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Kapitalmarktrecht im Fokus 2025 - Conference Report/20 August 2025, SIX ConventionPoint, Zurich

By Sandro Fehlmann/Benjamin Leisinger/Nina Reiser

The inaugural 2025 edition of Kapitalmarktrecht im Fokus, a conference co-hosted by the University of St. Gallen's Institute for Law and Economics and CapLaw, gathered practitioners, regulators and academics to discuss two issues that are hotly debated in Swiss capital-markets practice: (i) the disclosure duties of underwriters and syndicate banks and (ii) the handling of insider information in M&A and capital-markets transactions. In two thematically focused panels, the speakers analyzed the statutory framework, explained practical frictions and debated possible reforms. Particular attention was devoted to the abolition of the former blanket disclosure exemption for underwriting syndicates, the pending revision of the Financial Market Infrastructure Act (FinMIA), the interaction between disclosure law and ad-hoc publicity and the narrow safe harbors for market soundings and selective information sharing. The following report summarizes the main arguments and take-aways for readers who could not attend.

1) Introduction

Nina Reiser (University of St. Gallen) welcomed the attendees and panelists¹ to the first edition of *Kapitalmarktrecht im Fokus*, a conference organized in cooperation between the University of St. Gallen's Institute for Law & Economics and CapLaw. In her welcoming speech, she emphasized the importance of considering broader, academic questions, such as the appropriate level and type of transparency in capital markets, and the balance between detailed and principle-based regulation. Further, Nina Reiser discussed the recent FinMIA revision, which proposes changes like adjusting thresholds, reducing self-regulation and increasing FINMA's powers. She highlighted that the pros and cons of self-regulation versus state regulation must be considered, as well as the importance of legal certainty and the principle of legality, especially when criminal consequences are possible. In this context, Nina Reiser also addressed the challenges of expanding FINMA's enforcement powers, particularly regarding fines and the potential conflict between disclosure obligations and the right against self-incrimination, stressing the importance of always keeping fundamental legal principles in mind, even when dealing with technical details.

¹ The views and opinions expressed on the panels were those of the speakers and do not necessarily reflect the views or positions of any entities they represent.

2) Panel 1 - Disclosure of Shareholdings of Underwriters/Syndicate Banks

Moderated by Sandro Fehlmann (Advestra), the first panel brought together, Matthias Courvoisier (Baker McKenzie), Sebastian Harsch (UBS), Deirdre Ni Annrachain (NKF) and Matthias Weger (SIX Exchange Regulation) to discuss the complex and evolving landscape of disclosure obligations for underwriters and syndicate banks in Swiss capital market transactions. The discussion began with a detailed review of the Swiss disclosure regime under article 120 FinMIA and its implementing ordinance. The panel highlighted that the Swiss threshold for disclosure is set at 3%, which is notably lower than the 5% initial threshold in many jurisdictions in the European Union and elsewhere. This threshold is triggered not by the settlement or public announcement of a transaction, but already by the signing of the purchase agreement. This early trigger, combined with the calculation method - where the denominator is the pre-money share capital and the numerator includes post-money shares - often results in initial (or premature) notifications that significantly overstate the actual percentage held. These inflated figures must later be corrected once the transaction is registered, leading to confusion and additional administrative work.

A key distinction was drawn between firm underwritings and best-efforts mandates. In firm underwritings, banks take on a firm purchase obligation and the associated underwriting risk, which very often causes the syndicate to exceed the 3% threshold at the time of signing. This triggers the need to seek a formal exemption from the disclosure requirement. In contrast, best-efforts mandates, where banks act solely as placement agents without a purchase obligation, generally do not result in a disclosure duty of the underwriters due to the lack of agreement on all *essentialia negotii* and the availability of exemptions when the notification duty is triggered (such as the intra-day exemption). The panel noted that this distinction is not always clear-cut in practice, especially in complex transactions involving multiple parties and layered commitments.

The panel then turned to the historical context, explaining that from 2009 to 2021, the Disclosure Office of SIX Exchange Regulation (OLS) provided a general exemption for syndicate banks under Disclosure Office Notice I/09 (available here: <https://www.ser-ag.com/dam/downloads/publication/obligations/disclosure/notices/disclosure-notice-i-09-en.pdf>), provided that certain details were disclosed in the prospectus published in connection with the transaction. This approach was widely regarded as efficient, reducing both costs and time pressure for market participants. However, the withdrawal of this general exemption in 2022 has in many cases resulted in syndicates being required to submit an individual, *ex-ante* exemption request to SIX Exchange Regulation. Failure to obtain such an exemption can expose banks to administrative and even criminal sanctions, a risk that has increased the compliance burden and introduced new uncertainties into transaction planning.

Matthias Weger emphasized that the practice that was permitted under the Disclosure Office Notice I/09 remains applicable, just not in form of a general exemption. In order for this exemption to be applied, a request, following a clearly defined process, must be filed with OLS. The OLS then issues a recommendation to the Financial Market Supervisory Authority (FINMA), which then tacitly approves the recommendation (absent any objection). Most participants of the panel agreed that the process is unnecessarily costly, consumes significant resources, and can jeopardize the timing of transactions. One panelist emphasized that, in practice, these exemption requests have become a formality, involving standardized applications that are almost always approved. This situation suggests that the process adds little substantive value and primarily serves as a bureaucratic hurdle.

The discussion also addressed the types of transactions most affected by these rules. Rights offerings with volume put arrangements, back-stop commitments by cornerstone investors, equity-linked financings such as AT1 and CoCo instruments, and SPAC and de-SPAC transactions were all cited as examples where banks or other parties often exceed the disclosure thresholds. In cases where banks are merely intermediating the settlement of the transaction, the disclosure duty is seen as artificial and disconnected from the underlying economic reality. Conversely, when banks act as investors of last resort, the pre-money calculation can result in reported positions as high as several hundred percent, figures that are clearly meaningless and potentially misleading to the market.

The panelists discussed various reform options, agreeing on the need for a statutory safe harbor that would restore the efficiency of the former blanket exemption. Ideally, such a safe harbor would be incorporated into the forthcoming FinMIA revision or the implementing rules. However, the panelists also agreed that a general exemption (similar to the one existing until 2021 under Disclosure Office Notice I/09) would still be desirable and facilitate efficient capital market transactions. In the interim, the market could benefit from practical measures such as an online one-page exemption form, automatic electronic acknowledgements, and clearer guidance confirming that volume puts, sub-underwriters, and similar commitments are eligible for relief (for the current "Leaflet regarding applications for exemptions and easing provisions concerning disclosure in the prospectus for lockup groups and (sub-)underwriters" see: <https://www.ser->

[ag.com/dam/downloads/publication/obligations/disclosure/annual-reports/notice-202201-ols-en.pdf](https://www.ser-ag.com/dam/downloads/publication/obligations/disclosure/annual-reports/notice-202201-ols-en.pdf); the current Disclosure Office Notice I/09 is available here: <https://www.ser-ag.com/dam/downloads/regulation/disclosure-shareholdings/notices/disclosure-notice-i-09-en.pdf>). Some speakers also suggested that Switzerland should consider aligning its disclosure threshold with the EU standard to facilitate cross-border transactions and reduce regulatory arbitrage.

The panel concluded with a broader reflection on the relationship between self-regulation and state law. One panelist criticized the current patchwork of self-regulation, such as ad-hoc publicity rules, and statutory disclosure duties, arguing that this fragmentation creates legal uncertainty and inefficiency. Other panelists acknowledged that while detailed legislation can reduce flexibility, it is essential to provide a clear legal basis for criminal liability. The overarching goal of any reform should be to enhance legal certainty without sacrificing the speed and adaptability that have traditionally characterized Switzerland's principles-based regulatory model. The discussion underscored the need for a more coherent and practical framework that balances the interests of market participants, regulators, and the broader public.

3) Panel 2 - Handling of Insider Information in M&A and Capital-Markets Transactions

The second panel, moderated by Benjamin Leisinger (Homburger) and featuring Anna Peter (Homburger), Cédric Remund (Office of the Attorney General of Switzerland), Thomas Reutter (Advestra), and Patrick Schärli (Lenz & Staehelin), provided an in-depth exploration of the legal and practical challenges associated with insider information in the context of M&A and capital-markets transactions.

Cédric Remund began by outlining the seven elements that constitute a criminal insider-dealing offence under Swiss law: insider status (distinguishing between primary, secondary, and tertiary insiders), the act of trading or tipping, the existence of price-sensitive confidential information, a market reference, a causal link between the information and the action, the pursuit of a pecuniary advantage, and the requirement of intent. He emphasized that only primary insiders are subject to criminal liability for tipping, while secondary and tertiary insiders face administrative measures. The courts have adopted an *ex ante* probability-magnitude test, assessing whether a reasonable investor would consider the information significant, and have moved towards an objective standard in evaluating these cases.

The panel then addressed the notion of insider information in general as well as the nuanced relationship between insider information and ad-hoc publicity obligations, and explained that not necessarily all insider information automatically triggers an ad-hoc disclosure duty and *vice-versa*. For example, financial results that are about to be published may qualify as price sensitive inside information, but only require immediate ad-hoc disclosure (ahead of the release of the financial results which qualify as a *per se* ad-hoc matter) if they deviate *materially* from the issuer's guidance or the previous year's results. The panel agreed that the insider and ad-hoc regimes serve different purposes and must be analyzed independently, with compliance assessments tailored to the specific requirements of each framework.

The discussion then turned to the practical challenges posed by leaks, rumors, and loss of confidentiality. One panelist described the constant "background noise" that surrounds listed companies, particularly those with active M&A strategies. He noted that if a press leak reveals only information that is already generally known - such as a company's strategic direction - confidentiality is maintained, and the issuer can continue to rely on the deferral of disclosure. However, if transaction-specific details emerge that could only have come from insiders, the issuer is obliged to publish a leak statement without delay. The panel stressed that the existence of market rumors does not legitimize trading by insiders; rather, it imposes an obligation on the issuer to inform the market through the appropriate channels.

A significant portion of the panel was devoted to the limitations of the current safe harbors for selective disclosure under article 128 of the Financial Market Infrastructure Ordinance (FinMIO). Disclosures to advisers are permitted, while disclosures to potential counterparties are allowed if they are indispensable for the transaction and protected by a confidentiality agreement. The panelists agreed that these provisions are too restrictive for modern market practice, where market soundings, cornerstone negotiations, and relationship agreements with major shareholders often require the exchange of sensitive information without a formal bilateral contract. The European Union's Market Abuse Regulation (MAR), which provides a more appropriate framework for such disclosures, was cited as a potential model for a Swiss reform.

The panel also provided practical insights into the mechanics of wall-crossings and market soundings. One panelist explained that buy-side institutions are typically unwilling to be "tainted" by insider information for more than 24 to 48 hours, which forces banks to structure wall-crossings with very tight timeframes, clear cleansing procedures, and fallback options such as volume-weighted pricing if a transaction is delayed. The panel warned that issuers who engage directly with investors without proper documentation and safeguards

risk breaching insider trading rules. The use of intermediaries with established Chinese walls was recommended as a best practice to mitigate these risks.

The panel also discussed individual trading restrictions, particularly the use of blackout periods around the announcement of financial results. These periods combine statutory requirements with internal corporate policies to prevent insider trading. For insiders who are permanently restricted from trading - such as members of strategy teams in companies that are frequent acquirers - pre-arranged trading plans can provide a compliant way to execute trades. By delegating the execution of trades to a third party, the causal link between the insider's knowledge and the trade is broken. Cédric Remund confirmed that prosecutors generally respect properly structured trading plans, although any modifications during the term of the plan may raise suspicions and warrant further scrutiny.

Finally, the panel addressed the issue of corporate criminal liability for insider offences. To date, no Swiss issuer has been convicted under the corporate offence provisions, largely because the insider trading statute is not included in the catalogue of offences that trigger primary corporate liability and because prosecutors must demonstrate that the individual offender could not be identified due to organizational shortcomings. Nevertheless, the panel cautioned that careless treasury operations - such as selling or buying shares ahead of the release of negative, unpublished news - could attract regulatory scrutiny and potential investigations. Companies were advised to maintain thorough documentation of the rationale for all trading activities to mitigate the risk of enforcement actions.

4) Key Take-Aways

The conference organizers were delighted with the lively discussions and the numerous comments from speakers and participants, which can be summarized as follows:

- The abolition of the general underwriting exemption has re-introduced costs, timing risk and legal uncertainty. A statutory safe harbor is urgently needed. However, a general exemption (similar to the one existing until 2021 under Disclosure Notice I/09) would still be possible and facilitate efficient capital market transactions.
- The Swiss disclosure threshold and the pre-/post-money calculation distort percentage figures and generate meaningless notifications. Harmonization with EU standards deserves assessment.
- Insider and ad-hoc regimes serve different purposes. Compliance assessments must therefore address both tracks separately.
- Selective disclosure safe harbors are too narrow for modern market-sounding practice. Broader exceptions, coupled with robust NDAs and insider lists, would enhance legal certainty without impairing market integrity.
- Trading plans, disciplined blackout-period policies and thorough documentation remain the most effective tools to mitigate insider-trading risk for executives and for treasury desks.

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