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Cooling-off Periods under the New Swiss Rules on Insider Trading and Market Manipulation

Reference: CapLaw-2014-11

One of the key changes of the new Swiss laws on market abuse that entered into force on 1 May 2013 was the introduction of administrative law rules on insider trading and market manipulation which apply to all market participants. As a result thereof, Swiss publicly listed companies should, among other things, revisit their current internal trading regulations with a focus on cooling-off periods following the publication of price sensitive information to avoid any potential implications and/or allegations that market activities taken by the company or its directors, employees, affiliates, etc. are a form of market abuse.

By Philippe Weber/Christina Del Vecchio

1) Introduction

On 1 May 2013, new Swiss rules on insider dealing and market manipulation, embodied in the revised Stock Exchange Act (SESTA) and the amended implementing Stock Exchange Ordinance of the Swiss Federal Council (SESTO), entered into force.

One of the key changes of the new laws was the introduction of new administrative law rules on market abuse (articles 33e and 33f SESTA), which are enforced by the Swiss Financial Market Supervisory Authority (FINMA) and apply to all market participants (i.e., not only FINMA regulated entities).

The new administrative law regime prohibits all natural persons and legal entities from engaging in insider dealing and market manipulation. Prior to this, FINMA could only enforce market conduct rules against certain supervised market participants. Moreover, the administrative law rules apply irrespective of any intent and financial benefit on the part of any relevant person and thereby materially differ from insider dealing and market manipulation rules under criminal law.

As a result of these new rules, Swiss publicly listed companies should, among other things, revisit their current internal trading regulations with a focus on cooling-off periods following the publication of price sensitive information. By cooling-off period we mean the period during which trading in relevant securities remains prohibited after the publication of price sensitive information under the trading regulations of the publicly listed company. Indeed, in the past when drafting trading regulations companies typically focused on the prevention of criminal insider dealing and reputational matters (e.g., by adopting closed periods prior to publication of half-year and year-end financial results). However, under the new market abuse rules the situation has become more complex. In this context, appropriate cooling-off periods constitute an important compliance measure to avoid any potential implications and/or allegations that market

activities taken by the company or its directors, employees, affiliates, etc. following the publication of price sensitive information are a form of market abuse.

2) Unlawful dealing with inside information and market manipulation rules

a) Unlawful dealing with inside information

Administrative law: According to article 33e SESTA, any person who knows or should know that information constitutes inside information acts unlawful (and can be sanctioned pursuant to applicable administrative law rules, including through the issuance of a declaratory decision, publication of such decision ("naming and shaming") and confiscation of unlawful profits) if it (a) exploits such information to acquire or dispose of securities admitted for trading on a stock exchange or on a similar platform in Switzerland or if it uses financial instruments derived from such securities; (b) communicates such information to another person; or (c) exploits such information to make a recommendation to another person to acquire, dispose of or use financial instruments regarding any securities covered by (a).

Criminal law: In order to act unlawful under criminal law (i.e., art. 40 SESTA), the offender must additionally obtain (or at least attempt to obtain) for itself or for another person a financial advantage. Sanctions under criminal law vary from fines to up to five years of imprisonment, primarily depending on the type of offender (i.e., whether the offender is an officer of, or otherwise in a qualified relationship with, the issuer, or only a tippee or accidental insider) and the amount of financial advantage.

In both instances, "inside information" means any confidential information which, if made public, would be likely to have a significant effect on the price of securities admitted for trading on a stock exchange or on platforms which are similar to stock exchanges (*börsenähnliche Einrichtung*) in Switzerland.

b) Market manipulation

Administrative law: According to article 33f SESTA, any person acts unlawful if it (a) publicly disseminates information of which such person knows or should know that this will send a false or misleading signal in relation to the offer, demand or price of securities admitted for trading on a stock exchange or on a similar platform in Switzerland; or (b) carries out any transactions or executes buy or sales orders of which such person knows or should know that this will send a false or misleading signal in relation to the offer, demand or price of securities admitted for trading on a stock exchange or on a similar platform in Switzerland.

Criminal law: According to article 40a(1) SESTA, any person will be punished with up to three years of prison or with a fine, who, with the aim to significantly influence the

price of securities admitted for trading on a stock exchange or on a similar platform in Switzerland and, thereby, achieve a financial advantage for itself or another person, (a) against better judgment disseminates wrong or misleading information; or (b) effects sales and purchases of securities, which on both sides directly or indirectly are made for the account of the same person or persons that are affiliated for such purpose.

As a result of the new rules on market manipulation, companies must be careful when dealing with its own securities (or permitting its directors, employees, affiliates, etc. to deal with securities of the issuer) in order not to be deemed as sending a false or misleading signal in relation to the offer, demand or price of its securities. For example, under the new rules, stabilization is only permitted in exceptional cases and other activities, such as capping, ramping, cornering, marking the close or spoofing, are prohibited. By contrast, market making (with the purpose of providing liquidity on buy- and sell-side and narrowing the range between bid and ask price) is permitted, but in practice there exists only a thin line between permitted market making on the one hand and prohibited stabilization on the other hand.

In this context, and as further discussed below, the use of cooling-off periods following the publication of price sensitive information is a means to restrict dealing with own securities while price-sensitive information is still being absorbed by the market, thereby insulating the issuer, its directors, employees, affiliates, etc. from potential market manipulation liability.

c) FINMA Circular 2013/8

In connection with the new market abuse rules under the SESTA and SESTO, FINMA has published a completely revised version of its circular on market behavior rules which entered into force on 1 October 2013 (FINMA Circular). In line with the extended scope of the administrative law rules on insider dealing and market manipulation, the FINMA Circular also applies to non-FINMA supervised market participants.

The FINMA Circular provides certain guidance on the interpretation of the new administrative law market abuse rules, including a non-exhaustive list of behaviors that would and would not be considered a violation of 33f SESTA.

3) Market Reception of Potentially Price-Sensitive Information

a) Ad-hoc Disclosure Requirements

Under the listing rules of SIX Swiss Exchange (SIX and SIX Listing Rules, respectively), companies listed on SIX have an ongoing obligation to report potentially price-sensitive facts unknown to the public in connection with the business activities of the listed company. Such information includes new facts which are likely to result in significant movements in the price of securities and should be made available to all actual

and potential market participants on a non-discriminatory basis to ensure transparency and equal treatment for all investors. To the extent possible, media releases should be published before 7:30 a.m. or after 5:30 p.m. (i.e., 90 minutes before the start of trading or after the close of trading). If media releases need to be published during trading hours, SIX Listing Rules require submission of such media releases to SIX Exchange Regulation 90 minutes ahead of their release. Depending on the nature of the release, SIX may decide to suspend trading of the company's shares during market reception of the material information. Implicit in the SIX's ad-hoc disclosure policy, the 90 minute window ahead of the opening of trading should arguably give recipients sufficient time to acquire, read and interpret the information or, depending on the nature of the release, the SIX may artificially create a period of time for market recipients to acquire, read and interpret the information through suspension in trading. To ensure non-discriminatory distribution, media releases must be provided to SIX Exchange Regulation, via at least two electronic information systems widely used by professional market participants, at least two Swiss newspapers of national importance and to all interested parties upon request (i.e., through a push and pull system).

b) Digestion of Price-Sensitive Information

While the SIX Listing Rules strive to ensure that investors and all other interested parties receive price sensitive information within sufficient periods of time to acquire, read and interpret such information, it remains debatable as to when such information is priced-in to the actual shares of the company. Prior to the opening of trading, the SIX Listing Rules provide the market with 90 minutes to review, digest and price-in this information or, depending on the nature of the release, the SIX may artificially create a period of time for market recipients to acquire, read and interpret the information through suspension in trading. In contrast, though, certain studies have indicated that the Swiss market is rather slow in reacting to price sensitive information and, thus, may require, for example, more than 90 minutes ahead of the opening of trading to review, digest and price-in new information.

Generally, the time for the market to digest and price-in material information can understandably vary depending not only on the nature of the information, but also on other factors, such as the liquidity of the company's shares or the extent to which analysts and industry commenters follow the company. For example, a company's financial results will naturally take longer to be absorbed and reflected in trading prices as compared to the announcement of board or executive management resignations.

As discussed further below, in light of the expanded scope of the rules relating to market abuse, companies should, therefore, consider not solely relying on the SIX Listing Rules when designing their cooling-off periods within their internal trading regulations, but also take into consideration when the market has had sufficient opportunity to price-in the information.

Furthermore, it should be noted that the FINMA Circular does not provide specific guidance on appropriate cooling-off periods following the publication of price sensitive information.

c) Potential Violations of the New Swiss Rules Market Abuse

Under both the administrative and criminal law provisions, insider trading violations (articles 33e and 40 SESTA) are premised on individuals acting on the basis of non-public information. Established Swiss Federal Supreme Court precedent has indicated that once the information is public, the requisite element for the violation of insider dealing/trading under criminal law (i.e., acting on non-public information) falls away. Consequently, where an issuer has published price sensitive information in accordance with the SIX Listing Rules, trading following such disclosure should not constitute insider dealing/trading under criminal law or administrative law. Nevertheless, from an insider dealing perspective the more prudent approach is to avoid any appearance of improper use of inside information through the implementation of adequate cooling-off periods.

However, under the new administrative law rules relating to market manipulation, companies are advised to consider the potential exposure that dealing with own securities can present while the market is still absorbing newly published price sensitive information. Indeed, such dealings may be deemed as sending a false or misleading signal in relation to the offer, demand or price of its securities. In particular, under the new market abuse rules, stabilization is only permitted in exceptional cases and other activities, such as capping, ramping, cornering, marking the close or spoofing, are prohibited. Delays by the market in absorbing and pricing-in material information, therefore, create a tension between the new administrative law prohibiting market manipulation by any market participant and trading activities of a company's directors, employees, affiliates, etc. in the market following the publication of price sensitive information. Hence, in evaluating and re-designing internal trading regulations, including cooling-off periods, the new Swiss administrative rules on market manipulation provisions are of specific relevance and should be considered carefully.

4) Cooling-off periods

The expanded scope of liability embodied in the new Swiss rules on market abuse extending to all market participants pose rather difficult questions for listed companies when reviewing and reconsidering their company trading regulations. According to the SIX Listing Rules and established Swiss Federal Supreme Court precedent, once material information has been made public potential insider trading liability, both in the administrative and criminal law context, are removed. Furthermore, the criminal law provision of market price manipulation is limited to simulated transactions. However, the administrative law violations of market manipulation, which applies to all market participants, leaves FINMA with considerable discretion for what types of activities could

be considered a violation of article 33f SESTA. This is further complicated by the difficulty in assessing when information has been adequately absorbed and priced-in by the market, thus insulating trading activities by company directors, employees, affiliates, etc. from potential liability.

Since neither article 33f SESTA nor the FINMA Circular provide any legal guidance or safe harbors relating to cooling-off periods, the most practicable route is to include a general cooling-off period in the trading regulations of a publicly listed company which can be considered sufficiently long to enable the market to absorb new price sensitive information following its publication. In our view, a cooling-off period of one full trading day should be sufficient for such purpose. A more tailored solution could be to stipulate as a general rule a one day cooling-off period and grant the person responsible for implementing the trading regulations (for example, the general counsel) the authority to approve, at his discretion, shorter or impose longer cooling-off periods in exceptional circumstances. In determining whether to shorten or extend cooling-off periods, such individual could consider the (i) particular nature of the new information being disseminated to the market (e.g., departure of the member of the executive management responsible for HR versus a large and highly complex restructuring), (ii) liquidity of the company's shares or (iii) attention paid by analysts and industry commentators to the company's business activities. Through a more tailored and focused approach to a publicly listed company's cooling-off period, companies are more likely to avoid reputational issues and any potential allegations of or liability for market manipulation of both itself and company directors, employees, affiliates, etc. who engage in trading following the publication of price sensitive information. Nevertheless, it remains the view of the authors that a cooling-off period of one full trading day should suffice in any event.

5) Conclusion

In general, it is good practice for publicly listed companies to issue trading regulations in order to prevent insider dealing and market manipulation. These regulations should provide for appropriate cooling-off periods, meaning a period during which trading in relevant securities remains prohibited after publication of price sensitive information by the issuer. To facilitate more tailored solutions, company trading regulations may additionally provide the responsible person for enforcing trading regulations with the additional authority to approve shorter or impose a longer cooling-off periods in exceptional circumstances.

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Accelerated T+2 settlement in Switzerland starting October 2014

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Starting 6 October 2014, securities tradable on SIX Swiss Exchange and SIX Structured Products Exchange and settling through the Swiss central securities depository SIX SIS will settle after two business days.

By René Bösch/Benjamin Leisinger

On 4 March 2014, the SIX Swiss Exchange Ltd. (SIX) announced that starting 6 October 2014 the settlement cycle in Switzerland will be reduced from three business days (T+3) to two business days (T+2). This accelerated settlement reflects the so-called shortened settlement cycle (SSC) that is also under consideration in the United States and throughout Europe. In the European Union (EU), for example, the ordinary settlement cycle for securities transactions in regulated markets and Multilateral Trading Facilities (MTFs) shall be shortened to two days in accordance with the European Commission's Central Securities Depositories Regulation (CSDR) as of 1 January 2015. Ahead of the intended harmonization of settlement periods in the EU, the settlement periods currently differ substantially from jurisdiction to jurisdiction. The standard settlement period has been T+3 in almost all markets in Europe, except for Germany, Slovenia and Bulgaria where it is already T+2. For government bonds, corporate bonds and OTC transactions, a broad diversity exists, including some instruments settling on T+0.

A shorter settlement period seeks to reduce certain critical risks and concerns that had been identified in the financial crisis and its aftermath. Such risks include in particular the settlement risk; further concerns relate to inefficiencies regarding capital allocation and the costs of inefficient settlement processes. The main benefits for investors arising from a shorter settlement cycle are the reduction of counterparty risks and a reduction of the period during which they may need to post collateral with Central Counterparties (CCPs). A consultation of industry participants such as banks and other market infrastructures, as well as investors, public authorities and issuers in the context of the CSDR revealed that almost all respondents shared the view that settlement processes play a systemically important role for financial markets.

A study by the Boston Consulting Group (BCG) also showed that the majority of the market participants would support the SSC. A T+0 settlement was generally viewed as infeasible for the industry while a T+2 settlement was found to be possible by compressing timeframes and corresponding rule changes. A cost benefit analysis by BCG showed that the benefits of T+2 settlement would be much higher relative to the costs as compared to a T+1 settlement. In the EU, the T+1 settlement option was also discarded as not feasible mainly because many Central Securities Depositories in Europe

start their settlement process at 7pm the preceding evening wherefore T+1 settlements would imply that the settlement process starts on the same day as the trade day. It was held that this would put too much pressure on the back offices of markets infrastructures. Also, T+1 settlement was said to potentially create significant problems for investors who either use a different currency, because FX spot transactions typically settle on a T+2 basis, or who may be located in different time zones.

The switch in Switzerland to T+2 settlement not only impacts the settlement cycle of actually traded securities. In addition, the SIX regulations on short selling, in particular Section VI of "Directive 3: Trading" of the SIX Swiss Exchange and SIX Structured Products Exchange have been supplemented with effect from 11 November 2013 requiring sellers to generally settle the short sale at the latest upon execution of the trade. According to the Rule Books of the SIX, such execution and the payment of trades had to occur three trading days after the trade itself (T+3). Following the implementation of the shortened settlement cycles in Switzerland, short sales would have to be settled at the latest T+2.

Another area where the change from a T+3 to T+2 settlement cycle could potentially have an impact is the notification of shareholdings under article 20 of the Stock Exchange Act (SESTA). Article 18 of the Ordinance of the Swiss Financial Market Supervisory Authority on Stock Exchanges and Securities Trading (SESTO-FINMA) provides that banks and securities dealers are exempted from notification requirements for equity securities and financial instruments which they, amongst other requirements, hold exclusively and for a maximum of three trading days for the purposes of clearing or settlement. Because of the regulatory background of this exemption, namely to allow banks and securities dealers to hold these positions for technical reasons in the context of clearing and settlement within the normal settlement cycle, one can expect a change of this provision in the foreseeable future to adapt it to the new T+2 settlement cycle. Additionally, the change to the T+2 settlement cycle could have an impact on parties relying on the so-called intraday-exemption, for example if the acquisition transaction ordinarily settles on a T+2 settlement basis and the sale transaction contractually settles on a T+3 settlement basis these settlement cycles will need to be aligned.

To sum it up, the acceleration of the settlement cycle from three to two business days is expected to bring the benefits outlined above and will contribute to the harmonization of settlement cycles throughout the EU and with the Unites States. However, market participants active in short selling and/or intraday transactions with respect to securities listed at SIX Swiss Exchange or SIX Structured Products Exchange should note that this change could impact the way their trades will have to be executed after 6 October 2014.

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Regulation of Financial Market Infrastructures under the preliminary draft for a Financial Market Infrastructure Act

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As the consultation period for the preliminary draft of a Financial Market Infrastructure Act (E-FinfraG) reached its term, we survey the proposed regulation of providers of financial market infrastructure services. This new framework complements the regulation of over-the-counter derivatives described in previous articles (see CapLaw-2014-5 and CapLaw-2014-6).

By Rashid Bahar/Roland Truffer

1) Overview of the E-FINFRAG

In addition to the regulation of derivatives trading, the preliminary draft seeks to provide for a ***comprehensive regulatory framework for financial market infrastructures*** (FMI) in line with the *Principles for Financial Market Infrastructures* (PFMI) issued by the Committee on Payment and Settlement Systems of the Bank for International Settlements and by the Technical Committee of the International Organization of Securities Commissions (IOSCO) in April 2012 and with the EU's "EMIR" Regulation of 2012. This legislation distinguishes several types of FMIs, namely, trading venues such as stock exchanges, multilateral trading platforms and organized trading platforms, central counterparties, central securities depositories, payments systems and trade repositories.

With the exception of the regulation of stock exchanges which is already covered by the Stock Exchange Act, the draft bill marks a departure from current laws and regulations in terms of the ***normative density***. Instead of five articles spread throughout the Banking Act, the Stock Exchange Act and the National Bank Act (article 1bis BankA, article 10bis SESTA, article 19-21 NBA), the draft bill envisages to regulate FMIs with more than 80 provisions, which will need to be implemented through ordinances of the Federal Council, FINMA and the SNB. Even so, the draft bill remains to a large extent in line with current legislation, except for a limited number of important changes in specific areas, which will be the focus of this article.

2) General Licensing Requirement

Under the draft bill, FMIs are subject to licensing by ***FINMA*** (article 3 (1) E-FinfraG). Ongoing supervision over such institutions will be exercised by FINMA (article 75 (1) E-FinfraG) and, in the case of systemically relevant institutions, additionally by the ***SNB*** (article 75 (1) E-FinfraG).

As a matter of principle, an FMI is entitled to a license if it satisfies the general and specific licensing requirements for the relevant type of FMI (article 4 (1) E-FinfraG).

The general licensing requirements for FMIs mirror, to a large extent, the existing provisions under the BankA, SESTA and CISA regarding the licensing of other financial institutions.

However, the draft bill provides for certain novel requirements for FMIs. In a significant departure from the universal banking model that prevails in Switzerland, the draft bill provides that a given legal entity can ***only run one FMI*** with an exception for central depositories who can run a securities settlement system and a central securities depository (article 8 (1) E-FinfraG). A group of companies further remains free to hold several FMIs. Moreover, the rules encourage ring-fencing financial market infrastructures by allowing FINMA to impose specific organizational measures or require additional capital or liquidity from a FMI who would be engaged in an ancillary business that is not regulated (article 8 (3) E-FinfraG).

Furthermore, the draft bill includes new provisions on internal organization of FMIs. For example, it requires for the ***outsourcing of essential services*** the prior approval of FINMA, who, in connection with systemically relevant FMIs, must consult the SNB (article 9 (1) E-FinfraG). It provides also for specific requirements on business continuity and IT Systems (article 11 and 12 E-FinfraG).

Finally, the draft bill includes additional requirements specifically crafted for FMIs, such as the requirements to ensure an ***open access*** to their services on a non-discriminatory basis (article 16 E-FinfraG) and to ensure the validity and enforceability of their ***contractual arrangements*** under all applicable laws (article 17 E-FinfraG). Finally, the draft bill provides for extensive documentation and retention rules (article 18 E-FinfraG) and a generic obligation to publish important information for participants and the public generally (article 20 E-FinfraG).

3) Regulation of Stock Exchanges and Trading Platforms

Regarding trading venues, the draft bill distinguishes between stock exchanges (which list securities), multilateral trading platforms (which, without listing securities, enable trading in securities on an organized basis following non-discretionary rules), and organized trading platforms (which are governed by discretionary rules), the latter being regulated only if they allow multiple participants to trade with each other, thus leaving systematic internalizers, in principle, out of scope of the regulation unless the purpose of the law requires otherwise (article 3 (2) E-FinfraG).

Overall, the draft bill consolidates to a large extent the ***existing rules on stock exchanges***, but expands their scope to apply to other trading venues without leaving FINMA any discretion to tailor the regulation to the risk profile of each specific institution (see article 3 (4) SESTA and article 16 SESTO). Under the draft bill, the same set of rules apply to the organization and supervision of trading with differences among

types of trading venues appearing only for the admission of participants and securities (see article 33 (2) E-FinfraG, comp. article 34 f. E-FinfraG). As is currently the case for exchange transactions, participants to all types of platforms will be required to record their transactions (article 38 E-FinfraG) and report them to the trading platform (article 39 E-FinfraG).

Similarly, the draft bill proposes to extend the model that is currently applicable for the licensing of foreign participants in stock exchanges to all regulated Swiss trading platforms and to do the same with respect to the recognition of foreign trading platforms (see articles 40 and 41 E-FinfraG).

4) Regulation of CCPs

As with EMIR, the regulation of central counterparties (CCPs) is one of the cornerstones of the draft bill. In line with the current regulation of securities settlement systems under the current National Bank Ordinance (NBO), central counterparties are required to ***limit their risks*** by requesting collateral from participants, as well as contributions to a default fund, and to take further measures to limit credit and liquidity risks in connection with the default of a participant (article 44 and 47 E-FinfraG). In particular, CCPs will be required to ***define the 'waterfall'*** of collateral and other buffers in the event of a default (article 47 (2) E-FinfraG). In this respect, the draft bill provides for a less detailed regulation than the NBO or EMIR which both prescribe high-level provisions on the order of the waterfall, which need to be implemented through technical guidance.

The main challenge for CCPs, in particular in an environment mandating the use of exchange traded derivatives and/or of CCPs for OTC transactions, is that they concentrate risks around the CCP and its direct participants. To counteract this effect, the draft bill requires CCPs to ***segregate*** their assets from those of participants (article 48 (1) E-FinfraG) and allows the latter to open segregated accounts in the books of the CCP for some or all clients (article 49 (1) E-FinfraG) and, in turn, requires participants to inform clients of their right to request this set-up without imposing it (article 53 E-FinfraG). However, it is worth stressing that while segregation may help operationally to distinguish client assets from proprietary assets of participants, it does not *per se* have any legal effect.

Furthermore, to extend the benefit of CCPs from direct participants who legally face the CCP to non-clearing exchange members and ultimate clients, the draft bill requires CCPs to provide for ***porting of positions and collateral*** and, thus, ensure that, in the event of a default of a direct participant, collateral, rights and obligations that the direct participant holds for indirect participants can be transferred to another direct participant designated by the indirect participant (article 49 E-FinfraG). However, but for the insolvency law rule discussed in further detail below (see section 8 below), the draft bill

does not provide for any detail on how to achieve such porting and ensure its effectiveness.

To ensure an effective competition among CCPs, the draft bill, following EMIR, allows CCPs to enter into ***interoperability agreements*** allowing members of two different CCPs to clear transactions through their own CCP (article 50 (1) E-FinfraG) and even requires CCPs to accept requests to enter into such arrangements unless they would endanger the security and efficiency of the clearing (article 50 (2) E-FinfraG). However, to ensure that such agreements do not compromise the stability of the system, they are subject to the approval of FINMA (article 51 (1) E-FinfraG) and, when a systemically relevant CCP is involved, the SNB (article 51 (3) E-FinfraG).

An important aspect of the regulation, in this respect, will be the ***regime for foreign CCPs***. They will, as a matter of principle, be required to be recognized by FINMA before allowing direct participation of Swiss entities, providing services to a Swiss FMI or entering into an interoperability agreement with a Swiss CCP (article 54 (1) E-FinfraG). This recognition will be granted if, in addition to the usual conditions for cross-border business (e.g., appropriate regulation in the home country and no objection by the home country regulator to doing business in the host country), the home country regulator of the foreign CCP agrees to inform FINMA of any breach of laws or incident relating to a Swiss participant and will provide administrative assistance to FINMA (article 54 (2) E-FinfraG).

5) Regulation of Central Securities Depositories

Under the draft bill, a central securities depository (CSD) can either run a ***securities settlement system*** or a ***central depository***, or both (article 55 (1) E-FinfraG, see also article 8 (1) E-FinfraG). CSDs act as the guardians of the intermediated securities system: they are responsible for defining rules and procedures to ensure the appropriate and legally compliant custody, booking and transfer of securities (article 56 (1) E-FinfraG) and for preventing participants from overdrawing their securities accounts (article 56 (2) E-FinfraG).

As with other FMIs, CSDs must ensure that they have appropriate measures in place to cover credit risks and that they can both deal with risks arising out of the default of a participant (article 59 and 61 (1) E-FinfraG) and segregate their own assets from those of participants (article 63 (1) E-FinfraG). Furthermore, as with CCPs, CSDs must offer the possibility to segregate client assets from proprietary assets of a direct participant (article 63 (2) E-FinfraG) without however imposing such segregation.

Finally, the draft bill includes provisions on connections between CSDs to enable clearing and settlement between several CSDs or to allow a CSD to participate directly or indirectly in another CSD. In essence, such interconnections are possible, but require

the prior approval of FINMA who will ensure that connections among CSDs do not compromise the safety of the system and participants (article 65 (2) E-FinfraG).

6) Regulation of Trade Repositories

The requirement of transaction reporting to trade repositories is one of the financial infrastructure requirements at the core of the draft bill, in the same way as it is one of the priorities pursued under EMIR. The main function of these institutions is to ***ensure further transparency*** of the derivatives markets, by centralizing all data on OTC transactions and retaining such data for ten years (article 67 E-FinfraG). This data will need to be published in an anonymized statistical form covering at least open positions, trade volumes and value for each relevant category of derivatives (article 68 E-FinfraG).

Another purpose of trade repositories is to give regulators full access to relevant data. Under the draft bill, they will need to provide access to all trade data to Swiss ***financial market regulators***, including FINMA, the SNB, and other financial market supervisory authorities (which term is construed to include the Competition Commission when it investigates these markets for anti-competitive collusion, article 69 E-FinfraG), and also, subject to the satisfaction of certain safeguards, to their foreign counterparts (article 70 (1) E-FinfraG), who will also have direct access to such data, including the name of counterparties to a given trade.

The draft bill also provides for a regime to recognize ***foreign trade repositories***, which is comparable to the one applicable to foreign CCPs (article 72 E-FinfraG; see above section 4).

7) Regulation of Payment Systems

The regulatory regime for payment systems is probably the lightest of the regimes applying to licensed FMIs under the E-FinfraG. Payment systems will be subject to regulations and licensing requirements as a financial market infrastructure under the E-FinfraG only if they act on the ***whole-sale market*** among financial institutions (article 73 E-FinfraG). Moreover, the statute does not formulate any specific licensing requirements, except for any that would be required by the Federal Council following a development of international standards, or by the SNB in the case of systemically important payment systems (article 74 E-FinfraG).

8) Insolvency Rules for Infrastructures and Participants

Swiss FMIs will generally be subject to the ***special insolvency regime*** applicable to banks and securities traders, which has been repeatedly amended and refined in the years following the financial crisis (see amendments to the Banking Act effective 1 September 2011 and 1 March 2012; Banking Insolvency Ordinance of the FINMA ("BIO-FINMA") of 30 August 2012). Explicit reference is made to the rules of the

Banking Act for this purpose (article 79 E-FinfraG). Thus, failing market infrastructures will be subject to the various innovative resolution tools developed in connection therewith, such as the facilitated transfer of clusters of legal relationships to a third party in order to ensure continuity of particular services (article 30 para. 2 BankA) or the bail-in of debt (article 31 para. 3 BankA, articles 48 ff. BIO-FINMA), although the former seems of greater relevance in the case of FMIs as compared to the latter.

While the insolvency of a market infrastructure itself should remain an unlikely event, the draft bill also includes a number of rules that would apply in the ***insolvency of*** an infrastructure's ***participants***. For example, existing rules inspired by the EU Settlement Finality Directive and aimed at the protection of settlement systems, which provide for the timely information of the system on any insolvency action taken over its participant and for the finality of instructions emanating from it, will be moved from the Banking Act to the new Act (article 80 E-FinfraG). The draft bill further proposes a new provision aimed at facilitating 'porting' solutions in the case that a central counterparty's direct participant defaults (article 84 E-FinfraG). The proposed rule appears, however, overly ambitious in that it purports to install a *statutory* mechanism for the transfer, by operation of law, of collateral, claims and obligations, which may not interlock smoothly with a specific (potentially foreign) CCP's own rules governing such cases. A better approach would be for the Act to provide that the operation of *contractu*al 'porting' arrangements of a CCP shall not be affected by Swiss insolvency proceedings in respect of a participant.

The draft bill also takes some of the instruments and safeguards of existing bank insolvency law a ***step further***. Thus, the ancillary tool of a stay of termination rights in case of a transfer of contracts, currently provided in the BIO-FINMA for 'financial contracts' of a bank, is extended to all types of contracts that a FMI enters into (article 82 E-FinfraG). Several provisions across the draft bill (article 80 (4), article 83, article 102 (3) E-FinfraG) aim to protect netting arrangements and rights of private sale of collateral in particular insolvency situations. It would seem preferable to such a piecemeal approach, however, to address this evergreen topic of insolvency regulation in a comprehensive and principled manner in the Banking Act (and possibly in the Debt Enforcement and Bankruptcy Act for application in general insolvency law), as its importance is not limited to FMIs. A respective statutory provision could afford equal legal protection to various accepted instruments of risk mitigation (as defined, e.g., in article 61 of the Capital Adequacy Ordinance), including not only specific posted collateral and close-out netting arrangements, but also other forms of contractual or indeed statutory set-off.

In the interest of Switzerland remaining a step or two ahead of its peers in this particular field of banking regulation, as it has been for some time, it is hoped that the consultation procedure and further legislative process will result in a number of further re-

finements in the respective draft provisions. Meanwhile, the regulatory process in the ***European Union*** is ongoing (with formal promulgation of the Bank Recovery and Resolution Directive, which its Parliament passed on 15 April 2014, expected shortly and member states having to implement its requirements into their national laws by the end of 2014, the bail-in tool, however, not becoming universally available to resolution authorities until 2016), and may be expected in turn to produce new food for thought.

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Global Benchmarks in the Spotlight: An Overview of Investigations into LIBOR and Foreign Exchange Market Manipulations

Reference: CapLaw-2014-14

Worldwide investigations into manipulations of the London Interbank Offered Rate (LIBOR) have resulted in settlements between regulators and banks with fines so far exceeding USD 6 billion in total. After a number of banks have admitted in deals struck with regulators to manipulating LIBOR by misreporting borrowing rates, numerous private claimants have followed suit by pursuing individual and class actions. At the same time, evidence gathered by regulators has spurred further investigations into other financial benchmarks, in particular in the foreign exchange market where purported misconduct is expected to trigger further multibillion-dollar fines and civil litigation.

By Thomas Werlen/Jonas Hertner

1) Introduction

The London Interbank Offered Rate (LIBOR) is the reference rate at which banks indicate they can borrow funds, in marketable size, from other banks in the London interbank market. It is derived from a filtered average of submissions by a panel of banks and fixed daily. Used in financial markets globally, it is one of the main rates to determine the borrowing costs for trillions of dollars in loans. As such, LIBOR has been described as 'the most important number in the world'.

Although regulators and market observers had doubts about whether banks were being honest in how they were calculating the LIBOR as early as in 2007, it was only in June 2012 that it became the subject of public controversy. Allegations arose that individual panel banks significantly underreported their borrowing costs in order (1) to project financial strength in the midst of market uncertainty, and (2) to realize gains on LIBOR-based contracts. In total, US, UK and EU regulators have fined banks more than

USD 6 billion for participating in rigging benchmark interest rates, and ongoing investigations are expected to implicate further major financial institutions. In the meantime, both regulators and banks themselves have expanded the scope of their investigations into further allegations of benchmark rate and price manipulations. In the context of the foreign exchange (FX) market, in particular, allegations over benchmark rate and price fixing are at least as serious and substantial as the LIBOR manipulations have been.

The purpose of the present article is to provide a summary overview of investigations into both LIBOR and FX. The article will also, in brief, examine the basis that these investigations might provide for potential civil claims under US law.

2) LIBOR and other key interest rates

Hints by a Barclays insider at the end of 2007 and a subsequent Wall Street Journal study had cast grave doubts on the reliability of LIBOR. The Barclays employee is said to have contacted US regulators to complain that Barclays was not setting 'honest' rates. The April 2008 Wall Street Journal article then argued that a number of banks may have underreported interbank borrowing costs by significant amounts and on numerous occasions. This first spurred investigations into the fixing of a number of key reference rates, including LIBOR.

a) Regulatory Investigations

In the United States, the investigations into manipulations of LIBOR and other benchmark rates have been led by the US Department of Justice Fraud Division (DOJ) and the US Commodity Futures Trading Commission (CFTC). Non-public investigations by the CFTC began in late 2008, but it was only in early 2011 that the expanding global scope of the investigations became apparent when major financial institutions were subpoenaed by either the DOJ or the CFTC or both.

The DOJ launched criminal investigations in the course of which several banks pleaded guilty and received criminal fines. As of today, four banks – Barclays, UBS, RBS and Rabobank – have settled regulatory actions with the DOJ in the context of LIBOR manipulations and entered into non-prosecution (NPA) or deferred prosecution agreements (DPA).

Barclays seems to have been the first institution to have entered into an agreement with the DOJ in June 2012 admitting that it provided LIBOR and EURIBOR (Euro Interbank Offered Rate) submissions that, at various times, were false because they improperly took into account the trading positions of its derivative traders or reputational concerns about negative media attention. Barclays admitted that by falsely representing that its USD LIBOR submissions were based on its perceived costs of borrowing while fraudulently and in collusion with other institutions submitting misleading rates, it improperly benefited at the expense of its counterparties. It agreed to pay a USD 160

million fine. Barclays also entered into a settlement with the CFTC that entailed a USD 200 million fine to resolve LIBOR-related charges that it violated the Commodity Exchange Act (CEA).

UBS entered into an NPA with the DOJ in December 2012 admitting and accepting responsibility for misconduct, acknowledging that UBS derivatives traders (whose compensation was directly connected to their success in trading financial products tied to LIBOR and other benchmarks) exercised improper influence over UBS's submissions for LIBOR and other rates, i.e. that they requested and obtained submissions which benefited their trading positions. UBS further acknowledged that certain of its managers and senior managers were aware of the interest rate manipulations. Its subsidiary, UBS Securities Japan, signed a plea agreement in which it plead guilty to felony wire fraud and agreed to pay a USD 100 million fine. On the same day in December 2012, UBS and UBS Securities Japan entered into a settlement with the CFTC to resolve allegations that UBS violated the Commodity Exchange Act. According to the CFTC's findings, from at least January 2005 through at least June 2010, UBS engaged in systematic misconduct that undermined the integrity of certain global benchmarks, including USD LIBOR. The DOJ further filed criminal charges against two former UBS traders.

Later, in February 2013, RBS Securities Japan agreed with the DOJ to plead guilty to fraud and admitted its role in manipulating the Japanese Yen LIBOR, paying a USD 50 million fine. In addition, its parent company, the Royal Bank of Scotland (RBS), was charged as part of a deferred prosecution agreement with fraud for its role in manipulating LIBOR rates and with participation in a price-fixing conspiracy in violation of the Sherman Antitrust Act by rigging the Yen LIBOR with other banks. The DPA further required RBS to pay a USD 100 million penalty beyond the fine imposed upon RBS Securities Japan. This marked the first time the DOJ has held a financial institution criminally liable under the Sherman Antitrust Act for a trader-based market manipulation.

In October 2013, Rabobank was the fourth major financial institution to admit to misconduct in the context of rigging interest rates in a deal with the DOJ. Rabobank agreed, as part of a DPA, to pay a USD 325 million fine. It also settled for a USD 475 million fine with the CFTC after it was found that, from at least mid-2005 through early 2011, Rabobank traders engaged in hundreds of manipulative acts undermining the integrity of the LIBOR and the EURIBOR. Then in January 2014, three former Rabobank traders were charged with manipulating the Japanese Yen LIBOR by deliberately submitting what the traders called 'obscenely high' or 'silly low' LIBOR rates in order to benefit their own trading positions.

A further target of the CFTC was ICAP Europe, an interdealer broker against whom CFTC brought charges over manipulation, attempted manipulation, false reporting, and aiding and abetting derivatives traders' manipulations relating to the Yen LIBOR. The

CFTC found that for more than four years, from at least October 2006 through at least January 2011, ICAP brokers on its Yen derivatives and cash desks knowingly disseminated false and misleading information concerning Yen borrowing rates to market participants in attempts to manipulate, at times successfully, the official fixing of the daily Yen LIBOR. ICAP was ordered to pay a USD 65 million civil monetary penalty.

In Europe, regulators have also been actively investigating banks' misconduct and ordering fines. An extensive investigation that has led to substantial fines, criminal charges and regulatory action to improve the LIBOR setting methodology was conducted in the UK by the Financial Services Authority (FSA, which was replaced in 2013 by the Financial Conduct Authority [FCA]). These investigations have uncovered a range of systemic flaws in the LIBOR-setting methodology as identified in the Wheatley Review and have led to calls for fundamental reform or even the replacement of LIBOR. Equally notable, the European Commission in December 2013 fined eight major financial institutions a total of EUR 1.7 billion for participating in illegal cartels in the financial derivatives markets. Four of these institutions – Barclays, Deutsche Bank, RBS and Société Générale – had participated in a cartel relating to Euro-denominated interest rate derivatives, while six institutions – UBS, RBS, Deutsche Bank, JPMorgan, Citigroup and RP Martin – had participated in one or more bilateral cartels relating to Japanese Yen-denominated interest rate derivatives. Of these, UBS received full immunity for revealing the existence of the cartels and thereby avoided a fine of EUR 2.5 billion for its participation in multiple infringements.

The cartel in Euro interest rate derivatives is said to have operated between September 2005 and May 2008. Traders are alleged to have discussed their bank's submissions for the calculation of the EURIBOR as well as their trading and pricing strategies. While the abovementioned four institutions agreed to settle the case, thereby receiving a substantial reduction of fines, the European Commission has further opened proceedings against Crédit Agricole, HSBC, JPMorgan and the cash broker ICAP in the same context. Investigations are also being carried out into alleged manipulations of the Swiss Franc LIBOR. Besides regulatory investigations, authorities in a number of countries have brought criminal charges against individual traders.

b) Civil litigation

In the wake of the wide-ranging regulatory and criminal investigations into the LIBOR benchmark-setting process in the course of which a number of banks have admitted to misconduct, numerous private suits ensued in the US. Plaintiffs have based their claims most notably (1) on violations of antitrust laws and (2) on breach of contract and common-law fraud.

Many of the cases filed in a first round of litigation have been antitrust class actions brought on behalf of a diverse group of plaintiffs including municipalities, investment

managers, lending institutions, derivatives users and brokerage firms. A number of these early suits filed in 2011 were consolidated and transferred to *In re LIBOR* (*In re LIBOR-Based Financial Instruments Litigation* [Southern District of New York 12 August, 2011). However, in March 2013, Judge Buchwald held that plaintiffs had not suffered any antitrust injury and dismissed class action antitrust claims. LIBOR, Judge Buchwald opined, was never intended to be a competitive rate-setting process. Competition in the market for LIBOR-based financial instruments could not have been restrained through the actions of the defendant banks since any alleged collusion would not have harmed competition between buyers and sellers of such instruments. Rather, the injury alleged would have been the same if each defendant had decided independently to misrepresent the institutions estimated borrowing costs.

Anticipating that antitrust claims would likely not be viable, other plaintiffs focused their claims on direct relations with benchmark-setting banks. One of these "second-generation" lawsuits – based on fraud claims – was brought by Salix Capital (*Salix Capital US v. Banc of America Securities LLC et al.* [13 Civ. 4018]) which owns claims belonging to a number of investment funds that entered into interest rate swaps with the defendants. In these arrangements, the investment funds would contract with one of the defendant banks to receive floating rate payments linked to LIBOR. The swaps were supposed to be a hedge against a banking crisis given that LIBOR should have increased as it became more expensive for banks to borrow from one another. Instead, the plaintiff argues, the benchmark-setting banks significantly underreported their estimated borrowing costs, undermining the investment funds' trading strategy. The plaintiff argues further that the funds "relied on the integrity of how Libor was set and the truthfulness of defendants' representations about how Libor was set in entering into these transactions," the complaint said. "By suppressing Libor, defendants artificially lowered the amount they were contractually obligated to pay to the funds under the interest rate swaps, while still demanding that the funds make the contracted-for (comparatively high) fixed-rate payments. In marketing the basis packages, defendants misrepresented Libor and omitted to disclose their manipulation of Libor." In December 2013, the Salix Capital suit and other similar cases were transferred to Judge Buchwald in *In re LIBOR*.

Further second-generation lawsuits have been brought by mortgage financers Freddie Mac and Fannie Mae who filed largely identical suits against several LIBOR-setting banks alleging that the manipulations caused them to lose money on mortgages and other instruments. Most recently, the Federal Deposit Insurance Corporation (FDIC), who is acting as receiver for 38 failed banks, filed suits against 16 institutions claiming that these USD LIBOR panel banks 'fraudulently and collusively suppressed' the rate. The FDIC argues that the failed banks "reasonably expected that accurate representations of competitive market forces, and not fraudulent conduct or collusion" would determine the benchmark rate.

The only two cases brought so far in the UK involve Barclays against whom plaintiff Guardian Care Homes sought to rescind an interest-rate swap linked to LIBOR, pleading fraudulent misrepresentation or deceit (Graiseley Properties v. Barclays Bank [2012] EWHC 3093 [Comm]) and Deutsche Bank v. Unitech Global ([2013] EWHC 471 [Comm]). Unitech was allowed to amend its defense and counterclaim in respect of a claim brought by Deutsche Bank for payment under a credit facility and an interest rate swap so as to include similar allegations to those made by Graiseley. While the Graiseley case was settled in early April 2014, the latter is still pending.

3) Foreign exchange trading probes

Banks bound by cooperation agreements in LIBOR rigging investigations have provided regulators with extensive material that spurred further investigation into alleged manipulations of their foreign-exchange business. The potential scope of these manipulations are expected to exceed the magnitude of the LIBOR manipulations. It is reported that banks have found an array of apparent misconduct in internal reviews. Given that, at a trading volume of USD 5.3 trillion a day, the foreign exchange market is the largest market in the world, probes by regulators worldwide are excepted to trigger further multibillion-dollar fines and civil litigation.

a) Regulatory Investigations

Over the last few months, antitrust regulators in the US, Europe and Asia have focused investigations in particular into the possibility that major financial institutions have been manipulating the 4 pm 'London Fix' – the most widely used foreign-exchange benchmark rate – so as to profit off of their clients' trades.

The currency exchange market is a USD 5.3 trillion a day market with a daily average turnover estimated at USD 2 trillion. Companies, investors, portfolio managers and stock index compilers, among others, use exchange-rate benchmarks – snapshots of traded currency rates calculated on a half-hourly basis using sample data from a minute-long period starting thirty seconds before the half-hour/hour mark – as a transparent and auditable way of buying and selling currencies. The most popular benchmark, called the WM/Reuters rate, or the 'London fix', runs at 4 pm London time on each trading day. Hence, the London fix is calculated based on the transactions conducted between 3:59:30 and 4:00:30 each day.

The foreign exchange market is largely opaque and almost entirely unregulated, with four banks dominating the market and trading around the London fix: Deutsche Bank (15.2%), Citigroup (14.9%), Barclays (10.2%) and UBS (10.1%). Collectively, these banks have a market share exceeding fifty percent.

In the US, the DOJ, in cooperation with the Federal Bureau of Investigation and the CFTC, has an active criminal investigation into possible collusion among banks and

has required the production of banks' documents as well as conducted raids of foreign exchange traders' homes. (SCHOENBERG, 'U.S. Said to Open Criminal Probe of FX Market Rigging', Bloomberg 12 October 2013). Preliminary findings of the US investigation prompted US Attorney General Eric Holder to tell the New York Times that "the manipulation we've seen so far may just be the tip of the iceberg" and that the DOJ "recognized that this is potentially an extremely consequential investigation" (PROTESS et al., 'U.S. Investigates Currency Trades by Major Banks', New York Times DealB%k 14 November 2013).

In Europe, the UK's FCA, the Swiss Financial Market Supervisory Authority (FINMA) and the EU's top antitrust regulator, Joaquin Almunía, have also opened investigations. Swiss Finance Minister Eveline Widmer-Schlumpf has already confirmed that "it's a fact that foreign exchange manipulation was committed" (TREANOR, 'Foreign Exchange Rate Benchmarks Called into Question by Investigation', The Guardian 12 June 2013). Banks including Deutsche Bank, UBS, RBS, JPMorgan, Barclays, Credit Suisse, HSBC, Goldman Sachs and Citigroup have all confirmed they are the subject of investigations as well.

In April 2014, the Swiss Competition Commission became the first regulator to announce that it had uncovered signs of illegal activity in the context of price setting in the foreign exchange business. In addition, FINMA and Switzerland's Office of the Attorney General have also launched investigations into possible violations of banks' duties and banking secrecy provisions, respectively. To this date, regulators in more than a dozen countries on four continents are investigating possible manipulations. And while probes around the globe continue to identify hard evidence for misconduct and the number of banks that reach settlements with regulators increase, the number of civil lawsuits is equally on the rise.

b) The mechanics of FX manipulation

To profit on foreign exchange transactions, traders at a number of major banks seem to have been conspiring to manipulate foreign exchange rates to artificially inflate or suppress the value of certain currencies. This manipulation of currencies appears to be only possible through collusion between traders at various different institutions and information has emerged about how traders at major banks signaled each other.

First, foreign exchange traders would gather information about the direction of currency movement around the London fix by aggregating confidential information about their clients' trades and then sharing it with traders at other firms. According to multiple reports traders would rely on voice brokers and sales people to determine the amount and direction of currency exchanges that would take place at the [London] fix. Traders would then exchange that information with traders at other banks. As the Wall Street Journal reported based on evidence turned up in the global investigation:

> "a trader at one bank would accumulate all of his institution's 'buy' orders in a specific currency, so that he was responsible for all of the planned trades. Then he would share this information with his competitors and exchange information about their overall positions. If rival traders were planning similar batches of transactions, they would coordinate the timing of those deals in an attempt to boost everyone's profits." (MARTIN/ENRICH, 'Forex Probe Uncovers Collusion Attempts', WSJ 19 Dec 2013).

Traders would generally communicate this information through instant messaging and electronic chat rooms. The traders in these chat rooms were known by aliases such as 'The Cartel', 'The Bandits' Club', and 'The Dream Team'. By sharing information, traders were able to align their strategies, ensuring that they achieved the desired move in the benchmark and did not trade in a direction opposite to that in which the manipulation was occurring.

Second, traders would then preposition themselves or 'front-run' to take advantage of the information they acquired from their counterparts at other banks. One trader provided the following account which is illustrative of how this is executed:

> "if [a trader] received an order at 3.30 pm to sell EUR 1bn in exchange for Swiss franc at the 4 pm fix, he would have two objectives: to sell his own Euros at the highest price and also to move the rate lower so that at 4pm he could buy the currency from his client at a lower price. He would profit from the difference between the reference rate and the higher price at which he sold his own Euros, he said. A move in the benchmark of 2 basis points, or 0.02 percent, would be worth CHF 200.000, he said." (VAUGHAN/FINCH/CHOUDHURY, 'Traders Said to Rig Currency Rates to Profit Off Clients', Bloomberg 26 June 2013).

Third, once traders were prepositioned, they acted in concert to manipulate the benchmark rate. This manipulation was accomplished primarily by concentrating orders in the moments before and during the 60-second window for calculating the benchmark rate in order to push the rate up or down – a process known as 'banging the close'. Through their concerted actions, the banks were able to amass enough trade volume to push an exchange rate in a direction contrary to their customers' interests. Because the benchmark is based on the median of transactions during the period, traders would break their clients' orders into small installments so as to have more trades, which would in turn maximize the pressure on the exchange rate.

Lastly, traders would further manipulate the benchmark by 'painting the screen', meaning traders would place orders with other traders to create the illusion of trading activity in a given direction in order to move the rates prior to the fixing, even though the activity is only between traders and will be reversed shortly after the benchmark. Col-

lectively, through these acts, traders at major institutions have been able to cause inflation or suppression of exchange rates at the time of the London fix.

4) Summary and Outlook

While with regard to allegations of LIBOR manipulation, a first wave of regulatory activity has ended with heavy fines, it is now the turn of private claimants to use the financial institutions' admissions and guilty pleas to bolster their claims. At the same time, regulators are widening the scope of investigations into alleged manipulative conduct in the foreign exchange market.

In the context of LIBOR litigation, antitrust claims have, until now, not been fruitful. As of today, plaintiffs seem to find it hard to show that they suffered injury resulting from banks' alleged anticompetitive conduct given that US courts repeatedly have held that the process of setting LIBOR was not competitive and the alleged collusion occurred in an area in which the defendant banks never were intended to compete. As a result, focus has shifted to large investors who had direct contact with defendant banks and are in a position to bring individual actions alleging breach of contract, breach of the implied covenant of good faith, fraud etc. While such claims may succeed in some instances, many plaintiffs find, and will continue to find, it challenging to produce the necessary evidence in order to demonstrate damages and causality.

With regard to alleged manipulations of the foreign exchange market, plaintiffs in the US have already filed antitrust and breach of contract complaints against numerous financial institutions arguing that they conspired to manipulate FX benchmark rates by increasing trade volume at the time the rates are established. In Europe, potential plaintiffs have indicated interest in civil litigation over foreign exchange market manipulations, and, given the ongoing investigations by regulators and the possibility of obtaining further documentary evidence through these investigations as well the comparatively complex nature of the traders tricks and the necessary analysis of data, lawsuits are expected to follow later this year.

Whereas, in the matters relating to LIBOR manipulations, some potential plaintiffs still appear to remain hesitant to bring suits, given that manipulations generally occurred in both direction, i.e. not necessarily against a bank's client or counterparty, and because judges so far have refused to consider the collusion by traders an antitrust issue, the position with regard to the rigging of FX benchmarks seems slightly more favorable towards plaintiffs. As far as it appears today, banks involved in FX rigging have sought and achieved to manipulate the London fix over a prolonged period of time specifically against and to the detriment of their clients.

Currently, with most of the banks accused of manipulating LIBOR having settled their cases with regulators and the future of LIBOR civil litigation not entirely certain, banks

will likely seek to avoid another round of record penalties by fully collaborating with investigators and dismissing potential wrongdoers from their trading floors. At the same time, it is likely that regulators are discovering evidence that will lead to expand probes further into possible benchmark misreporting in other markets. This is destined to not only to result in a substantial increase of financial litigation in the medium term, but also put further (political) pressure to fundamentally change the way financial benchmarks are set.

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Private Placement of Newron Pharmaceuticals S.p.A.

Reference: CapLaw-2014-15

On 7 April 2014, SIX Swiss Exchange listed biopharmaceutical company Newron Pharmaceuticals S.p.A. headquartered in Bresso/Milan, Italy, announced that in connection with a private placement it has raised gross proceeds of CHF 18.6 million, following the subscription by current institutional shareholders and new institutional investors joining from Europe and the US. The private placement was conducted without preferential subscription rights to institutional investors. The subscription price was set at CHF 15.75 per share, marginally below the closing price of Newron's shares on 3 April 2014 of CHF 15.80.

Initial Public Offering of Thurgauer Kantonalbank

Reference: CapLaw-2014-16

On 24 March 2014, Thurgauer Kantonalbank announced its initial public offering of 2,175,000 participation certificates with a nominal value of CHF 20 each. The final offer price per participation certificate was CHF 74, valuing the listed share capital of Thurgauer Kantonalbank at approximately CHF 160 million. The first day of trading of the participation certificates on the Domestic Standard of SIX Swiss Exchange was 7 April 2014. A greenshoe option allowing for the placement of up to 325,000 additional participation certificates was granted and has been exercised.

St. Gallen Company Law Day (St.Galler Gesellschaftsrechtstag)

Tuesday, 27 May 2014, SIX Convention Point, Zurich

http://www.irp.unisg.ch/de/Weiterbildung/Tagungen

Annual Meeting of the University Research Program: Financial Markets Regulation (UFSP Finanzmarktregulierung)

Monday-Tuesday, 2-3 June 2014, 9.15-18.15, University of Zurich, Zurich

http://www.eiz.uzh.ch/weiterbildung/seminare/

Update on Collective Investment Laws (Aktuelles zum Kollektivanlagenrecht)

Thursday, 5 June 2014, 13.30-17.30, Kongresshaus Zurich, Zurich

http://www.eiz.uzh.ch/weiterbildung/seminare/

St. Gallen Banking Law Day (St.Galler Bankrechtstag)

Friday, 13 June 2014, SIX Convention Point, Zurich

http://www.irp.unisg.ch/de/Weiterbildung/Tagungen

Asset Management and Investment Advisory Services (Vermögensverwaltung und Anlageberatung)

Friday, 27 June 2014, SIX Convention Point, Zurich

http://www.irp.unisg.ch/de/Weiterbildung/Tagungen