requirements:

– the requirements of article 37 nISO are met with respect to the issuing group company as well as the parent company or group entity (in particular, the Guaranteeing Group Entity);

– the instrument is not secured with assets of the parent company or any other group company (in particular, the Guaranteeing Group Entity);

– the respective Tier 1 or Tier 2 trigger also makes reference to the SST ratio of the consolidated group SST and the insolvency risk of the top group company, as well as any Guaranteeing Group Entity, to the extent applicable;

– to the extent there is an intragroup guarantee, the risk of double payment by the Guaranteeing Group Entity is appropriately limited; and

– appropriate measures are taken to ensure that the risk-absorbing effect is maintained from a group perspective.

By extending the decisive triggers and references regarding insolvency risk to the issuing group company, the Guaranteeing Group Entity and/or the top group company, the revised ISO aims to prevent financial resources flowing out of the group due to payments arising under risk-absorbing capital instruments in situations where the group and the top group company no longer meet the requirements of the consolidated SST and face the risk of insolvency, respectively.

With regard to the appropriate measures to maintain the instruments' risk-absorbing effect from a group perspective, the Explanatory Report explicitly refers to the measures being adequate and not necessarily absolutely certain.

Further, the Explanatory Report clearly states that risk-absorbing capital instruments may be issued through foreign special purpose vehicles, with the proceeds being upstreamed by way of group-internal loans. This clarification is particularly important given that in practice risk-absorbing capital instruments are often issued via foreign special purposes vehicles for withholding tax reasons.

d) Transitional provisions

Article 216c (1) nISO allows for grandfathering periods for risk-absorbing capital instruments issued and approved as eligible by FINMA under the existing ISO. Instruments that do not meet the eligibility requirements of article 37 nISO can be included in the supplementary capital or considered in the target capital until the earlier of (i) the repayment date and (ii) 10 years following the revised ISO entering into force (*i.e.*, expected to run until 2034).

The draft amendment of the ISO (published on 17 May 2022) provided that risk-absorbing capital instruments issued and approved as eligible by FINMA under the existing ISO, but which do not meet the eligibility requirements of article 37 nISO, are exempt from a bail-in by way of conversion into equity or write-down pursuant to article 52d (4) nISA for a maximum of 10 years following the revised ISO entering into force. This transitional provision has been deleted in the revised ISO. In our view, this deletion should not be interpreted to mean that risk-absorbing capital instruments are not excluded from the conversion and write-down of claims under article 52d (4) nISA. Rather, the later provision should not apply retroactively to risk-absorbing capital instruments issued prior to the adoption of the revised ISA. Otherwise, the legislators' intent to increase legal certainty and predictability would be undermined.

5) Issues in Practice

Despite not even having entered into force, the revised rules on the eligibility of risk-absorbing capital instruments have already brought to light a number of issues which merit a closer look.

a) Infection risk if eligibility of risk-absorbing capital instrument is revoked during their term

Article 51 (4) (a) nISA discounts risk-absorbing capital instruments from being included in the determination of the issuing entity's over-indebtedness if they fulfil certain requirements (see above 5)(b)). If FINMA revokes the relevant instruments eligibility, in particular due to the lapse of the grandfathering period for legacy instruments (see above 5)(d)), claims arising out of such instruments (if they do not fulfil the requirements of article 51 (4) nISA) would suddenly be included in the determination of the issuer's over-indebtedness and could therefore trigger an insolvency event. In practice, however, if such instruments are no longer eligible for inclusion in the risk-bearing capital anymore (*e.g.*, at the end of the grandfathering period), they will likely be called for redemption. The reason being that such instruments would then constitute an overly expensive form of funding.

b) Effect of risk-absorbing capital instruments on the SST

Pursuant to article 34 (1) (a) nISO, the effect of risk-absorbing capital instruments on the SST by inclusion in the risk-bearing capital or consideration in the target capital in terms of amount is determined by (a) the market consistent value (*i.e.*, the financial expenditures of the issuer to fulfil the relevant liabilities; cf. article 27 nISO) on the effective date of the instrument's inclusion in the risk-bearing capital and (b) the effect on the target capital for consideration in the target capital.

In our view it is not sufficiently clear how the market consistent value of the risk-absorbing capital instrument would be recognized in the SST net assets and eligible with respect to the risk-bearing capital. For instance, if such instrument traded at 80% of its nominal value on the effective date of its inclusion in the risk-bearing capital, article 34 (1) (a) nISO implies that it would only be included to that extent in the risk-bearing capital, but for purposes of the SST net asset calculation added to the liabilities at 100% of its nominal value.

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SIX Enforcement Actions in 2023

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2023 was a fairly busy year for SIX Exchange Regulation (SER), the regulatory body of the SIX Swiss Exchange, in terms of enforcement and sanctions proceedings. 2023 saw a striking increase in enforcement proceedings and investigations compared to 2022. In these proceedings and investigations, SER focused in particular on breaches of the ad hoc publicity rules. While there were already a number of ad hoc publicity related investigations and decisions in 2022, SER concentrated even more of its efforts on ad hoc publicity matters in 2023 with a significant increase in sanctions decisions and newly opened investigations (many of which are still ongoing). As in previous years, SER also continued reviewing and, where necessary, investigating financial reporting of listed companies. Moreover, in 2023 SER also made use of its most far-reaching sanction tool by ordering the delisting of three companies.

By Martina Pavicic / Patrick Schärli

1) Strong focus on violations of the rules on ad hoc publicity

From January to end of November 2023, SER initiated ten investigations, all of which were due to potential violations of the rules on *ad hoc* publicity. As of end of November, only two of these investigations were already concluded (see the decision in the matters Alcon Inc. and Perrot Duval Holding SA below). Hence, we expect further sanctions decisions on non-compliance with *ad hoc* publicity rules to be announced in the coming months.

Between January 2023 and end of November 2023, SER also concluded three investigations on potential violations on *ad hoc* publicity that were initiated before 2023. These various proceedings resulted in fines of between CHF 25,000 and CHF 125,000 and concerned the following matters:

- ***Alcon Inc. (fine: CHF 100,000)***: Due to a human error by an external service provider, the distribution of an *ad hoc* announcement was delayed (*i.e.* operation of the e-mail distribution (push system) only by 11.25 a.m. as opposed to no later than 7.30 a.m.). The Sanctions Commission of SIX Group AG (Sanctions Commission) concluded that the delayed push e-mails constituted a violation of the SIX Directive on *Ad Hoc* Publicity and qualified the degree of fault as negligent, the severity of the breach as "serious but not as severe".

- ***Perrot Duval Holding SA (fine: CHF 25,000)***: The company published its Annual Report 2021/2022 with undue delay. The Sanctions Commission qualified the degree of fault as negligent and the severity of the breach as "light".

- ***Airesis SA (fine: CHF 50,000)***: The Sanctions Commission held that the advance disclosure of price-sensitive facts on 7 April 2022 by a subsidiary of Airesis SA via

LinkedIn and the subsequent belated publication of the same price-sensitive facts by Airesis SA five days later on 21 April 2022 violated the SIX Listing Rules and the SIX Directive on *Ad hoc* Publicity. It qualified the degree of fault as grossly negligent and the severity of the breach as "severe".

- ***Relief Therapeutics Holding SA (fine: CHF 125,000)***: The subject of SER's investigation was the timing of the publication of the refusal by the newly elected member and Vice Chairman of the Board of Directors to take over this position as well as the publication timing of several other *ad hoc* announcements, the content of which had been published in advance by a contractual partner. The period investigated extended from March 2020 to July 2022. As regards the matter of the Vice Chairman, SER held that the SIX Listing Rules and the SIX Directive on *Ad hoc* Publicity have been violated intentionally, by waiting for at least three and a half months before disclosing this fact in a side note of another *ad hoc* announcement. The Sanctions Commission fully concurred with SER's sanction proposal. Further, the Sanctions Commission held, that the repeated late disclosure of price-sensitive facts by one or more days after the contracting party had already published them was grossly negligent. It qualified the severity of the breach as "very severe" in the case of late notification of the refusal of the election and as "severe" in the cases of multiple late notifications of price-sensitive facts.

- ***Swissquote Group Holding SA (fine: CHF 75,000)***: The SER investigation was prompted by the *ad hoc* announcement published on 16 June 2021 entitled "Swissquote expects record half-year results thanks to exceptional growth". The Sanctions Commission concluded that the delayed operation of the push system, approximately three hours after the distribution of the *ad hoc* announcement and during trading hours, constituted a violation of the SIX Directive on *Ad hoc* Publicity. The Sanctions Commission qualified the severity of the breach as "serious but not as severe" (in particular because, despite the issues encountered with the push system, the *ad hoc* announcement was broadly distributed to media and market participants).

By comparison, in 2022 the Sanctions Commission only imposed one fine with regards to violations of the rules on *ad hoc* publicity (*i.e.* against Interroll Holding Ltd in the amount of CHF 100,000) and SER submitted a further request for a sanction (*i.e.* against Evolva Holding SA) to the Sanctions Commission. SER also initiated four investigations into potential violations of the rules on *ad hoc* publicity in 2022. One of these investigations was already closed in 2022 (*i.e.* against Spice Private Equity Ltd), as SER came to the conclusion that it would not pursue the possible violation any further. Two of the investigations resulted in the Sanctions Commission imposing a sanction in in 2023 (see the decision regarding Airesis SA and Swissquote Group Holding SA above) and one investigation (*i.e.* against Poenina Holding Ltd) remains a pending matter at this time.

The published sanctions decisions clearly show the importance of timely and complete disclosure of price sensitive facts through all relevant channels (including submission to SIX through Connexor, publication on company's website, distribution through push e-mail system). Many listed companies have outsourced the technical aspects of the publication of *ad hoc* publications (and other media releases) to third-party service providers, but it is evident from the SIX sanction decisions that listed companies remain fully responsible for timely publication of their *ad hoc* communications even where they use a third-party service provider.

2) Continued focus on corporate and financial reporting

As in previous years, SER closely followed and reviewed corporate reporting, in particular financial reporting. From January to end of November 2023 the Sanctions Commission issued three decisions relating to financial reports and SER moreover reached a settlement agreement in one further case:

- ***Clariant Ltd (fine: CHF 150,000):*** The Sanctions Commission determined that Clariant Ltd negligently violated the applicable financial reporting rules and thereby its obligations pursuant to the SIX Listing Rules and the SIX Directive on Financial Reporting by booking provisions in the 2020 annual financial statements that did not comply with the IFRS requirements for the recognition of such provisions.

- ***Tornos Holding AG (fine: CHF 300,000)***: In its decision of originally 26 March 2020, the Sanctions Commission concluded that Tornos Holding AG violated Swiss GAAP FER by improperly retaining and partially reversing a provision for employee benefit obligations and that, as a result, the 2016 and 2017 financial statements did not present a true and fair view of the company's net assets, financial position and results of operations. Due to these violations of the regulations on financial reporting and thus the SIX Listing Rules as well as the SIX Directive on Financial Reporting the Sanctions Commission imposed a fine of initially CHF 500,000 against Tornos Holding AG. Tornos Holding AG subsequently filed an appeal against this decision with the Federal Administrative Court, in which it was argued that the Federal Administrative Court and not the Court of Arbitration of SIX Group AG was the competent court for the review of the sanction decision. The Federal Administrative Court did not accept the appeal. In addition, Tornos Holding AG had simultaneous initiated proceedings before the Court of Arbitration of SIX Group AG, which were initially suspended until the decision of the Federal Administrative Court. After the arbitration proceedings were resumed, the Court of Arbitration in its final award confirmed the conclusions of the Sanctions Commission, but reduced the fine to CHF 300,000, *inter alia* due to the sensitivity of Tornos Holding AG to monetary sanctions. Tornos Holding AG subsequently filed an appeal against this arbitration decision with the Federal Supreme Court, which the Federal Supreme Court dismissed.

- ***IGEA Pharma N.V. (fine: CHF 100,000)***: SER initiated an investigation against IGEA Pharma N.V. due to its failure to publish the annual report 2021 within the regulatory and repeatedly extended deadline. Following SER's sanction proposal, the Sanctions Commission held that, IGEA Pharma N.V. had failed to publish and file the Annual Report 2021 with SER within the deadline set out in the regulations and extended several times, the last of which ended on 31 August 2022 and only published and filed its Annual Report 2021 on 20 October 2022, in violation of the SIX Listing Rules, the SIX Directive on Regular Reporting Obligations and the SIX Directive on Financial Reporting).

- ***Phoenix Mecano AG (settlement agreement: restatement and a donation of CHF 20,000)***: In its 2022 half-year financial statements Phoenix Mecano AG disclosed that an internal investigation had been opened due to irregularities in connection with customer orders, external sales and trade receivables at a U.S. subsidiary. As a consequence, the operating result of the half-year financial statements was reduced by EUR 5.6 million. Out of this amount, expenses of EUR 4.7 million related to corrections from previous periods that rather should have been recognized as a restatement. Due to the fact that these errors were not corrected on an accrual basis, including a restatement of the previous period, but instead were fully charged against the current results, the 2022 half-year interim financial statements were misstated. As part of the settlement agreement with SER, Phoenix Mecano AG has undertaken to correct and disclose the errors by means of a restatement of its financial statements and to make a donation of CHF 20,000 to the Foundation for Accounting and Reporting Recommendations (*Stiftung für Fachempfehlungen zur Rechnungslegung*).

In comparison, in 2022, the Sanctions Commission also imposed fines on three listed companies in connection with the violation of financial reporting regulations, with the amount of the fines being CHF 50,000 (against Evolva Holding SA), CHF 100,000 (against Rapid Nutrition PLC) and an undisclosed amount in one case (against Blackstone Resources AG).

3) Three delisting sanctions

Although delisting of a company's shares is probably the most severe sanction available under the listing rules and the SIX sanctions regime, there were a total of three enforced delistings in 2023 to date (*i.e.* Talenthouse Ltd, Baar ZG, IGEA Pharma N.V., Hoofddrop NL and Achiko Ltd, Zurich, all of which originally became listed companies by way of so-called direct listings). These three delisting proceedings were initiated due to serious doubts about the solvency of the respective issuer or, in the case of Achiko Ltd, due to the opening of liquidation proceedings. Both Talenthouse Ltd and IGEA Pharma N.V. have appealed against the delisting decision. The Appeals Board of SIX Group Ltd (Appeals Board) granted Talenthouse Ltd's appeal against the delisting suspensive effect until the end of November, meaning that the delisting of Talenthouse

Ltd has been postponed until further notice. In contrast, the Appeals Board dismissed the appeal by IGEA Pharma N.V. and confirmed the original delisting decision of the Regulatory Board and thus the delisting of the shares of IGEA Pharma N.V. and 3 November 2023 as the last trading day. The formal delisting of IGEA Pharma N.V. will not take place, while the deadline for filing an appeal against the Appeals Board's decision is still running.

In comparison, there was only one enforced delisting in 2022 (Blackstone Resources AG, Baar), which the Regulatory Board decided to delist at SER's request due to the lack of an auditor. However, the company itself had also submitted a delisting application a few days after SER's request, which was then no longer considered.

4) Conclusion

In 2023, SER made active use of its various enforcement options, particularly in comparison to previous years, and in particular did not shy away from using even its most significant sanction, the delisting, in case a company no longer meets the expectations that investors have for a listed company. In particular, the published sanctions decisions and investigations show that there currently is a strong focus on compliance with *ad hoc* publicity rules; a trend which is likely to continue in 2024 due to a number of outstanding investigations and also in light of the recently revised directive and newest communications from SIX on this topic.

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Reduced Scope of *per se Ad Hoc* Obligations on SIX

Reference: CapLaw-2023-59

As of 1 February 2024 the current per se Obligation of Issuers having only Bonds listed on SIX Swiss Exchange to publish their Financial Reports by way of an Ad Hoc Announcement is abolished.

By René Bösch / Patrick Schleiffer

The rules on *ad hoc* publicity of SIX Exchange Regulation applies to Swiss and non-Swiss issuers who have securities listed on the SIX Swiss Exchange, in case of non-Swiss issuers, however, only if they have no securities (be it equity or debt) listed in their home country. Accordingly, any issuer who exclusively has bonds listed on the SIX Swiss Exchange, but in case of non-Swiss issuers not at the same time in their home jurisdiction, is subject to the *ad hoc* publicity rules of the SIX Exchange Regulation. Conversely, if a non-Swiss issuer has also securities listed in its home jurisdiction (which according to the practice of the SIX Exchange Regulation do not have to be of the same type as those listed in SIX Swiss Exchange), it is not subject to the *ad hoc* publicity regime of SIX Exchange Regulation.

This regime has been criticized by issuers who only have debt instruments listed on the SIX Swiss Exchange. This is because pursuant to the current *ad hoc* publicity regulation, annual as well as interim reports of an issuer with listed securities on the SIX Swiss Exchange have ***always*** to be published by way of an *ad hoc* announcement, irrespective of the type of securities listed on SIX Swiss Exchange. Mere bond issuers noted that this is overreaching because debt securities have a risk profile that is different from that of equity securities, and therefore most financial statements published would in reality not contain price sensitive information in relation to debt securities. Moreover, for non-Swiss issuers of debt securities who do not have any equity or debt instruments listed in their home country that regulation was overly burdensome because of the formal and technical requirements they had to fulfill for the posting of the *ad hoc* announcements pursuant to the SIX regulations.

Recognizing the difference between equity and other type of securities, SIX Exchange Regulation, with effect as of 1 February 2024, has finally revised its listing rules and directive on *ad hoc* publicity to specify that annual and interim reports are only considered *per se ad hoc* relevant for those issuers who have a primary listing of equity securities on SIX Swiss Exchange. Accordingly, as of entry into effect of the amended rules on 1 February 2024, issuers who have only bonds listed on the SIX Swiss Exchange (and in the case of non-Swiss issuers, no securities in their home country) will only have to publish their financial reports by way of an *ad hoc* announcement if they are assessed by such issuers as price-sensitive for their SIX Swiss Exchange listed bonds. However, in the absence of near insolvency or similar situations, this will not often be the case.

It has to be noted that all other *ad hoc* publicity rules of SIX Exchange Regulation remain applicable to Swiss and non-Swiss bond issuers (with no securities listed in their home jurisdiction), *i.e.*, they have to maintain a pull and push system with respect to their *ad hoc* announcements.

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The Continuing Conundrum in Public Tender Offers: Treatment of Participation Plans

Reference: CapLaw-2023-60

The Swiss Takeover Board ("TOB") applies a relaxed standard to modifications of participation plans concerning the target's board members and executives ("PPs"). This conflicts with the doctrine of ancillary benefits. In a recent newsletter the TOB seemed to announce a change in the doctrine of modifications to PPs in connection with a public offer so as to align it with the doctrine of ancillary benefits. However, in subsequent orders, the TOB has backtracked on its previous announcement.

By Ralph Malacrida

1) Introduction

A public tender offer for shares of a Swiss listed company typically succeeds only if the target's board of directors and management are supportive of the offer and if the bidder has the prospect of being able to buy 100% of the target's shares. Therefore, executive (equity) compensation is a key factor in public offers. Most listed companies offer participation plans to board members, senior management and key employees. In view of a takeover offer involving a change of control over the target company, PPs either provide for special rules or must be modified to enable the beneficiaries of restricted shares or unvested awards to either sell or exchange their interests or benefit from a cash settlement rather than end up as minority shareholders in a delisted target company. Likewise, a bidder will not want to launch a public offer if it is not able to acquire 100% of the target shares.

The treatment of PPs in the context of public offers can raise complex questions, in particular concerning the applicability of general principles of takeover law, the legality of modifications to existing plans, and/or the provision of additional benefits in connection with a public offer. Swiss law on public offers does not provide for special rules regarding PPs. Therefore, the TOB must deal with these issues on the grounds of general principles of Swiss takeover law, trying to find middle ground between the interests of the target companies, the members of the board and management, the shareholders and the bidders. The TOB has issued a plethora of orders dealing with the treatment of PPs in the context of public tender offers. However, there is a misalignment of the TOB's doctrine of modifications of PPs and its general doctrine of ancillary benefits. Since the TOB generally omits to state the detailed reasons upon which its conclusions are based, the TOB's practice is a continuing conundrum.

The most recent twist on the treatment of PPs in connection with public offers is evidenced by the TOB's release of a newsletter on 10 May 2023 (the "**Newsletter**") and the TOB's subsequent orders. In the Newsletter, the TOB seemed to announce a tightening of standards – but in subsequent orders backtracked on its previous announcement. Market participants are now left to wonder how the conundrum continues.

2) Participation Plans

PPs are available in many forms. Common elements of board and executive compensation involve one or more of the followings features.

– ***Short term incentive plans*** are variable incentive plans for key employees designed to deliver executive management compensation that is competitive and recognizes employees for their contributions in achieving short-term performance objectives as established by the board of directors or, if delegated to it, the compensation committee. The short term incentive programme is typically tied to cash payments, but may involve any other form of remuneration.

– ***Long term incentive plans*** are variable incentive programmes designed to deliver executive management compensation that recognizes employees for their contributions in achieving long-term performance objectives as established by the board of directors, or, if delegated to it, the compensation committee, and aligns executive management and board members with shareholders in focusing on long-term growth and stock performance. The long-term incentive awards are typically structured as awards in the form of stock options, restricted stock units, performance stock units or cash, or may consist of shares, restricted shares, deferred stock units, share appreciation rights, other financial instruments or derivatives, and any other form of remuneration.

– ***Retention bonuses*** are extra payments given to selected employees as a way of persuading them not to leave the company at a time when it is experiencing big changes (notably a change of control).

3) Interests of Bidder, Members of Target's Board/Management, and Shareholders

In a takeover scenario the ***shareholders*** of a target company are interested in receiving an opportunity to sell shares at a premium to trading value and in being treated equally with managers or board members who are holders of shares and/or equity awards.

The ***members of the board*** and the ***key employees*** expect to receive a cash compensation (or an equivalent roll-over) in relation to the shares or equity awards received under the applicable PPs. As a matter of fact, the board members and senior management of the target company are instrumental for the success of a public offer and therefore have clout in negotiating terms concerning their own compensation.

Finally, it is in the interest of the ***bidder*** to be able to acquire 100% of the target company, keep transaction costs low, and retain key employees. If proposed bonuses or modifications to existing PPs involve costs or risks, the bidder will want to reflect this in a reduced offer price. In consequence, in the run up to a change of control takeover transaction, the bidder is the antagonist of the members of the board and management when it comes to modifying board and executive compensation.

The TOB's task is to weigh the interests of the protagonists in a takeover process against the applicable rules and regulations of Swiss takeover law, including the price rules and the principle of equal treatment, which are the key criteria to assess modifications to PPs.

4) Guiding Principles in Change of Control Offers

a) Before Publication of an Offer

The ***minimum price rule*** (article 135 (2) FMIA) is relevant if shares in the target are purchased by a bidder or parties acting in concert with the bidder before a public offer is made that results in a change of control (see article 9 (6) Takeover Ordinance). According to the minimum price rule, the offer price must be at least equal to the higher of the stock exchange price and the highest price paid by the bidder and the persons acting in concert with the bidder for equity securities of the target company during the preceding twelve months.

The bidder and the target company are ***acting in concert*** as of the time when they sign a transaction agreement (see *e.g.* TOB Order 770/01 of 26 August 2022 in the matter Sunrise Communications Group AG, N 30). Therefore, for as long as the bidder and the target company are negotiating a transaction agreement, the minimum price rule does not apply to agreements between the target and its board or management regarding compensation matters.

As a matter of principle, the ***best price rule*** applies to purchases ***after*** a public offer is published (see below clause 4b)). Exceptionally, in the event of a "**combined overall transaction**" (*gekoppelte Gesamttransaktion*) the best price rule applies even if shares in the target are purchased ***before*** a public offer is made. This is intended to prevent circumventions of the best price rule (TOB Order 849/02 of 15 August 2023 in the matter of Schaffner Holding AG, rec. 15 f.; TOB Order 846/02 of 4 August 2023 in the matter of Von Roll Holding AG, rec. 12; TOB Order 846/01 of 23 June 2023 in the matter of Von Roll Holding AG, rec. 28; TOB Order 730/01 of 28 May 2019 in the matter of Alpiq Holding AG, rec. 22). A combined overall transaction is deemed to occur if a purchase agreement and a public offer are linked and subject to the same conditions (except conditions that are necessary or essential to complete the purchase or the offer).

For example, a combined overall transaction would be assumed if during the pre-offer phase the target company agreed with a member of senior management – who holds equity awards – to pay an additional special bonus, conditional on the successful completion of the public offer. In this scenario, the best price rule would apply, and the value of the additional bonus would have to be taken into account when determining the total price paid to the senior manager for his tendered shares.

b) After Publication of the Offer

According to the ***best price rule*** (article 10 (1) Takeover Ordinance), if a bidder buys equity securities of the target company at a price which is above the offer price during the period between the publication of the offer and six months after the expiry of the additional acceptance period, the bidder must offer the higher price to all recipients of the offer. The best price rule is a reflection of the principle of equal treatment, which provides that holders of equity securities of the same type must be treated equally (TOB Order 849/02 of 15 August 2023 in the matter of Schaffner Holding AG, rec. 6; TOB Order 846/02 of 4 August 2023 in the matter of Von Roll Holding AG, rec. 4; TOB Order 846/01 of 23 June 2023 in the matter of Von Roll Holding AG, rec. 18). The best price rule is violated if the price paid for equity securities or derivatives by the bidder or a person acting in concert with the bidder (within the meaning of article 11 (1) Takeover Ordinance) is higher than the offer price. As pointed out above (see clause 4a)), in the event of a "combined overall transaction" the best price rule may apply to transactions that were entered into before the publication of the offer.

If a selling shareholder receives not only the official offer price but also other (ancillary) benefits from the bidder or a person acting in concert with the bidder, the value of these benefits must be added to the official offer price with the effect that the offer price must be increased to comply with the best price rule. Conversely, if a selling shareholder provides benefits to the bidder, the value of these benefits may be deducted from the offer price (see article 43 (4) FMIO-FINMA).

It is the bidder's responsibility to determine whether ancillary benefits exist and to value these benefits (TOB Order 849/02 of 15 August 2023 in the matter of Schaffner Holding AG, rec. 8; TOB Order 846/02 of 4 August 2023 in the matter of Von Roll Holding AG, rec. 6; TOB Order 846/01 of 23 June 2023 in the matter of Von Roll Holding AG, rec. 21). If a bidder anticipates a risk of the review body and/or the TOB identifying ancillary benefits, the bidder will want to appoint a valuation expert to determine and value these potential benefits prior to the publication of the offer so as to ensure that no shareholder receives more than the official offer price. Typically, the bidder seeks formal pre-clearance by the TOB to avoid the risk of breaching price rules.

5) The TOB's Doctrine of Modifications to PPs

a) Relaxed Standard

In a public offer for shares in a Swiss listed company, where the buyer is purchasing the target as a whole, equity awards are usually either cashed out or rolled over.

Quite often, existing PPs provide for ***the unblocking of restricted shares***, the ***acceleration of unvested equity awards*** and/or ***cash settlement*** in connection with a change of control transaction. If the awards being cashed out are subject to performance-vesting conditions, the applicable level of performance will need to be determined either by agreement between the bidder and the target company or based on the terms of existing PPs. If existing PPs do not address change of control scenarios, the target company will have to modify the PPs to permit the unblocking of shares, the acceleration of the unvested equity awards and/or cash settlements, subject to compliance with any limitations imposed by employment and corporate law.

While these modifications to PPs are favourable for employees, they are not necessarily ideal for the acquiring bidder. When shares are unblocked and options become fully vested and are exercised, target employees have less incentive to stick around and will be open to offers from elsewhere. Therefore, modifications to PPs are sometimes combined with the payment of ***retention bonuses*** to key employees.

The bidder and the target company are acting in concert as soon as they have entered into a transaction agreement. As of that point in time, equity awards or bonus payments made by the target company in favour of the target's employees or members of the board are subject to compliance with the best price rule and the duty to treat shareholders equally (TOB Order 823/01 in the matter of Valora Holding AG, N 8 and 29; TOB Order 770/01 of 26 August 2020 in the matter Sunrise Communications Group AG, N 11 and 30).

In essence, the TOB has applied a relaxed standard when reviewing bonus payments and modifications to existing PPs by taking the view that customary modifications do not result in the applicability or violation of the best price rule so that no valuations must be produced to determine the value of potential benefits.

b) Modifications to PPs

By way of illustration, the TOB has confirmed that the best price rule does not apply or is not violated in relation to the following modifications of existing PPs:

– The ***termination of blocking periods*** in relation to restricted shares, which allows the beneficiaries to tender their shares during the additional acceptance period (TOB Order 849/04 of 6 November 2023 in the matter Schaffner Holding AG N 11; TOB

Order 823/01 of 25 July 2022 in the matter Valora Holding AG N 36; TOB Order802/02 of 14 January 2022 in the matter Vifor Pharma AG N 36).

– The ***acceleration of vesting periods*** in relation to equity (share or option) awards (TOB Order 802/02 of 14 January 2022 in the matter Vifor Pharma AG; TOB Order 823/01 of 25 July 2022 in the matter Valora Holding AG, N 44), even if entitlements are not reduced *pro rata temporis* provided that existing PPs do not require such a reduction (TOB Order 770/01 of 26 August 2020 in the matter Sunrise Communications Group AG, N 33 et seq.).

– The ***cash settlement of rights to physical delivery of shares***, which complies with the best price rule if the beneficiaries receive a cash settlement corresponding to the offer price or the intrinsic value of any "in the money-options" or the value determined as per Black Scholes or a binominal model for "out of the money-options" (TOB Order 849/04 in the matter Schaffner Holding AG N 13; TOB Order 823/01 of 25 July 2022 in the matter of Valora Holding AG N 49; TOB Order 802/02 of 14 January 2022 in the matter of Vifor Pharma AG N 39; TOB Order 638/03 in the matter Charles Vögele Holding AG N 20; TOB Order 678/02 of 28 February 2018 in the matter Goldbach Group AG, N 14 et seq.).

– The ***modification of awards without physical delivery*** (cash awards, phantom stocks) (TOB Order 652/01 of 14 February 2017 in the matter Actelion AG, N 38).

c) Pre-Offer Arrangements relating to Executive Compensation

Apart from the modifications to PPs that are referred to in clause 5b) above, which are typically agreed in the transaction agreement between the bidder and the target company, the TOB has confirmed that any ***modification to PPs or additional management or board compensation arrangements before the public offer is made*** falls outside the scope of the best price rule in the absence of a "combined overall transaction".

More precisely, if the target decides to improve the terms of a long term or short term incentive plan or agrees to pay a retention bonus or other bonuses to management or members of the board, these pre-offer compensation arrangements fall outside the scope of the best price rule if they are (a) agreed before a public offer is made and (b) not linked to or contingent on the success of the public offer or the tendering of shares by the respective members of the management or the board (TOB Order 849/02 in the matter Schaffner Holding AG N 14 et seq.; TOB Order 846/02 of 4 August 2023 in the matter Von Roll Holding AG, N 22 et seq.; TOB Order 846/01 in the matter Von Roll Holding AG, N 40 et seq.).

The TOB has not explained why arrangements between the target company (represented by the board of directors) and the members of the board and management concerning modifications to their compensation shortly before a transaction agreement is signed between the target company and the bidder should be exempt from scrutiny of price and equal treatment rules simply because of the absence of a formal condition linking these arrangements to the completion of the public tender offer. The TOB said that abuses should not be tolerated but has not specified the scenarios in which circumventions of the price and equal treatment rules should be assumed.

d) Conflicting Doctrines on Modifications to PPs and Ancillary Benefits

In its orders on modifications of existing PPs the TOB has not given detailed reasons for its conclusions and whether these conclusions were in line with or deviating from the doctrine of ancillary benefits. As a result of this, anyone reading these orders is left to speculate as to the possible route by which the results were achieved. This prevents the practitioners and the parties concerned from ascertaining the basis upon which similar cases will probably be decided in the future.

On the one hand, the TOB has developed the ***doctrine of ancillary benefits***, deciding that, if a bidder not only pays a shareholder the official offer price but also provides other ancillary benefits, these benefits must be taken into account when calculating the total offer price received by a shareholder (TOB 623/01 of 25 February 2016 in the matter Kuoni Reisen Holding AG, N 27).

On the other hand, to illustrate the ***doctrine of modifications of PPs***, the TOB held in several orders that the unlocking of restricted shares by terminating the blocking period so that employees may tender their shares into the offer does not involve a "purchase of shares" as per article 10 (1) Takeover Ordinance so that the best price rule does not apply (TOB Order 823/01 of 25 July 2022 in the matter Valora Holding AG, N 36), with the effect that the value attributable to the unlocking of the shares does not need to be determined. Likewise, the TOB has decided that the acceleration of vesting periods as a matter of principle does not violate the best price rule (see orders listed in clause 5c) above).

This reasoning is not properly balanced. As of signing a transaction agreement, the bidder is acting in concert with the target company so that the actions of the target company are actions of the bidder and *vice-versa*. If the target/bidder unlocks restricted shares to allow their tendering into the offer, the unlocking has a value for the employee who is given the possibility of selling his/her shares (usually at a premium). The link between the unlocking of the shares by the target/bidder and the contemplated purchase of the shares by the bidder is evident. The purpose of unlocking shares is to enable their purchase and sale during the additional offer period. Therefore, it is not clear why the TOB is saying that the unlocking of restricted shares is not related to a "purchase of shares" and falls outside the scope of the best price rule whilst at the same time it insists that ancillary benefits fall within the scope of, and violate, the price rules. The same question arises in relation to the accelerated vesting of equity awards.

6) TOB Newsletter of 10 May 2023

a) Content of the Letter and Subsequent TOB Orders

On 10 May 2023 the TOB published the Newsletter dealing with the treatment of PPs in connection with public takeover bids. The TOB seemed to announce a policy change for the purpose of rebalancing its contradictory doctrines on modifications of PPs and ancillary benefits:

"Ancillary services provided in connection with a public takeover bid must first be valued by the bidder. In a second step, the Review Body must verify the appropriateness of this valuation (see Federal Administrative Court decision of 30 November 2010 in the matter Quadrant AG, N 7.3 f.). In order to comply with the best price rule, the Review Body must issue a positive assurance and perform appropriate audit procedures (see Swiss Auditing Standard 880: Auditing of Public Takeover Bids, para. 54). At its last meeting, the TOB confirmed that this practice should be applied by analogy to benefits from employee participation plans of the target company that are modified in connection with a public takeover bid. In particular, a vesting triggered or accelerated by a change of control is also deemed to be a modification (newsletter of the TOB dated 10 May 2023, as referred to in TOB Order 849/04 of 6 November in the matter Schaffner Holding AG, N 7 et seq.)."

According to this Newsletter the TOB seemed to announce a tightening of its relaxed standard in relation to modifications of PPs in connection with public offers because according to past practice the TOB had treated accelerations of vesting periods as modifications not violating the best price rule so that no valuations had to be commissioned (see clause 5b) above). The question raised by the Newsletter was whether henceforth customary modifications to PPs would fall under suspicion of involving (ancillary) benefits and therefore require valuations of the benefits conveyed to members of the board and employees to determine compliance with the best price rule.

However, in a recent order of the TOB, it "clarified" that the Newsletter was meant to confirm the standard practice of the TOB and to highlight that benefits related to PPs may be relevant under the best price rule (TOB Order 849/04 of 6 November 2023 in the matter Schaffner Holding AG, N 8). The ***narrative inconsistency*** of this statement is twofold: first, modifications of PP's were generally held to be outside the scope of (or not violating) the best price rule, and, second, the TOB's doctrine of ancillary benefits is misaligned with its doctrine of modifications of PPs. In consequence, the conundrum continues.

b) Consequences

Looking at the Newsletter and the subsequent orders of the TOB, market participants are trying to understand whether or not the TOB intends to reconcile the doctrine of ancillary benefits with the doctrine of modifications of PPs.

Two scenarios are possible:

- One scenario is that the TOB shies away from unifying the two doctrines, with the result that ***two divergent standards*** apply in the field of the price rules and the equal treatment principle in connection with a public offer: (a) a strict standard for ancillary benefits that are provided by the bidder to selected shareholders (other than compensation of executive management and board members) or to co-investors and (b) a relaxed standard for benefits provided by the target in the form of modifications to executive compensation, usually for the benefit of the members of the board and management. In this scenario, on the one hand, shareholders may be put at a financial disadvantage in two respects. First, shareholders do not receive the benefits that executives receive and, second, the bidder may reduce the offer price to balance out additional costs arising from the target's (increased) costs related to executive compensation. On the other hand, in this scenario shareholders may benefit from a higher number of public offers providing them with sales opportunities at a premium.
- In the other scenario the TOB tries to ***unify two conflicting doctrines*** and focus the attention of bidders on the risk of PP modifications possibly failing to comply with the best price rule. The effect of this would be that PPs and their modifications would come under increasing scrutiny of bidders. Bidders will not want to bear the financial risk for decisions that were taken by the target and its employees. At the same time, since bidders were not involved in the target's business operations, they are not well placed to assess whether a proposed modification to PPs results in adequate compensation. Therefore, due diligence requests will become more extensive. Furthermore, bidders will attach greater importance to the negotiation of adequate terms in the transaction agreement and special compensation arrangements for target employees. This includes the treatment of target equity awards that are subject to performance conditions and the determination of the level of achievement of any performance metrics. In any event, negotiations between the bidder and the target on modifications to PPs and executive compensation would start much earlier than today. If due diligence becomes (too) burdensome and negotiations with the target's board and management on PPs become very challenging at an early stage of the process, the risk of potential takeover transactions failing would increase, thus depriving shareholders of attractive sales opportunities.

7) Conclusion and Outlook

The treatment of PPs in the context of public offers represents a critical workstream for a bidder in its acquisition of a Swiss listed company. It is a key factor in any successful transaction. Modifications to PPs and special bonus payments may be relevant transactions under the price rules.

In defining the scope of relevant transactions and the standard of review, the TOB is walking a fine line. On one side, it must avoid regulatory overreach that would prevent takeovers from happening or impose obstacles to the takeover process both in terms of timing and costs. On the other side, it must not take a *laissez-faire* approach by turning a blind eye on modifications to executive compensation in connection with public offers and thus tolerate unequal treatment of shareholders.

It is not yet clear whether the TOB will go in the direction of leaving things unchanged by continuing to apply different standards to modifications of PPs and ancillary benefits or whether it intends to tighten the standard of review in relation to PPs and executive compensation, as it seemed to have indicated in the Newsletter. In any event, the distinction may become less relevant if target companies were tempted to pre-empt any increasing scrutiny by resorting to pre-offer modifications and arrangements concerning PPs and executive compensation, which according to the TOB's recent decisions are outside the scope of takeover law as long as they are not formally linked to the public offer (subject to clear circumventions of the law). It remains to be seen how the TOB would react to a notable increase in pre-offer modifications of PPs and executive compensation – given the fact that Swiss takeover law is designed principally to ensure that shareholders in a target company are treated fairly.

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UBS Group Ltd's debut issuance of AT1 Notes

Reference: CapLaw-2023-61

On 13 November 2023, UBS Group Ltd successfully completed its offering of an aggregate of USD 3.5 billion of AT1 Notes. The offering comprised two tranches: USD 1.75 billion of 9.250 per cent. AT1 Notes, which are redeemable at the option of UBS Group Ltd after five years, and USD 1.75 billion of 9.250 per cent. AT1 Notes, which are redeemable at the option of UBS Group Ltd after ten years.

Roche Holdings, Inc.'s Issuance of Senior Notes

Reference: CapLaw-2023-62

On 13 November 2023, Roche Holdings, Inc. successfully completed its issuance of USD 5.5 billion in aggregate principal amount of senior notes, consisting of USD 1.1 billion 5.265% Notes due 2026, USD 1.25 billion 5.338% Notes due 2028, USD 1.25 billion 5.489% Notes due 2030, USD 1.6 billion 5.593% Notes due 2033, and USD 300 million Floating Rate Notes due 2026. The notes are irrevocably and unconditionally guaranteed by Roche Holding Ltd.

Vencora UK Ltd announced public tender offer for Crealogix Holding Ltd

Reference: CapLaw-2023-63

On 16 November 2023, Vencora UK Limited, an indirect subsidiary of Volaris Group Inc. and Constellation Software Inc. (CSI), a Canadian-based international provider of software and services (TSX: CSU), and Crealogix Holding Ltd, a Swiss-based global leader in digital banking technology (SIX: CLXN), jointly announced that they have entered into a definitive transaction agreement, under which Vencora agreed to submit an all-cash public tender offer to acquire all publicly held registered shares of Crealogix for CHF 60 per share, for an aggregate equity value for Crealogix of approximately CHF 84 m. Certain shareholders of Crealogix have concurrently entered into a share purchase agreement with Vencora for the sale of a total of 51.66% of all shares in Crealogix to Vencora.

TEMENOS's Issuance of CHF 200 m Bonds

Reference: CapLaw-2023-64

On 11 October 2023, TEMENOS issued CHF 200 million bonds. Zürcher Kantonalbank, BNP Paribas (Suisse) SA and BZ Bank Aktiengesellschaft acted as managers. The bonds will be listed on the SIX Swiss Exchange.

City of Geneva's Issuance of First Green Bonds

Reference: CapLaw-2023-65

In November 2023, the City of Geneva announced that it had issued green bonds for an aggregate principal amount of CHF 140 million. The issuance is a first for the City of Geneva.

Starrag and Tornos's Merger

Reference: CapLaw-2023-66

The two traditional Swiss precision machine tool manufacturers Starrag and Tornos, both listed at the SIX Swiss Exchange, announced on 26 October 2023 that they entered into a merger agreement. Under the terms of the merger, Tornos will be absorbed by Starrag and the Tornos shares will be exchanged into new listed Starrag shares for which Starrag will increase its share capital. The combined group will have a worldwide geographical presence and will operate under the name StarragTornos Group.

Highlight Event and Entertainment Ltd's Rights Offering

Reference: CapLaw-2023-67

On 7 November 2023 Highlight Event and Entertainment Ltd, which is listed on the SIX Swiss Exchange, completed a rights offering with net proceeds of CHF 41.2 million. The new shares were subscribed by or placed with existing shareholders, several backstop investors who had previously committed to the subscription by means of commitment letters as well as other private investors. The capital increase was carried out within the capital band by issuing 3.5 million new bearer shares at a subscription price of CHF 12 each by way of cash contributions and by offsetting various loans.

Lonza's placement of bonds

Reference: CapLaw-2023-68

Lonza successfully placed two tranches of CHF 185 million 2.25% due 2028 and CHF 2.60% due 2031. UBS Investment Bank, BNP Paribas (Suisse) SA and Commerzbank Aktiengesellschaft acted as Managers in this transaction.

Will Semiconductor Co. Ltd Shanghai's GDR offering and listing on SIX Swiss Exchange

Reference: CapLaw-2023-69

On 10 November 2023 Will Semiconductor Co. Ltd Shanghai offered and listed its global depositary receipts (GDRs) on SIX Swiss Exchange and raised approximately USD 445 million gross proceeds. The GDRs were issued based on newly issued A shares of Will Semiconductor Co. Ltd Shanghai, which are listed on the Shanghai Stock Exchange, and were priced at the upper end of the price range. J.P. Morgan Securities plc and UBS Ltd acted as Joint Global Coordinators and Joint Bookrunners in this transaction.

R&S Group's Business Combination Agreement with VT5

Reference: CapLaw-2023-70

The shareholders of R&S Group, a leading provider of electrical infrastructure components in Switzerland and international markets, entered into a Business Combination Agreement with VT5 Acquisition Company Ltd, the SIX-listed SPAC. The parties have agreed to combine their businesses at a purchase price of CHF 274 million and thereby take R&S Group public in Switzerland. The transaction is expected to be completed by mid-December 2023.

Sandoz's Placement of Inaugural Bonds

Reference: CapLaw-2023-71

On 21 November 2023, following its spin-off from Novartis on 4 October 2023, Sandoz, a global leader in the generics and biosimilars markets successfully placed EUR 2.0 billion senior guaranteed Eurobonds and CHF 750 million senior bonds. The Eurobonds are issued in three tranches with EUR 700 million 3.97% bonds due 2027, EUR 700 million 4.22% bonds due 2030 and EUR 600 million 4.50% bonds due 2033 whereas the CHF bonds were issued in two tranches with CHF 400 million 2.125% bonds due in 2026 and CHF 350 million 2.600% bonds due in 2031. The Eurobonds are issued by Sandoz Finance B.V. and guaranteed by Sandoz Group Ltd (SIX: SDZ). BNP Paribas, J.P. Morgan and Mizuho acted as Joint Active Bookrunners for the Eurobonds and BNP Paribas and UBS acted as Joint Lead Managers for the CHF tranches.

UBS Switzerland Ltd's Covered Bond Program

Reference: CapLaw-2023-72

On 6 October 2023 UBS Switzerland Ltd has established a CHF 20 billion program for the issuance of Covered Bonds issued by UBS Switzerland Ltd and guaranteed by UBS Hypotheken Schweiz Ltd. The Covered Bonds issued under the program will be indirectly backed by a portfolio of mortgages from UBS Switzerland Ltd's domestic mortgage pool.

On 18 October 2023, UBS Switzerland Ltd successfully closed its inaugural issuance of Covered Bonds under the program in an aggregate principal amount of CHF 820 million, consisting of CHF 350 million Covered Bonds with a coupon of 1.820% due October 2026 and CHF 470 million Covered Bonds with a coupon of 2.035% due October 2033. The Covered Bonds are governed by Swiss law, have been provisionally admitted to trading on SIX Swiss Exchange and application for definitive admission to trading and listing will be made.

[ams Osram's Rights Issue

Reference: CapLaw-2023-73

On 11 December 2023, ams Osram, which is listed on the SIX Swiss Exchange, completed a rights issue with proceeds of approximately CHF [775] million. ams OSRAM intends to use the proceeds to redeem its outstanding senior notes. The rights issue consisted of a rights offering to existing shareholders, subject to certain limitations based on residency, and an international offering, in which the offered shares in respect of which rights have not been validly exercised were sold to institutional investors or otherwise in the market. UBS, HSBC and Morgan Stanley acted as Joint Global Coordinators in this transaction.]

PureGym's Offering of Bonds

Reference: CapLaw-2023-74

PureGym successfully completed the offering of EUR 380 million 8.250% senior secured notes due 2028, GPB 475 million 10.000% senior secured notes due 2028 and a GPB 175.5 million super senior revolving credit facility for PureGym. The net proceeds of the notes will be used to refinance PureGym's existing financial indebtedness. PureGym is a leading European gym and fitness operator, with approximately 1.9 million members across more than 550 sites in the United Kingdom, Denmark and Switzerland.

Clariant's Issuance of a CHF 150 million Bond

Reference: CapLaw-2023-75

Clariant AG has placed a CHF 150 million bond with a term to maturity of five years. The net proceeds will be used for general financing purposes. Clariant is one of the world's leading specialty chemical companies that contributes to value creation with innovative and sustainable solutions for customers from many industries.

Schulthess Forum Stock Corporation Law 2024 (Schulthess Forum Aktienrecht 2024)

Thursday, 9 November 2023, Metropol, Zurich

https://www.eiz.uzh.ch/EIZ/web/eiz/event/Vermoegensverwaltung2023.aspx

Implementation of the VAG/AVO revision (Umsetzung der VAG/AVO Revision)

Wednesday, 24 January 2024, Metropol, Zurich

https://www.eiz.uzh.ch/EIZ/web/eiz/event/VAG2024.aspx

Swiss Capitalmarket Forum 2024

Thursday, 25 January 2024, Zunfthaus zur Zimmerleuten, Zurich

https://capitalmarketforum.swiss/

3rd Conference on Control Systems (3. Tagung zu Kontrollsystemen)

Thursday, 14 March 2024, Paulus Akademie, Zurich

https://www.eiz.uzh.ch/EIZ/web/eiz/event/Kontrollsystemen2024.aspx

21st Zurich Stock Corporation Law Conference (21. Zürcher Aktienrechtstagung)

Thursday, 21 March 2024, Metropol, Zurich

https://www.eiz.uzh.ch/EIZ/web/eiz/event/Aktienrecht2024.aspx