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The General Legal Reserve: Some Questions of Company Law Revisited in Connection with the FTA's Guidance on the Capital Contribution Principle

Reference: CapLaw-2011-1

On 1 January 2011, changes in Swiss tax law entered into force which permit a company to re-distribute certain contributed capital amounts–not only nominal share capital, as was previously the case–to shareholders without deducting withholding tax, and without triggering income tax at the level of Swiss individual shareholders (the "capital contribution principle"). In its related guidance, the Federal Tax Administration (FTA) prescribes the way in which companies are to present such capital on their balance sheets, if they wish to take the benefit of the new rules. In doing so, the tax authorities give new prominence to some seasoned controversies in company law, and also raise new questions.

By Roland Truffer

1) Background

Swiss company law contains provisions concerning the presentation of a company's equity capital on its (unconsolidated or 'statutory') balance sheet (articles 671 ff. of the Swiss Code of Obligations (CO)). Besides the share capital, the statutory provisions distinguish several types of ***reserves:*** *"legal reserves"* (articles 671–671b CO), reserves prescribed by the articles of association (articles 672 f. CO), and reserves 'by resolution' which the company's General Meeting forms in its discretion and which are at its disposal (article 674 CO). The *"legal reserves"* comprise a *"general reserve",* a reserve for own shares, and a revaluation reserve. The first (hereinafter the "General Reserve") is the most important in practice; article 671 (1) and (2) CO prescribe that to this position must be assigned, on the one hand, certain parts of the company's yearly net profits and, on the other hand, any paid-in surplus *(agio)* received by it upon the issuance of shares. Article 671 (3) CO goes on to say that to the extent the General Reserve does not exceed half the amount of the share capital, it may only be used to cover losses (and for certain other purposes of lesser relevance). From this provision, legal doctrine has always deduced *e contrario* that amounts exceeding this threshold may in principle be used freely. Pursuant to some scholars this freedom would be limited to parts of the General Reserve historically formed from profits, while contributed funds (paid-in surplus and other contributions from shareholders) would effectively remain subject to the limitation of uses pursuant to paragraph 3 irrespective of their amount. This restrictive view is, however, contradicted by a majority of writers in recent doctrine and does not appear to be generally followed in accounting practice. Finally, the text of article 671 CO is not very clear concerning the special case of holding companies; the prevalent view in this respect is that the same rules apply to them with the only difference that the relevant threshold is set at 20%, rather than 50%, of the share capital amount.

The possibility of a ***tax-free repayment*** of contributed funds which exceed the nominal share capital, as introduced by the "Business Tax Reform II" with effect as from 1 January 2011, also extends to funds contributed in the past, after the cut-off date of 31 December 1996. Article 5 (1 bis) of the Federal Withholding Tax Act requires that respective amounts be shown *as a separate item* on the company's (unconsolidated) balance sheet. In guidance recently published by the FTA, and also in statements made by that authority to specific companies, the FTA seems to take the position that this separate line item must necessarily be shown as part of the company's *legal* reserves, rather than of free reserves. Since the prerequisites of other legal reserves as defined by statute are clearly not fulfilled, this would arguably mean that the position of capital surplus contributed since 1 January 1997 has to be shown as a sub-position of the General Reserve. While it is doubtful whether the FTA's position has any valid basis in (tax) law (and while unrelated restrictions to the capital contribution principle are currently again on the political agenda), I will here briefly discuss some of the questions that its implementation would raise in the field of company law.

2) Re-assigning Funds to the General Reserve?

Paid-in surplus received by the company in a capital increase must be assigned to the General Reserve (article 671 (2) no. 1 CO). Some companies, however, have in the past requalified—by resolution of the General Meeting—the parts of such funds that exceeded the restricted amount of the General Reserve (see above 1) into ***'free' reserve positions.*** In addition, contributions from shareholders which occur outside of a share capital increase are often directly assigned to a free reserve on the balance sheet (although it is controversial whether they should be treated the same way as paid-in surplus). Companies are therefore now faced with the question whether such funds may be requalified 'back' into parts of the General Reserve, in order to comply with the FTA's requirement.

Although the voluntary assignment of funds to a *"legal reserve"* may appear counterintuitive, there are good grounds to conclude that it is generally admissible in the case of the General Reserve: ***Article 671 (1) and (2) CO*** are widely understood, in legal doctrine and in the accounting profession, as governing the question which assignments *must* be made to the General Reserve *as a minimum,* but not to prohibit a company from voluntarily making higher assignments. In particular, higher than mandatory assignments to this reserve from annual net profits are considered to be permissible. In other words, the General Meeting is held to have the power to form 'reserves by resolution' in the sense of article 674 (2) CO not only in the form of separate reserve positions on the balance sheet, but also by increasing legal reserves or reserves prescribed by the articles of association beyond mandatory amounts, in particular by an additional assignment to the General Reserve. Even the wording of article 674 (2) CO seems to intimate such an understanding, stating that the General Meeting may, under the conditions there mentioned, resolve to form reserves *"which are not provided for by sta-*

tute and by the articles of association, or which exceed their requirements". Pursuant to this understanding, the General Reserve is a *"legal reserve"* only in the sense that the law prescribes what amounts must at least be assigned to it, and which restrictions apply for its use, but not in the sense that only the assignments prescribed by law may be credited to it. On this basis, one does not see why parts of equity capital which were initially booked as retained earnings or as free reserves could not at a later moment still be assigned to the General Reserve. All the more, it seems admissible that the General Meeting re-assigns to the General Reserve funds which were originally part of the General Reserve and were later requalified to a free reserve.

Nevertheless, in substance, such an assignment would not be a mandatory assignment of a surplus received upon the issuance of shares in the sense of article 671 (2) CO—that assignment may have been made at an earlier time, when the funds were first received by the company—but rather a voluntary assignment in the sense of ***article 674 (2) CO.*** This provision states that the General Meeting may form reserves by resolution to the extent, *inter alia,* that this *"is justified, in the interest of all shareholders, with a view to the permanent prosperity of the business or to the aim of a consistent payment of dividends".* This condition, which is not very restrictive, should not present a problem at least where the re-assigned funds remain generally available for dividend payments (see above 1 and below 3).

3) Paying Dividends Directly from the General Reserve?

As mentioned above (see 1), a minority view in legal doctrine does not approve of the re-distribution of contributed funds in the form of a dividend in any event. But even among the scholars who do not share this view, there is disagreement in respect of the steps that are required for a dividend to be lawfully paid from 'excess' amounts (article 671 (3) CO) of the General Reserve. While some believe that the General Meeting must first resolve to requalify (or *"dissolve"*) such amounts into a free reserve before they may be used to pay a dividend, others think that the dividend may directly be debited to the 'excess' portion of the General Reserve. The second view is more convincing: because the General Meeting is competent for both the requalification and the dividend resolution, it would amount to a mere formality to insist on a two-step procedure.

4) Purchasing Own Shares Using the General Reserve?

If the part of the General Reserve which is not restricted pursuant to article 671 (3) CO may be debited with dividend payments (above 3), does it also constitute *"freely disposable equity"* in the sense of the provisions on the acquisition of a company's own shares (article 659 (1) CO), which the Board of Directors may use for share repurchases? Many authors think so, based on the understanding that *"freely disposable"* in article 659 (1) CO means the same as 'available for dividend payments'. Interestingly, even some of those scholars who require an explicit requalification by the General

Meeting before such funds may be distributed as a dividend, do not object to their use for share repurchases. This view, however, appears to neglect the aspect of the separation of powers within the company: while a dividend payment is always resolved on by the General Meeting itself, a purchase of own shares pursuant to article 659 CO is generally within the authority of the Board of Directors. Therefore, for the latter purpose funds need not only to be *"freely disposable"* under aspects of the statutory protection of parts of the company's equity capital (which is primarily in the interest of its creditors); they need to be disposable also in the sense that the General Meeting has approved of their use for this purpose. As long as funds are booked as part of the General Reserve, it is questionable whether the shareholders can be taken to have authorized their use for other purposes than those generally proper to this reserve (as stated in article 671 (3) CO), in particular to serve as a buffer for absorbing possible future losses. The Board of Directors should therefore, in my view, not use an 'excess' part of the General Reserve for purchasing the company's own shares (at least unless the General Meeting has exceptionally expressed a respective intention when assigning—or re-assigning—funds to it).

5) An Impending Decision of the Legislator, and a Long-Neglected Question

The project of the Federal Council for the revision of the law on companies limited by shares and on financial reporting of 2007 (so-called ***"major company law reform"***) proposes a new categorization of the reserves on a company's balance sheet. All contributions made by the holders of equity securities (including a surplus paid upon a capital increase) would have to be assigned to a *"legal capital reserve"* (article 671 (1) rev.CO). This capital reserve could in essence only be used to cover losses; in particular, dividend payments could not be debited to it, irrespectively of what amount the reserve would have reached (article 671 (2) rev.CO). To date, the part of the reform bill containing the provisions on reserves has had a reading in the Council of States, but not yet in the National Council. On this occasion, the Council of States added a no. 4 to article 671 (2) rev.CO, directing that the legal capital reserve may also be used *"for repayment to the shareholders", "to the extent that the legal reserves exceed half the amount of the share capital"* (note that the proposed rule, unlike that in article 672 (2) rev.CO in respect of the *"legal earnings reserve "*, does not distinguish between holding companies and other companies for purposes of the required percentage of the share capital amount). It is uncertain at this point in time whether the National Council will agree to this change, revert to the proposal of the Federal Council, or propose another solution (although the Legal Affairs Commission of the National Council in its pre-deliberation of the bill resolved to recommend to the National Council to support the Federal Council's proposal).

In case that the company law reform should indeed result in a general prohibition of dividend payments from the legal capital reserve, delicate questions of ***intertemporal application*** would arise, in respect of funds received by the company before the new law entered into force. Depending on whether these questions would receive a clear answer in the legislative process, it might be expected that some companies who now re-assign funds from free reserves to the General Reserve would use the time remaining between the legislator's decision on this point and the entry into force of the new law to again reverse the respective step.

In addition, companies would be faced with the question whether reserves of this type may at least be repaid to the shareholders by observing the statutory procedure for ***capital reductions*** (article 732 ff. CO). The problems of a share capital reduction with disbursement to the shareholders of an amount in excess of the nominal reduction amount (capital reduction *"above pari"*), and of a possible analogous procedure for a disbursement from restricted legal reserves *only* (without a change in the share capital), also arise under the law currently in effect, but they are not extensively discussed in legal doctrine. In view of the eventuality that the Federal Council's restrictive proposal on the use of the legal capital reserve prevails in the company law reform, several authors have now expressed the view that the capital reduction procedure would be available for the repayment of such amounts. Others, however, have expressed doubts in this respect. On the consideration that it would be an untenable position if funds contributed by shareholders over and above the nominal amount in a share capital increase, or outside of such an increase, were restricted more severely than the nominal share capital itself and could not in any way be repaid to shareholders except in the company's dissolution and liquidation, it would indeed appear logical and necessary in this case to apply the capital reduction provisions by analogy to repayments from the legal capital reserve.

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Swiss Federal Administrative Court Orders Reassessment of Offer Price In Quadrant Bid—"Back to Square One" for the Appealing Shareholder—The End Of The Road For All the Others

Reference: CapLaw-2011-2

On 30 November 2010 the Swiss Federal Administrative Court issued its first decision in takeover matters, responding to the appeal of a qualified shareholder against the decisions rendered by the Swiss Takeover Board and FINMA in the public takeover of Quadrant AG, Lenzburg. This article analyzes the court decision which not only declared the valuation and assessment by the audit body and the lower instances to be inadequate but raises new questions concerning the interplay of administrative and public takeover law.

By Lorenzo Olgiati / Nadin Schwibs

1) Facts

In May 2009, the SIX Swiss Exchange listed Quadrant AG, Lenzburg, (Quadrant) became the target of a friendly public takeover offer launched by Aquamit B.V., Amsterdam, (Aquamit), a Dutch-based joint venture (JV) between the Japanese Mitsubishi Plastics, Inc., Tokyo, (Mitsubishi Plastics) and four of the then incumbent board members and shareholders of Quadrant, Messrs A. Niggli, A. Schenk, R.-P. Müller and W. Grüebler (Quadrant Management).

In order to prepare and govern their joint action with regard to the public bid for Quadrant, the Quadrant Management and Mitsubishi Plastics had entered into a framework agreement and a joint venture agreement on 1 May 2009, pursuant to which:

- The Quadrant Management established the JV-company Aquamit by contribution in kind of its 433,019 Quadrant shares and 113,500 Quadrant directors' stock options;
- Mitsubishi Plastics acquired 50% of the Aquamit shares from the Quadrant Management at a price of CHF 25,710,822.75, reflecting a price per Quadrant share of CHF 114.50 and a price per Quadrant stock option of CHF 16.22;
- Mitsubishi Plastics agreed to provide financing to Aquamit in the form of an initial loan of up to CHF 50,000,000 and two convertible loans in the amount of up to CHF 236,000,000 and up to CHF 173,431,000; and
- The Quadrant Management was granted a put/call option regarding the JV parties' Aquamit shares, exercisable in case Mitsubishi Plastics ceased to provide financing to Aquamit after 30 June 2014 (Founders' Rights).

Also on 1 May 2009, the bidder Aquamit entered into a transaction agreement with the target Quadrant, essentially agreeing on the change of control and the subsequent delisting of the Quadrant shares. In this connection, Aquamit purchased from Quadrant 104,736 Quadrant shares at CHF 86 per share and exchanged further 54,779 of Quadrant's own shares at a value of CHF 86 per share. In further transactions, Aquamit purchased 306,052 Quadrant shares from third parties at CHF 104.50 per share.

On 4 May 2009, Aquamit pre-announced, and on 2 June 2009 published, the offer prospectus for a voluntary public takeover offer for all shares of Quadrant at an offer price of CHF 86 per share. By that time, Aquamit, together with all persons acting in concert, held 21.54% of the Quadrant shares as well as Quadrant stock options entitling to a further 4.13% of the Quadrant shares.

According to the offer prospectus the offer price of CHF 86 included a premium of 57.8% against the 60-day volume weighted average Quadrant share price of CHF 54.50. The highest price per share paid by Aquamit or any person acting in concert in the preceding 12 months (Highest Pre-Bid Price) was reportedly CHF 114.50. Compared to the latter, the offer price fell short by 24.9%.

On 28 May 2009, the audit body (*Prüfstelle,* article 25 of the Stock Exchange Act (SESTA)) Deloitte AG confirmed that the offer and the offer prospectus were in compliance with all statutory requirements, including the minimum price rule. By decision 410/01 of 29 May 2009 the Takeover Board (TOB) also confirmed that Aquamit's public takeover offer was compliant with the Swiss takeover regulations.

Upon the publication of the offer prospectus and the concurrent publication of the TOB's decision 410/01 on 2 June 2009, Sarasin Investmentfonds AG (Sarasin) was granted party status and inspection rights as a qualified shareholder holding 2.18% of the Quadrant shares and voting rights. The admission to the proceedings was long-awaited; Sarasin had already filed the respective request upon the publication of the preannouncement, only to see it being rejected by the TOB as premature pursuant to article 57 of the Takeover Ordinance.

Sarasin filed its objection with the TOB on 9 June 2009, primarily requesting an increase of the actual offer price of CHF 86 per share. It claimed that the offer price per share should be increased to (i) the share price for a potential buyback of stock options by Quadrant which would trigger the best price rule (*i.e.,* allegedly CHF 187.25), alternatively (ii) to 75% of the share price resulting from the calculation of the value of the Quadrant Management's stock options which were part of the contribution in kind to Aquamit (CHF 16.22/174.38), or (iii) to 75% of the share price resulting when adding to the Highest Pre-Bid Price of CHF 114.50 the specific value of additional material benefits the Quadrant Management allegedly had received from Mitsubishi Plastics

in connection with the transactions related to the sale of the 50% share in Aquamit, such as the financing of Aquamit, the Founders' Rights, etc.

The TOB rejected Sarasin's objection on 16 June 2009 (decision 410/02). Sarasin's immediate appeal to the Swiss Financial Market Supervisory Authority FINMA (FINMA) was also rejected by decision of 8 July 2009. Both, TOB and FINMA held that the original offer price was adequate. They dismissed the claim that the potential buy back of stock options granted under a long established option plan would trigger the best price rule. In addition, both regulators held that the audit body *(Prüfstelle)* had appraised the stock options properly. Sarasin's further claim, that the Quadrant Management had received additional material benefits whose specific value needed to be factored into the price, was also declared baseless. TOB and FINMA found that the audit body had fairly assessed the valuation of any additional material benefits exchanged between the JV parties. Both regulators shared the view that the joint venture consisted of a bundle of interconnected services and benefits which should not be assessed individually but as a whole because they had been exchanged by the JV parties in a fair and balanced way.

On 19 August 2009, Sarasin filed an appeal against the FINMA decision with the court of last instance in takeover matters, the Swiss Federal Administrative Court *(Bundesverwaltungsgericht).* It requested, essentially on the same grounds as brought forward before the TOB and FINMA, to revoke the FINMA decision and (i) to increase the offer price for all Quadrant shares to CHF 246.44 or, alternatively, (ii) to order a reassessment by FINMA of the merits of the case.

2) Considerations of the Swiss Federal Administrative Court

The Federal Administrative Court answers to Sarasin's appeal in a decision that spreads over almost 80 pages, seemingly motivated by the fact that the court issues its first decision in takeover proceedings since the 2009-establishment of the Federal Administrative Court as the highest and at the same time only judicial authority in public takeover matters.

In the first part of the decision, the Federal Administrative Court looks into the important procedural question of whether the appellant Sarasin is entitled to appeal against the decision of FINMA. FINMA and TOB as well as the counterparties Quadrant and Aquamit contest Sarasin's party status before the Federal Administrative Court based on the argument that the offer period of the Quadrant offer had expired on 6 August 2009, *i.e.* before the Federal Administrative Court had even received the appeal, and that Sarasin had at that time disposed of its shareholding of more than 2% by tendering all but 100 of its Quadrant shares to the bidder.

Notwithstanding this argumentation, the Federal Administrative Court admits the appeal. It rules that the SESTA-provision requiring a minimum shareholding of 2% to become and remain a party to the takeover proceedings before TOB and FINMA does not apply to the proceedings before the Federal Administrative Court. According to the Federal Administrative Court's reading of the law, the latter proceedings are solely governed by the Federal Administrative Procedure Act (FAPA; *Verwaltungsverfahrensgesetz*) which does not provide for the application of the special 2%-shareholding-requirement. Based on a systematic interpretation of the law, the Federal Administrative Court further concludes that the legislator deliberately refrained from providing for a limitation to the right of appeal before the only judicial instance in takeover matters, invoking the constitutionally guaranteed right to judicial review *(Rechtsweggarantie)* pursuant to article 29a of the Swiss Federal Constitution.

On the merits, the Federal Administrative Court first succinctly dismisses Sarasin's requests for calculating the Highest Pre-Bid Price based on the valuation of any type of Quadrant stock options, in the essence concurring with the views of FINMA and TOB.

The main part of the court decision is dedicated to the court's considerations on whether or not additional, *i.e.* "other material benefits" in the sense of article 41 para. 4 of the FINMA Stock Exchange Ordinance (SESTO-FINMA) should have been taken into account for the calculation of the Highest Pre-Bid Price.

Considering the formal aspects, the Federal Administrative Court holds that

- the duty to primarily examine whether the public takeover offer and its valuation is compliant with the takeover regulation is delegated by law to the audit body (article 25 SESTA). This means that TOB and FINMA may, in principle, rely on the facts established by the audit body as well as on its assessment of the offer.
- the statutory delegation based on article 25 SESTA is, however, not unlimited and TOB (and FINMA upon appeal) must verify that the audit body's assessment is thorough and comprehensive and has sufficiently covered all material aspects. In particular, TOB (and FINMA) must examine whether the audit body's calculations and explanations with respect to the valuation of the "other material benefits" in the sense of article 41 para. 4 SESTO-FINMA are "transparent, plausible and retraceable".
- even in cases where there is no indication of a circumvention of the minimum price rules, the audit body must examine which specific benefits are exchanged by the parties. This means that each supposedly material benefit to either party, and each component thereof, must be carefully assessed and valuated, even if there is no straightforward valuation model at hand. According to the Federal Administrative Court, settling for less would reduce the "assessment" by the audit body under

article 41 para. 5 SESTO-FINMA to the plain statement that there is a synallagmatic agreement.

In substance, the Federal Administrative Court consequently puts the statements of the audit body on the alleged benefits to the test, in particular with regard to (i) the favorable conditions of the financing provided by Mitsubishi Plastics to Aquamit, (ii) the Founders' Rights of the Quadrant Management under the joint venture agreement and, as compensation for the latter benefits, (iii) the know-how transfer and managerial assistance to be rendered by the Quadrant Management to the JV Aquamit.

The result of the Federal Administrative Court's meticulous review is rather deflating. In the Federal Administrative Court's view, the audit body bases its assessment of the respective "other material benefits" in several instances on unfounded facts, incorrect legal assumptions and implausible considerations. Moreover, for lack of a retraceable determination of the relevant facts as well as a real valuation, the court also rejects the audit body's opinion that the know how transfer and managerial assistance provided by the Quadrant Management would compensate for any financial benefits the Quadrant Management may have gained from Mitsubishi Plastics.

Partially granting the appeal, the Federal Administrative Court revokes the FINMA decision and parts of the TOB decisions. It sends the matter back to the TOB for a reassessment of the merits of the case and the adequacy of the offer price.

In its judgment, the Federal Administrative Court makes clear that FINMA's and TOB's decisions are revoked only to the extent that the appellant Sarasin is concerned. Sarasin's formal request to the Federal Administrative Court to increase the offer price for all shares of Quadrant is therefore only partially granted, *i.e.* for the sole benefit of the appellant. For all other shareholders and in any other respect, the TOB and FINMA decisions have come into full force and effect.

3) Conclusions and Outlook

The Federal Administrative Court 's judgment can be considered a landmark decision in takeover law, holding several fundamental and far-reaching findings.

For the appellant Sarasin, the ruling seems to mark a success, yet it remains uncertain whether the final result will be what the minority shareholder requested from the outset, an increase of the Highest Pre-Bid Price and, accordingly, of the offer price. The TOB's reassessment of the "other material benefits" was ordered mainly due to incomplete determination and non-retraceable analysis of the facts. At the same time, the Federal Administrative Court emphasized the wide discretion of the audit body and the TOB if their findings are based on properly collected and evaluated facts. Hence, it may well be that the reassessment, albeit being based on a more adequate factual basis, will not lead to a revision of the TOB's earlier conclusions.

The Federal Administrative Court appears to require a higher standard with respect to the audit body's capacities, scope of work and level of detail relating to both, evaluation and documentation work. The same is true for the assessment of the audit body's findings by the TOB. As a consequence, it must be expected that in complex cases the lead time for the audit body's and the TOB's respective assessments as well as the related transaction costs will increase.

In addition, the Federal Administrative Court clarifies that the legislator, in accordance with article 29a of the Swiss Federal Constitution, deliberately refrained from providing for a limitation of the right to appeal before the only judicial instance in takeover matters. While the court's reasoning is comprehensible, it also paves the way for the more delicate question whether shareholders that have not been entitled to party status before the TOB and FINMA (due to shareholdings below 2%) may nevertheless have a right to appeal to the Federal Administrative Court under the FAPA. As the circumstances do not call for an answer to the latter, the court leaves it open for future debates.

The most important finding of the voluminous judgment of the Federal Administrative Court covers barely one page, and is neither discussed controversially nor in great detail. Seemingly against all expectations of the involved parties, including the TOB and FINMA, the Federal Administrative Court revokes FINMA's and TOB's decisions only to the extent that the appellant Sarasin is concerned. For all other shareholders, the TOB and FINMA decisions have come into full force and effect. For the non-appealing shareholders the offer price is therefore definitely determined and shall not increase even if Sarasin were to succeed in the ordered reassessment of the offer price before the TOB.

The Federal Administrative Court's reasoning is given in plain language: In administrative law, as much as in other fields of law, the direct legal force and effect of a court ruling covers and binds only the parties to the respective proceedings. Whether this reasoning adequately considers the peculiarities of legal process in takeover matters and the legislative purpose of the takeover regulation, most importantly the principles of equal treatment among investors and fairness in takeover offers is, however, questionable. This is illustrated by the hypothesis that, had the TOB or the FINMA come to the same conclusion as the Federal Administrative Court, their respective rulings would have had legal effect on all shareholders, not solely on the objecting shareholder. Pursuant to its decision, however, the Federal Administrative Court will not act as a genuine third instance in takeover matters; it will grant due process but at the same time not enforce compliance with the takeover regulations with binding effect on all investors. While such understanding of the Federal Administrative Court's role is in line with a strict literal interpretation of the law, it raises questions regarding the interplay of administrative and public takeover law. In particular, the question must be asked and ex-

plored whether there is not, in fact, an unintended gap in the takeover regulations which calls for judicial interpretation and a change in the Federal Administrative Court's view.

Decision B-5272/2009 of the Swiss Federal Administration Court dated 30 November 2010 (relating to FINMA decision of 8 July 2009 and TOB decision 410/02 Quadrant AG of 16 June 2009). (see www.takeover.ch)

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Internal Transfer of Confidential Information within a Banking Group against the Backdrop of Swiss Banking and Business Secrecy

Reference: CapLaw-2011-3

The restrictions imposed by the rules of Swiss banking secrecy and business secrecy generally apply to relations between banks that are part of the same group of affiliated entities. However, pursuant to article $4^{quinquies}$ of the Swiss Banking Act as well as the general principles of corporate law as they pertain to affiliates, the parent's duty to supervise its subsidiaries on a consolidated basis may justify an extensive internal transfer of confidential information within the group.

By Christoph B. Bühler / Alexandre-C. Manz

In order to carry out effective, comprehensive consolidated group management, boards or internal audit functions require information on certain qualitative aspects of the business of subsidiaries for which they are responsible. In the case of a banking group, however, the requirements of Swiss banking and business secrecy rules potentially restrict the transfer of certain information, such as client data, among separate legal entities.

The following is an attempt to provide an overview of the relevant exceptions to bankers' obligations to respect their clients' privacy as well as to the business secrecy restrictions that apply to the individual companies of a banking group.

1) Legal Basis and Scope of Swiss Banking Secrecy and Business Secrecy

a) Banking Secrecy

Article 47 of the Swiss Banking Act (BA) contains a secrecy provision that makes a banker's disclosure of confidential information a criminal offense. Accordingly, this secrecy provision does not have its legal basis in the BA; the BA simply provides additional regulatory protection using the instrument of criminal law. Swiss banking secrecy is an obligation grounded in private law, as specifically provided for in

(i) the ***individual contract*** (either explicitly stipulated or tacitly assumed as a secondary contractual duty) between the bank and the client;

(ii) the ***implied accessory duty under contract and agency law*** (article 398 (1) Swiss Code of Obligations (CO)), and

(iii) the ***right of personality of the client*** (article 28 Swiss Civil Code (CC); *right to privacy*).

Article 47 BA protects the confidential information of the bank's client and banking secrecy is, therefore, the client's right and the bank's obligation. Banking secrecy covers all data relating to the business relationship between the client and the bank.

b) Business Secrecy

Business secrecy on the other hand, as set forth in article 162 of the Swiss Criminal Code, constitutes an obligation to keep secret the business information of a company; it thus pertains to confidential information of ***the bank itself.*** It originates in the ***contractual duties*** (*e.g.* employment contracts, *see* article 321a (4) CO) or in statutory law itself, *e.g.* the duty of confidentiality of (i) the agent (article 418d (1) CO), (ii) authorized officer (article 464 CO), or (iii) directors and officers in accordance with the general provisions of company law.

Article 717 CO provides that members of a board of directors, as well as any third parties engaged in the management of a company shall carry out their duties with ***due care*** and must act in the best interest of the company. There is a common understanding in doctrine that this duty of care incorporates the obligation not to disclose ***business secrets*** to third parties. Furthermore, under article 697 (2) CO, company information which shareholders would otherwise be entitled to in connection with the exercise of their shareholder rights may be withheld if releasing such information would jeopardize ***business secrets*** or other company interests worthy of protection.

While there is no legal definition of "business secrecy" or the information subsumed by the term, the common understanding of "business secrecy" generally presupposes two conditions:

(i) The information must be *"secret", i.e.*

- the relevant facts must be non-public;
- the beneficiary's interest in maintaining confidentiality must be objectively legitimate;
- the beneficiary must have the will to keep the facts confidential.

(ii) Confidentiality must pertain to information that is truly ***relevant to the business,*** *i.e.* information that imparts an economical or competitive advantage, such as pricing information, business models etc.

2) Carve-out from Banking Secrecy for Purposes of Consolidated Supervision

Banking secrecy, as outlined above, pertains to the transfer of client data to ***third parties.*** Thus, in principle, it would also apply to the transfer of data between affiliated companies such as a parent and a subsidiary within the same group.

An ***exception*** to this general rule is set out in the BA itself. Article $4^{quinquies}$ BA specifically provides for a "carve out" from the Swiss banking secrecy provision for purposes of consolidated supervision. A bank, whose parent company is supervised by the banking or financial market supervisory authorities, may provide the parent company with any such non-public information or documents as deemed necessary to exercise consolidated supervision, so long as:

(i) the information is used exclusively for internal control or direct supervision of banks or other financial intermediaries subject to a banking license;

(ii) the parent company and the authorities responsible for consolidated supervision are subject to official or professional confidentiality;

(iii) the information is not transmitted to third parties without the bank's prior permission or is transmitted based on a blanket authorization contained in an international treaty.

Therefore, if the foreign parent company that is regulated by a foreign banking or financial market supervisory authority asks for information and documents for purposes of consolidated supervision (*e.g.* a group internal audit), its Swiss subsidiary would be permitted to disclose the required information. However, if the foreign bank is not the

direct parent company, but rather the parent's parent company, from a ***formal*** point of view, article 4quinquies (1) BA, which refers to "parent companies", does not appear to apply. Nevertheless, from a ***functional*** perspective, one might argue that the Swiss sub-subsidiary is a subsidiary by virtue of consolidation of the foreign parent's parent company, which is regulated by the foreign banking or financial market supervision, ***provided,*** that

(i) the regulated foreign parent's parent company has the lead for purposes of the group internal audit; and

(ii) all the other shareholders of the Swiss subsidiary are also regulated and audited by foreign banking or financial market supervisory authorities.

It, therefore, would appear to be in line with the ***legislative intent*** of the specific provision of article 4quinquies BA, for a group company to be permitted to request certain confidential information or documents, if the requesting company is under the control of a top group company that is supervised by banking or financial market supervisory authorities, as required by article 4quinquies BA ***("substance over form"-principle).***

In order to carry out effective, comprehensive consolidated group management, boards or internal audit functions require information on certain qualitative aspects of the business of subsidiaries for which they are responsible. In the case of a banking group, the board must also ensure the monitoring of the subsidiary's liquidity and prevent excessive reliance on a small number of third party sources of funding, *i.e.* reliance on only a few clients. While recognizing that there are legitimate reasons for protecting ***clients' privacy,*** secrecy laws should not impede the ability of the parent company's board or management to ensure ***effective consolidated group management.***

However, with respect to ***client data,*** information should be provided on a ***"need to know"-basis*** only. In principle, internal auditors have no need to know the identity of individual depositors or customers. Their interest in any deposits is primarily related to ***liquidity;*** what they typically need to know is whether there are any ***global deposit concentrations*** and, if so, the amounts involved. Accordingly, aggregate information on deposits that significantly exceed a threshold as compared to the deposit base, balance sheet or capital base of the respective institution, along with some information on the geographic source of such deposits, should usually suffice for internal auditors to perform their task.

Notwithstanding the foregoing, group internal auditors may also wish to verify whether or not a given depositor is among the large depositors in order to monitor deposit concentrations or the funding risk posed by the withdrawal of a specific large deposit. They may also want to be able to track all the transactions made by, or on behalf of, a single large client, which may represent a group of related companies. Under such

well-defined circumstances, group internal audit may be justified in requesting access to individualized client data such as a depositor's name and to specific deposit account information.

When in doubt as to whether the Swiss Financial Market Supervisory Authority (FINMA) shares the view of the parent company's board of directors regarding permissible disclosure of client data, article 4^{quinquies} (2) BA explicitly provides that banks may request a directive (or, rather, a "ruling") from FINMA to permit or prohibit the release of specific information.

3) Internal Transfer of Data within a Group Protected by Business Secrecy?

Article 697 CO states that when a shareholder requests certain information at the shareholders' meeting, the board is required to provide it under two conditions:

(i) the information is ***relevant*** to the exercise of shareholders rights, and

(ii) the information does not jeopardize legitimate ***business secrets*** of the company.

From a formal point of view, under this rule, it would appear that a company would hardly ever be required to disclose information containing any kind of business secrets. Such interpretation, however, seems too restrictive. One should bear in mind that the parent company, in a group context, is generally not asking the subsidiary for information simply in its capacity as a ***shareholder*** in order to exercise its shareholder rights; more likely, the parent is asking for the data in question in order to carry out its duty of ***consolidated supervision*** in its role as ***controlling parent company.*** In fact, in order to qualify as a controlling parent of a subsidiary, it is not required that a parent company holds ***all*** shares of the respective subsidiary. Instead, what determines whether a parent is deemed the ***controlling parent*** in a group is the fact that ***multiple companies were subordinated to an integrated group management by a majority vote*** or by some similar means (*see* article 663e (1) CO).

The board of directors of the subsidiary in this scenario would not be permitted to refuse the disclosure of the requested documents or information, even if they contained business secrets. As part of a group under common control, the subsidiary may not merely act in its own best interests as a separate legal entity, it must also consider its ***affiliation with the group*** and act in accordance with the interests of the group as a whole. As a result, if the disclosure to the parent of the requested documents or information is necessary to carry out ***effective, comprehensive consolidated group management,*** and so long as it does not cause material harm to its specific interests,

the subsidiary would be required to disclose the data, even if it could reasonably be deemed a business secret of the subsidiary.

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AIFMD: Implications for Non-EU Alternative Investment Fund Managers

Reference: CapLaw-2011-04

The Directive on Alternative Investment Fund Managers (AIFMD) regulates managers of funds which do not fall under the existing UCITS-Directive. Once implemented, the AIFMD will create a comprehensive framework for the supervision and prudential oversight of such fund managers in the EU. The directive will also impact on non-EU based companies managing EU funds or marketing funds in the EU. In principle, these companies will have to comply with the AIFMD in order to be able to operate within the European passport system. Additional requirements have to be met by their non-EU country of establishment. During a transitional period, member states may allow non-EU companies to market to professional investors shares or units of funds they manage subject to some minimal conditions.

By Markus Schott

1) Background

On 11 November 2010, the European Parliament has adopted its position at first reading regarding the legislative resolution on the proposal for a *Directive of the European Parliament and of the Council on Alternative Investment Fund Managers* (AIFMD, available at http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2010-0393). Presumably, the AIFMD will enter into force, upon formal approval by the Council, early in 2011.

The AIFMD regulates *managers of alternative investment funds* (AIFM). The term ***alternative investment fund*** (AIF) encompasses a wide range of investment funds that are not already regulated on the European level by the *Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities* (UCITS Directive), including hedge funds, private equity funds, real estate funds and other types of institutional funds.

The AIFMD defines the activities of the AIFM as follows:

a. ***Managing AIF*** means providing at least the investment management services of ***portfolio management*** and ***risk management.*** Additionally, the AIFM may provide administrative services, marketing services and activities related to the assets of the AIF (cf. whereas clause 10m; article 3 sec. 1 lit. x; annex I).

b. ***Marketing*** means any direct or indirect offering or, placement, at the initiative of the AIFM or on behalf of the AIFM, of units or shares in an AIF it manages to or with (professional or retail) investors domiciled in the Union (cf. article 3 sec. 1 lit. y).

The overarching objective of the AIFMD is to create, for the first time, a comprehensive framework for the supervision and prudential oversight of AIFM in the EU. While previously, AIFM have not been regulated on the European level at all, once the AIFMD will be implemented, all AIFM in the EU will be required to obtain ***authorization*** and will be subject to ongoing regulation and supervision.

Until now, fund management companies (and asset managers of funds) domiciled in Switzerland had mainly to comply with the requirements of the ***Swiss regulation*** regarding collective investment schemes. So far, such regulation did not require Swiss asset managers of non-Swiss funds to be licensed by the Swiss Financial Market Supervisory Authority FINMA. Depending on their activities for non-Swiss funds and other trans-border activities, Swiss fund managers had to comply with the requirements of the relevant ***EU member states'*** regulations as well. However, there were no requirements on the EU-level regarding fund management outside of the scope of the UCITS Directive.

2) General Framework of the AIFMD

The AIFMD distinguishes between EU AIFM and non-EU AIFM. The former are defined as AIFM which have their ***registered office*** in a member state of the European Union, and non-EU AIFM means any AIFM which is not an EU AIFM (article 3 sec. 1 lit. m and ac[1]). Similarly, EU AIF are defined as AIF which are authorized or registered in or which has its registered office and/or head office in a member state of the EU, and non-EU AIF means any AIF which is not an EU AIF (article 3 sec. 1 lit. l and ab).

According to article 2 sec. 1, as a general rule, the AIFMD applies to all EU AIFM as well as to all non-EU AIFM

– which ***manage*** one or more and/or

1 In the following, all references are to the AIFMD.

– which ***market*** shares or units of one or more AIF in the EU, irrespective of whether the AIF is an EU AIF or a non-EU AIF.

According to article 4, member states shall ensure that no AIFM manages one or more AIF unless it has been ***authorized*** in accordance with the AIFMD. According to article 6 sec. 1, the authorization shall be valid for all member states.

Once authorized for taking up activities as AIFM, the ***operating conditions*** for AIFM are defined in Chapter III, *i.e.* article 9–18a. These provisions cover the following issues: remuneration, conflicts of interest, risk management, liquidity management, investment in securitization positions, organizational requirement, delegation of AIFM functions and depositary. In addition, article 19–21 define transparency requirements of AIFM with regard to annual reporting, disclosure to investors, and reporting obligations to competent authorities.

Chapter VI defines the *rights* of EU AIFM to market and manage EU AIF in the EU. As a general rule, according to article 31 sec. 1 and article 34 sec. 1 respectively, member states shall ensure that an authorized EU AIFM may market shares or units of any EU AIF that it manages, to *professional investors* (in the meaning of Annex II of *Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments* (MIFID)) in the home member state of the AIFM and in other member states.

With regard to ***retail investors,*** according to article 35j member states may allow AIFM to market, on their territory, shares or units of AIF they manage in accordance with the AIFMD, irrespective of whether AIF are marketed on a domestic or cross-border basis or whether they are EU or non-EU AIF. In such cases, member states may impose stricter requirements on the AIFM or the AIF than the requirements applicable to the AIF marketed to professional investors. However, member states may not impose stricter or additional requirements on EU AIF established in another member state and marketed on a cross-border basis than on AIF marketed domestically.

3) Specific Rules in Relation to non-EU AIFM

A basic principle of the AIFMD is that non-EU AIFM shall benefit from the rights conferred under the directive, such as to market shares and units in AIF throughout the EU with a so-called ***European passport*** if it complies with the requirements of the AIFMD. This concept should ensure a level playing field between EU and non-EU AIFM.

According to article 35d, non-EU AIFM intending to manage EU AIF and/or to market shares or units of AIF managed by it in the territory of the EU must acquire a ***prior authorization*** by the competent authorities of their member state of reference. In order to obtain such authorization, as a general rule, the non-EU AIFM must comply with all provisions of the directive.

However, if and to the extent compliance with a provision of the directive is ***incompatible*** with compliance with the law to which the non-EU AIFM is submitted, the AIFM does not need to comply with that provision of the directive if it can demonstrate that

- it is impossible to combine compliance with a provision of the AIFMD with compliance with a mandatory provision in the law to which the non-EU AIFM is submitted;
- the law to which the non-EU AIFM is submitted provides for an equivalent rule having the same regulatory purpose and offering the same level of protection to the investors of the relevant AIF; and
- the non-EU AIFM complies with that equivalent rule.

Section 4 of article 35d defines how the ***member state of reference*** of a non-EU AIFM shall be determined. According to sec. 3 of that provision, the non-EU AIFM must have a ***legal representative*** established in its member state of reference which is the contact point of the AIFM in the EU.

Non-EU AIFM are only authorized to manage EU AIF and/or market shares or units of AIF managed by it in the EU if, in addition to the regular conditions for authorization, according to sec. 7 of article 35d, they also comply with the following ***requirements:***

a. the member state of reference has been determined;

b. the AIFM has appointed a legal representative established in its member state of reference;

c. such legal representative shall be the contact person of the non-EU AIFM for the investors, for ESMA and for the competent authorities and shall at least be sufficiently equipped to perform the compliance function pursuant to the directive;

d. appropriate cooperation arrangements are in place between the competent authorities of the member state of reference, the competent authorities of the EU AIF concerned, and the supervisory authorities of the third country where the non-EU AIFM is established in order to ensure an efficient exchange of information;

e. the third country where the non-EU AIFM is established is not listed as a Non-Cooperative Country and Territory by the Financial Action Task Force on anti-money-laundering and terrorist financing;

f. such third country has signed an agreement with the member state of reference which fully complies with the standards laid down in article 26 of the OECD Model Tax Convention and which ensures an effective exchange of information in tax matters, including, if any, multilateral tax agreements;

g. the effective exercise by the competent authorities of their supervisory functions under the AIFMD is not prevented by the laws, regulations or administrative provisions of a third country governing the AIFM, nor by limitations in the supervisory and investigatory powers of the third country supervisory authorities.

According to article 35i, during a ***transitional period*** of three years after the introduction of the European passport system, a member state may allow non-EU AIFM to market to professional investors, ***without a European passport and on their territory only,*** shares or units of AIF they manage subject to the following conditions: compliance with transparency requirements, obligations regarding acquisition of major holdings and control of non-listed companies; appropriate cooperation arrangements between member states and third countries involved, and no listing of the third countries involved as Non-Cooperative Countries by the Financial Action Task Force on anti-money-laundering and terrorist financing.

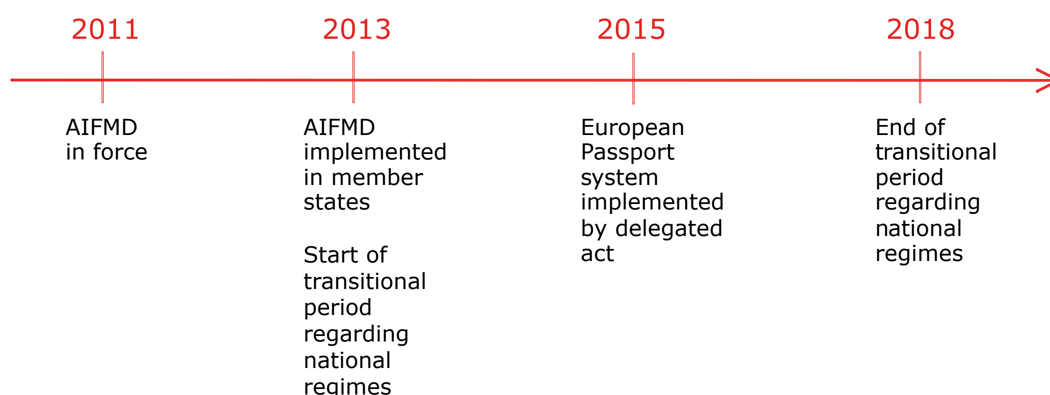
4) Implementation of the AIFMD

Like all European directives, the AIFMD is not directly applicable but must be implemented by ***national lawmakers.*** According to article 54, the member states are under an obligation to bring into force the laws, regulations and administrative provisions necessary to comply with the AIFMD within *two years* after the entry into force of the AIFMD, scheduled to take place early in 2011. Once the AIFMD will be implemented, Swiss AIFM will be able to manage EU AIF and market EU or non-EU AIF in EU member states under the existing national regimes according to article 35i.

However, national legislation regarding the *European passport* shall become applicable only under the condition of the prior entry into force of the respective ***delegated act*** of the Commission specifying the date when such rules shall become applicable in all member states. According to article 54a, such delegated act shall be adopted ***four years*** after the entry into force of the AIFMD.

Finally, according to article 54b, the Commission shall adopt a delegated act regarding the termination of the existence of the national regimes set forth in article 35i ***three years*** after the entry into force of the delegated act on the entry into force of the European passport system. Thus, for these three years, the national regimes under article 35i and the European passport regime will operate *in parallel.*

The following timeline visualizes the chronology of the implementation of the AIFMD:



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Contingent Convertible Bonds (CoCos) Issued by Credit Suisse

Reference: CapLaw-2011-5

In February 2011, Credit Suisse Group AG executed an agreement to put in place USD 3.5 Billion and CHF 2.5 Billion of Tier 1 Buffer Capital Notes, a form of contingent capital, with two strategic investors and publicly issued USD 2 Billion Tier 2 Buffer Capital Notes due 2041 in the capital markets. These instruments, issued by Guernsey SPVs and guaranteed on a subordinated basis by Credit Suisse Group AG, are convertible into ordinary shares of Credit Suisse Group AG at certain specific events in order to meet the requirements set forth in the current proposals in Swiss TBTF-regulation. Additionally, these instruments are expected to meet the requirements set forth by the Basel Committee on Banking Supervision's regulatory framework Basel III.

By René Bösch / Benjamin Leisinger / Ansgar Schott

In February 2011, Credit Suisse Group AG (CSG) executed a definitive agreement with two strategic investors to put in place USD 3.5 billion and CHF 2.5 billion of Tier 1 buffer capital notes (Tier 1 BCN) with a coupon of USD 9.5% and CHF 9.0%, respectively. These Tier 1 BCN qualify as a form of contingent capital to be paid up no earlier than October 2013 for cash or in exchange for USD 3.5 billion of 11% and CHF 2.5 billion of 10% Tier 1 capital notes issued in 2008 (the existing Tier 1 Capital Notes). In addition, CSG placed USD 2 Billion 7.875% Tier 2 Buffer Capital Notes due 2041 in the capital markets (Tier 2 BCN).

The terms of the instruments have been designed by CSG in close cooperation with, the Swiss Financial Market Supervisory Authority FINMA (FINMA), and the Swiss National Bank to ensure that the buffer capital notes will qualify under the future Swiss capital rules as contingent capital and fall within the envisaged capital buffer *(Eigenmittelpuffer)* described in the Federal Council's proposal dated 22 December 2010 in relation to a proposed amendment of the Swiss Banking Act concerning "too big to fail" (TBTF-Proposal). Moreover, the terms of the Tier 1 BCN and Tier 2 BCN are designed to comply with the requirements of Basel III as envisaged to be implemented by the Swiss regulator.

With respect to the Tier 1 BCN, the actual purchase or exchange will occur no earlier than October 2013, which is the first call date of the existing Tier 1 Capital Notes, and, amongst others, is subject to the implementation of the TBTF-Proposal, *i.e.,* Swiss regulations requiring CSG to maintain buffer capital, and receipt of all required consents and approvals from CSG's shareholders, including approval for additional conditional capital or conversion capital *(Wandlungskapital)*—a new form of capital under the TBTF-Proposal.

The Tier 1 BCN will be converted into CSG's ordinary shares if the Group's reported Basel III common equity Tier 1 ratio falls below 7%. Because of this threshold, the Tier 1 BCN will qualify as "high-triggering CoCos" as described in the TBTF-Proposal. The conversion price will be the higher of a floor price of USD 20 / CHF 20 per share, subject to customary adjustments, or the daily weighted average sale price of the Group's ordinary shares over a trading period preceding the notice of conversion. The Tier 1 BCN will also be converted at what the Basel III proposal calls the "point of nonviability", *i.e.,* if FINMA determines that CSG requires public sector support to prevent it from becoming insolvent, bankrupt or unable to pay a material amount of its debts, or other similar circumstances.

Also the Tier 2 BCN are high-trigger contingent capital (the same 7% trigger applies) and expected to count towards the capital buffer *(Eigenmittelpuffer)* that will be required of systemically relevant Swiss banks under the Swiss capital adequacy regulations proposed by the TBTF-Proposal. The Tier 2 BCN were offered on a "Regulation S-only" basis outside the US and other restricted jurisdictions in a minimum denomination of USD 100 000. The Tier 2 BCN will initially carry a coupon rate of 7.875% per annum.

In order to meet the proposed Basel III requirements for future Tier 2 capital instruments, the Tier 2 BCN are subordinated notes with a 30-year maturity and may be redeemed by the issuer at any time from August 2016. The initial coupon is reset every five years from August 2016. Interest payments will not be discretionary or deferrable. As the Tier 1 BCN, the Tier 2 BCN will be converted into CSG ordinary shares if the Group's reported consolidated risk-based capital ratio, at the end of any calendar quarter, is below 7%. In contrast to the Tier 1 BCN, the capital ratio is already meas-

ured today and applies even before the Swiss regulations requiring CSG to maintain buffer capital are implemented. The Tier 2 BCNs will also be converted if FINMA determines that CSG requires public sector support to prevent it from becoming insolvent, bankrupt or unable to pay a material amount of its debts, or other similar circumstances (conversion in case of non-viability; see above). If converted, the Tier 2 BCNs will convert into CSG ordinary shares at their prevailing market price over a 30-day period preceding the notice of conversion, subject to a minimum price of USD 20. The Tier 2 BCNs are listed on the Euro-MTF exchange.

While the Tier 1 BCN and Tier 2 BCN are presently issued by Guernsey SPVs, and the proceeds of the issue will be applied exclusively outside of Switzerland, the respective issuers will be substituted by CSG once the tax regime for CoCos changes in a way envisaged in the TBTF-Proposal. The envisaged change in Swiss tax laws would lead to a situation where there would be no Swiss withholding tax *(Verrechnungssteuer)* on payments of interests paid by the issuers themselves, even when the issuer is a company domiciled in Switzerland.

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St. Gallen Stock Company Law Forum 2011 (St. Galler Aktienrechtsforum 2011)

Friday, 17 June 2011, 8.55–16.40 h, SIX ConventionPoint, Zurich

http://www.irp.unisg.ch/org/irp/web.nsf/wwwPubInhalteGer/St.+Galler+Gesellschaftsrechtstag?opendocument

St. Gallen Banking Law Forum 2011 (St. Galler Bankrechtstag 2011)

Friday, 24 June 2011, 8.55–16.40 h, SIX ConventionPoint, Zurich

http://www.irp.unisg.ch/org/irp/web.nsf/wwwPubInhalteGer/St.+Galler+Bankrechtstag?opendocument