The Law of Insider Dealing: A Tale of Two Jurisdictions

Kern Alexander*

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I. Introduction

Insider dealing is defined generally in most jurisdictions as trading in organized securities markets on the basis of material, privileged or non-public information in order to make a profit or avoid a loss. Most insider dealing is based on corporate information, *i. e.*, information about a company's finances or operations. In recent years, most of the important insider trading cases in European countries have concerned mergers and acquisitions.[1] Another type of insider dealing has arisen from traders using electronic trading networks and algorithmic trading systems to take advantage of privileged inside information and to manipulate markets.[2] This indicates that the control of insider dealing and market abuse is a complex issue in regard to which the criminal justice system can only achieve so much.

Insider dealing legislation and regulation has been considered necessary to promote the efficient pricing of securities and to enhance the integrity of the capital markets.[3] Insider dealing is not a victimless crime; it is both a manifestation of inefficient markets and a considerable corporate governance problem.[4] In today's globalized financial markets, there is a general acceptance of

* Professor of Law, Master in Economics and MA (Law) (University of Cambridge), Master in Modern European History (University of Oxford), Lehrstuhl für Finanzmarktrecht, Rechtswissenschaftliches Institut, Universität Zürich. – I would like to thank Veronica Lynn, lic. iur., for her research assistance.

1 Notwithstanding the fact that for over twenty years the abuse of this information has been a serious criminal offence in most European countries, studies conducted by the UK Financial Services Authority indicate that there is considerable evidence that such information is abused in a high percentage of cases. See *Financial Service Authority*, Annual Report 2011/12, 2012, pp. 73–78.

2 See *Kern Alexander*, Market Structures and Market Abuse, in: Gerard Caprio (ed.), Handbook of Safeguarding Global Financial Stability: Political, Social, Cultural and Economic Theories and Models, 2012, pp. 381–391.

3 See *Kern Alexander*, Insider Dealing and Market Abuse: The Financial Services and Markets Act 2000, ESRC Centre for Business Research, University of Cambridge, Working Paper 222, 2000, pp. 19–20; see also *Kern Alexander/Lisa Linklater/Barry Rider*, Insider Dealing and Market Abuse, 2001; *Emilios Avgouleas*, The Mechanics and Regulation of Market Abuse, 2005, pp. 11–14.

4 Insider dealing laws are generally considered to be necessary because they address a particular manifestation of the principal-agent problem in corporate governance in which firm agents extract rents from the firm by using privileged or confidential information belonging to the firm.

the impropriety and economic inefficiency of insider dealing and market manipulation.[5] Indeed, the International Organization of Securities Commissions (IOSCO) expressly recognizes market abuse and insider dealing to be a threat to the integrity and good governance of financial markets that undermines market confidence and investor protection.[6] Accordingly, IOSCO has adopted international standards for the efficient regulation of securities markets that contain recommended prohibitions on market abuse and insider dealing.[7]

The European Union Directive on Insider Dealing and Market Manipulation (the 'Market Abuse Directive')[8] requires EU member states to create a civil or administrative offence for insider dealing and market manipulation known as the 'Market Abuse' offence. The EU requirement that member states adopt an administrative or civil offence against market abuse was a legal innovation pioneered in Europe by the United Kingdom when it adopted a civil offence against market abuse in 2001 under the UK Financial Services and

5 Market manipulation involves deliberate acts or statements intended to create false or misleading impressions about (a) particular issuer(s) of securities or to engage in behaviour that would distort the functioning of the market that could lead to unusual and sharp price swings in securities and related volatility which can undermine investor confidence and financial stability. Although Article 161bis of the Swiss Criminal Code (CC) entered into force on February 1, 1997, there have been no convictions of individuals for market manipulation in Switzerland (see <http://www.bfs.admin.ch/bfs/portal/de/index/themen/-19/03/03/key/straftaten/haeufigste_delikte.html> (last visited 28 January 2013). There have been, however, a number of legal and administration cooperation cases involving market manipulation (BGer 2A.162/2001, BGer 2A.55/2003, BGer 1A.76/2003; BGer 2A.153/2003, BGer 1A.184/2005, BGer 1A.5/2006, BGer 1A.9/2006; BGer 2A.266/2006; BGer 2A.267/2006, BGer 1A.5/2008, BGer 1C_396/2010) and two sanction decisions of the Swiss Stock Exchange (SIX) on market manipulation (<http://www.six-exchange-regulation.com/download/trading/participants/sanctions/decision_13_10_10_en.pdf> and <http://www.six-exchange-regulation.com/download/trading/participants/sanctions/decis-ion_04_08_11_en.pdf>, last visited 31 January 2013). See in general and for more information *Sonja Pflaum*, Kursmanipulation, 2013, Art. 161bis StGB/Art. 40a BEHG (forthcoming).

6 International Organization of Securities Commissions (IOSCO), Objectives and Principles of Securities Regulation, 2001, p. 5, para. 4. 2. 1: Investors should be protected from misleading, manipulative or fraudulent practices, including insider trading, front running or trading ahead of customers and the misuse of client assets.

7 See IOSCO, Objectives and Principles of Securities Regulation, 2001, p. 18, para 9.3: Fraud, market manipulation, insider trading and other illegal conduct that crosses jurisdictional boundaries can and does occur more and more frequently in a global market aided by modern telecommunications.

8 Directive 2003/6/EC of the European Parliament and Council of 28 January 2003, O.J. EU L96/16.

Markets Act 2000.[9] As a result of international standards and European legislation, insider dealing has been recognized as a criminal and administrative offence in all European Economic Area countries and in most other jurisdictions with developed financial markets.[10]

This article analyses and compares the UK law of insider dealing and market abuse with the Swiss law of insider dealing to argue that effective insider dealing and market abuse laws depend not only on effective criminal sanctions but also on robust civil enforcement measures. Part II discusses the development of the Swiss criminal offence of insider dealing and why it has been ineffectual in controlling insider dealing. Part III analyses the UK criminal offence of insider dealing and the civil offence of market abuse and why UK authorities found it necessary to adopt a civil offence of market abuse to provide a more effective deterrent against market misconduct. Part IV discusses Switzerland's recent efforts to increase the reach of the insider dealing offence and to adopt a regulatory or civil offence against insider dealing separate from the criminal offence.[11] This section compares the main elements of the Swiss regulatory offence with the UK market abuse offence and concludes that the absence of civil penalties or sanctions under Swiss law substantially limits its effectiveness against market misconduct. The section argues that Switzerland has misfased an important opportunity to reform adequately its insider dealing law and to bring it up to the level of international norms as set forth in the IOSCO agreement on market abuse and insider dealing and also to make it equivalent to the EU requirement that each member state create an administrative or civil offence of market abuse and to enforce it with monetary penalties.

9 Financial Services and Markets Act 2000, sec. 118 (1)-(8). Insider dealing is a criminal offence defined under Part V of the Criminal Justice Act 1993, whereas market abuse is a civil offence, as set forth in §§ 118-123 of the Financial Services and Markets Act 2000.

10 As discussed below, Switzerland adopted legislation creating a criminal offence for insider dealing in 1988 not because of EU legislation or international norms but because of direct pressure from the United States of America, which had insisted on a Swiss insider dealing offence in order to fulfil the dual criminality requirement of the 1984 US-Swiss mutual assistance agreement in matters related to the enforcement of anti-insider dealing legislation, that would permit Swiss authorities to exchange information on transactions involving Swiss bank accounts that were related to US insider dealing investigations and prosecutions.

11 Botschaft zur Änderung des Börsengesetzes (Börsendelikte und Marktmissbrauch) vom 31. 8. 2011, BBl. 2011, pp. 6873 et seqq. (hereinafter cited as Botschaft Börsengesetz), available at <http://www.admin.ch/ch/d/ff/2011/6873.pdf> (last visited January 30, 2013).

II. The Swiss Legal Framework for Regulating Insider Dealing

Article 36 of the Swiss Federal Constitution provides the fundamental legal basis for the regulation of financial markets and economic activity, and requires that government intervention is "justified in the public interest or for the protection of the fundamental rights of others, must be proportionate, and the essence of fundamental rights is sacrosanct." The legislation creating the offence of insider dealing is based on this constitutional provision, which requires that government intervention be proportionate and not unduly restrict economic freedom.

Switzerland's first criminal prohibition against insider dealing was adopted in 1988 and has served as its primary legal instrument to control market misconduct. The criminal offence of insider dealing was adopted in response to great pressure from US authorities who were at the time investigating a number of suspicious transactions involving Swiss bank accounts and related insider dealing.[12] The insider dealing offence is regulated in Article 161 of the Swiss Criminal Code ('SCC') and states as follows:

1. Any person who as a member of the board of directors or the management board, an auditor or an agent of a company limited by shares or a company controlling or dependent on such a company, or as the member of a public authority or as a public official, or as an auxiliary to any of the aforementioned persons, obtains a financial advantage for himself or another by using or making known to a third party confidential information, the knowledge of which will have a substantial and foreseeable influence on the price of listed or pre-listed shares, other securities or corresponding book entry securities, or options on any of the aforementioned securities traded on a Swiss stock exchange, is liable to a custodial sentence not exceeding three years or to a monetary penalty.
2. Any person who receives such information directly or indirectly from any of the persons mentioned in Section 1 and obtains a financial advantage for himself or another through the exploitation of such information, is liable to a custodial sentence not exceeding one year or to a monetary penalty.
3. [deleted]
4. In the case of the planned merger of two companies limited by shares, sections 1 and 2 apply to both companies.

12 US authorities could not obtain information from Swiss authorities regarding these transactions and bank accounts because insider dealing was not a criminal offence under Swiss law and therefore the dual criminality requirement of the Swiss-US mutual assistance treaty could not be invoked by US authorities to obtain information on the relevant transactions and bank accounts. Without dual criminality, Swiss bank executives would have been subject to unilateral US court orders compelling them to produce requested information, including documents, on Swiss bank accounts that held information on transactions in the United States of America (see *Marcel Alexander Niggli/Hans Wiprächtiger* [eds.], Basler Kommentar, Strafrecht II, Art. 111–392 StGB, 2007, Art. 161, 8).

5. Sections 1, 2 and 4 apply by analogy if the exploitation of the knowledge of confidential information relates to shares, other securities, book-entry securities or related options in a cooperative or a foreign company.

The Swiss Federal Council stated that the three main objectives of the insider dealing offence was to 1) enhance the integrity of the Swiss stock market, 2) promote a level playing field for investors, and 3) respect the fiduciary duty that company insiders have to the company not to exploit confidential information belonging to the company.[13] The legislation, however, does not state which objective takes priority with the result that all three objectives should be pursued in a balanced way.[14]

The prohibition on insider dealing was narrowly drafted and subject to strict conditions that made it very difficult to enforce. Similar to the UK's experience in enforcing its insider dealing law in the 1990s, Swiss authorities brought only a few prosecutions and obtained only 14 convictions.[15] One of the reasons for the low number of prosecutions and convictions was that the substantive offence of insider dealing was defined very narrowly under the statute and that prosecutorial responsibility was with local cantonal prosecutors who had little knowledge and understanding of the operation of securities markets and the complex regulatory issues they raise.[16]

The narrowness of the substantive offence in article 161 SCC revolved around the definition of "inside information and insiders". Inside information was defined as information ("*Tatsache*")[17] that must have a significant effect on the price of the relevant securities. If the impact or effect of the information was not considered to be *significant* it did not qualify as inside information. This narrow definition of inside information was more limited than the definition set forth in the EU Insider Dealing Directive 1989 and the definition of inside information under Part V of the UK Criminal Justice Act 1993, which required that inside information be precise and specific. To qualify as insider information under UK law, it was not necessary for prosecutors to prove that the information in question had a significant effect on the price of the relevant

13 See generally *Günther Stratenwerth/Wolfgang Wohlers*, Schweizerisches Strafgesetzbuch – Handkommentar, 2009; *Niggli/Wiprächtiger* (n. 12), Art. 161, 12.

14 *Stratenwerth/Wohlers* (n. 13), p. 493, 2. See also the discussion in *Karin Lorez*, Insider Dealing in Takeovers – Developments in Swiss and EU Regulation and Legislation, 2012 (forthcoming), p. 25.

15 See Swiss Federal Statistical Office citing only 14 individuals as being convicted for insider dealing and no individuals have been convicted for market manipulation between 1984 and 2011: <http://www.bfs.admin.ch/bfs/portal/de/index/themen/19/03/03/key/straftaten/haeufigste_delikte.html> (last visited January 28, 2013).

16 Indeed, the formal regulation of financial markets by a federal authority is a rather new phenomenon in Switzerland which began in the 1990s. See *David Wyss*, Marktaufsicht in der Schweiz – eine Bestandesaufnahme, SZW 2011, 561.

17 "Tatsache", strictly translated, is a "fact", not "information". It is argued that inside "facts" result in a more narrowly defined insider dealing offence than insider 'information'. See *Lorez* (n. 14), pp. 65–67.

securities, only that it was precise and specific enough to likely (and not probably) have an effect on the relevant securities.

The narrowness of the definition of inside information was addressed in 2008 when the scope of article 161 SCC was broadened by deleting paragraph 3 of the article: before only the use of confidential knowledge about "events that have a fundamental effect on the legal or economic structure of a company" was prohibited. After deletion of paragraph 3, the use of all information which "will have a substantial and foreseeable influence on the price" is prohibited.[18] Although the revision of Article 161 SCC was welcomed, it still did not lead to increased investigations and enforcement actions, nor did it lead to more convictions. International and national criticism therefore continued unabated.

As mentioned above, another factor limiting the application of the provision was that the definition of insider was very narrow; it only covered individuals who had a confidential or privileged relationship with the company in question, and did not cover most tippees, such as family members and social acquaintances, who could have benefited from the use of inside information based on tipoffs from primary insiders.These limitations on the definition of insiders were much narrower than the definitions of these terms under UK, EU or US law.

In addition, the offence only applied to securities traded on a "Swiss stock exchange" or to pre-listed securities that were traded but not yet listed on a Swiss stock exchange. This raised the important issue of what type of exchange was a Swiss stock exchange and what type of securities were subject to the prohibition. Article 2 lit. b of the Federal Act on Stock Exchanges and Securities Trading (SESTA) provides that stock exchanges covered by the prohibition are defined as follows:

[...]

lit. b A "stock exchange" shall mean any organization which is set up for the purpose of securities trading and which enables the simultaneous exchange of offers of securities among a number of securities dealers, as well as the execution of transactions; trading systems which facilitate the exchange of electricity are also deemed to be stock exchanges.

[...]

This definition of stock exchanges and securities covered by the prohibition is much narrower than the coverage of the 1989 EU Insider Dealing Directive that applied to securities traded on an organized exchange and to a broad array of financial instruments including securities (equities and debt instruments), contracts for differences, options and futures contracts based on covered secu-

18 Botschaft zur Änderung des Schweizerischen Strafgesetzbuches (Streichung von Art. 161 Ziff. 3 StGB) vom 8. 12. 2006, BBl 2007, pp. 439 et seqq. (hereinafter cited as Botschaft Strafgesetzbuch), available at <http://www.admin.ch/ch/d/ff/2007/439.pdf> (last visited January 10, 2013).

rities. Furthermore, the EU Market Abuse Directive 2003 provides a much wider coverage for the civil offence of market abuse to all equity and debt instruments traded on a regulated market, including stock exchanges and some alternative trading facilities (*i.e.*, MTFs), and to all derivatives, options and futures contracts based on securities traded on these venues.[19] As a result, the EU and UK law is much broader in coverage than the narrower definitions of "stock exchange" and "securities" traded on these exchanges set forth under SESTA and article 161 SCC.

It should also be mentioned that between 2000 and 2009, the prohibitions and restrictions of UK insider dealing and market abuse law had applied to the Swiss blue chip stocks that were traded on the SIX Swiss Exchange because the SIX Swiss Exchange was headquartered in London and governed by UK law.[20] The SIX Swiss Exchange was a prescribed market under the UK market abuse regime as discussed below and therefore all securities traded on the market were governed by the strictures of the UK market abuse and insider dealing regimes. This state of affairs, however, ended in 2009 when the SIX Swiss Exchange moved its trading venue to Zurich and the exchange entity reincorporated as a Swiss legal entity, thereby avoiding the stricter requirements of UK law.[21]

1. International Criticism

Despite having the insider dealing offence, Switzerland has attracted much attention in recent years as a poorly regulated jurisdiction in which insider dealing has flourished and the criminal offence has been characterized as ineffective and toothless.[22] Switzerland is also known throughout European regulatory circles as a haven for financial market traders to flee to once they have lost their licences in EEA states for committing market abuse and other market misconduct.[23] Although Switzerland adopted insider dealing legislation in

19 See EU Market Abuse Directive, Article 1(13).

20 See discussion in *Wyss* (n. 16), SZW 2011, 561.

21 I am grateful for the comments of former General Counsel of the SIX Swiss Exchange, *Michael Blair*, QC, for sharing his insights about the SIX exchange's move to Zurich.

22 See FATF, Mutual Evaluation Report of Switzerland on Anti-Money Laundering and Combating the Financing of Terrorism, 2005 (hereinafter cited as FATF Report 2005), pages 30, 42, 49, 137, 225, available at <http://www.fatf-gafi.org/media/fatf/documents/reports/mer/mer%20switzerland%20resume%20english.pdf> (last visited on January 29, 2013).

23 *Jabre* v. *Financial Services Authority* (Jurisdiction), 2006, Court of Appeal – United Kingdom Financial Services and Markets Tribunals, July 10, 2006, (Eng.): Mr Jabre lost his licence as an approved person by the UK Financial Services Authority for committing market abuse. Jabre now operates in Geneva through a company called "Jabre Capital Partners SA" registered in Geneva and the company has a licence from FINMA to act as asset manager of collective investment schemes according to articles 13 para. 4 and 18 of the Swiss Federal Act on Collective Investment Schemes (CISA) (<http://ge.ch/hrcintapp/externalCompanyReport.action?companyOfrcId13=CH-660-2214006-4&ofrcLanguage=1>; <http://www.finma.ch/institute/pdf_d/dassetmanager.pdf> and <http://www.finma.ch/e/beaufsichtigte/pages/vermoegensverwalter-kka.aspx>, last visited February 4, 2013). The company is however not allowed to conduct certain strategies in Switzerland which they disclaim in small print on their website (<http://www.jabcap.com/>, last visited February 4, 2013).

1988, it has never vigorously enforced its provisions and has been criticized by international bodies for failing adequately to police its markets for misconduct, including but not limited to insider dealing, market manipulation and money laundering.[24]

The Financial Action Task Force (FATF) adopted the Forty Recommendations on financial crime and money laundering in 1990 which recommended that states list most serious criminal offences, including white collar crimes, as predicate offences for the offence of money laundering. Among the white collar offences included in the FATF Recommendations was insider dealing and market manipulation. The FATF criticized Switzerland for many years for not listing insider dealing and market manipulation as predicate offences for money laundering.[25]

Switzerland attempted unsuccessfully to comply with the Council of Europe's Convention on Laundering, Search, Seizure and Confiscation of the Proceeds for Crime and on the Financing of Terrorism[26] and with the recommendations of the FATF.[27] Both required that insider trading and market manipulation are predicate offences to money laundering. Under Swiss criminal law insider trading and market manipulation are qualified as "misdemeanors"[28] and not as "felonies".[29] According to article 305bis SCC, which states

24 See FATF Report 2005 (n. 22), ibid; FATF, Second Report: Follow-up Report to the Mutual Evaluation, 2009 (hereinafter cited as FATF Report 2009), pp. 16 & 21, available at <http://www.fatf-gafi.org/media/fatf/documents/reports/mer/mer%20switzerland%20rapport%20de%20suivi.pdf> (last visited on January 29, 2013). By the time the second FATF report was written the Federal Department of Finance was already discussing inserting insider dealing and market manipulation into the SESTA and "upgrading" the offences to predicate offences for money laundering.

25 FATF Report 2005 (n. 22), pp. 3 & 13; FATF Report 2009 (n. 24), pp. 16 & 21.

26 Available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/198.htm> (last visited on January 10, 2013).

27 <http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%20%28approved%20February%202012%29%20reprint%20May%202012%20web%20version.pdf> (last visited on January 10, 2013).

28 According to article 10 para. 3 SCC, misdemeanors are defined as offences that carry a custodial sentence not exceeding three years or a monetary penalty.

29 According to article 10 para. 2 SCC, felonies are defined as offences that carry a custodial sentence of more than three years.

the prohibition of money laundering,[30] however, only money that originates from a felony can be laundered. The expert commission addressed this issue in their report and suggested to add another paragraph that qualifies some acts as a felony and therefore a predicate offence to money laundering.[31]

These limitations in the scope and coverage of the insider dealing offence led to public criticism in Switzerland that the law was toothless and ineffectual and, combined with international pressure on Switzerland to improve the transparency and efficiency of its securities markets, eventually led to proposals for legal reform. The Federal Council responded in 2007 by authorising the creation of an expert commission to compare the insider dealing and market abuse laws of Switzerland to other European countries, taking into account the Financial Action Task Force's recommendations on insider dealing legislation, in preparation of the planned revision of SESTA.

2. Findings of the Swiss Expert Commission and Revision of SESTA

The expert commission criticized the wording of articles 161 and 161bis SCC as being too narrow in comparison to the laws of other countries.

a) Definition of Insiders

The category of possible *insiders* did not cover all those involved in insider dealing because article 161 SCC was designed as a "special offence".[32] After the revision,[33] insider dealing will be a "common offence" meaning that anybody who has knowledge of inside information can be a possible offender. There will no longer be a specific category of possible insiders but the new regulation will differentiate between categories of insiders (primary insiders, secondary insiders and anyone who became aware of inside information by chance) based on the reason why they were able to access inside information.[34] In practice, this means that the definition of insider will be much broader to include: all shareholders, the issuer's employees, research analysts for advisory firms and ratings agencies.[35]

30 The Federal Act on Combating Money Laundering within the Financial Sector (Anti-Money Laundering ACT, AMLA) specifies the prohibition of money laundering (article 305bis SCC) and financing terrorism (article 260quinquies SCC).

31 Bericht der Expertenkommission Börsendelikte und Marktmissbrauch vom 29. 1. 2009, p. 43 (hereinafter cited as Bericht Expertenkommission), available at <http://www.efd.admin.ch/dokumentation/zahlen/00578/01375/index.html?lang=de> (last visited January 10, 2013); Botschaft Börsengesetz (n. 11), pp. 6880–6881.

32 Bericht Expertenkommission (n. 31), p. 24.

33 See the new articles at: <http://www.efd.admin.ch/dokumentation/gesetzgebung/00571/01634/index.html?lang=de> (last visited on January 10, 2013).

34 *Roland Lüthy/Simon Schären*, Neuerungen im Kapitalmarktstrafrecht, AJP 2012, 500.

35 This has been subject to debate for years (see *Daniela Koenig*, Umfassende Revision des Insiderverbotes, Überführung des Tatbestandes ins Börsengesetz und neue Behördenzuständigkeit geplant, Jusletter April 19, 2010, p. 2; Bericht Expertenkommission [n. 31], pp. 32 & 44).

b) Acts of Insider Dealing

The expert commission came to the conclusion that not enough *acts* could be qualified as insider dealing under the 1988 statute.[36] After the revision, the following acts of a primary insider will be qualified as insider dealing:

a) he uses inside information to buy or sell securities traded at a Swiss stock exchange or an organization which is set up for the purpose of securities trading or using financial instruments derived from such securities[37] and gains a pecuniary advantage;
b) discloses inside information to other people without permission;
c) recommends another person to buy or sell securities or financial instruments derived from such securities based on inside information.

All other categories of insiders will commit insider dealing if they gain a pecuniary advantage by using inside information for transactions with securities traded at a Swiss stock exchange or an organization which is set up for the purpose of securities trading or using financial instruments derived from such securities.

c) Enforcement Procedure

The expert commission observed that another weakness in the Swiss system was the complexity of the jurisdiction and the competency of the departments involved with investigations and enforcement, sometimes even leading to parallel proceedings for investigation, assessment and sanctioning of stock exchange crimes, including insider dealing and market manipulation. The stock exchange, FINMA, cantonal law enforcement agencies and courts as well as the Federal Department of Finance are all involved in prosecuting these offences.[38] Not only is this process inefficient[39] but the applicable procedures are governed by different principles. For example: the administrative procedure of FINMA or the stock exchange is governed by the obligation to co-operate. On the other hand, in a criminal procedure there is no obligation for self-incrimination.[40] Furthermore, the cantonal law enforcement agencies responsible for prosecuting the offences do not have the expert knowledge necessary for such complex and specific crimes.[41]

36 Bericht Expertenkommission (n. 31), p. 24.

37 Meaning *over the counter*-products will also be included from now on, even though there has been a discussion in Switzerland of whether or not to include over them (see *Lüthy/Schären* [n. 34], AJP 2012, 500, 501; *Niggli/Wiprächtiger* [n. 12], Art. 161, 18 & 23).

38 Bericht Expertenkommission (n. 31), p. 24.

39 Bericht Expertenkommission (n. 31), p. 24.

40 Bericht Expertenkommission (n. 31), pp. 25 & 26.

41 Bericht Expertenkommission (n. 31), p. 29.

In the future, the criminal prosecution authority of the Confederation is expected to possess the necessary expertise to prosecute insider dealing and market manipulation cases in front of the Federal Criminal Court and the Swiss Supreme Court.[42]

d) Predicate Offence to Money Laundering

Apart from reformulating the articles addressing the narrowness of the wording and moving them from the SCC to the SESTA, the expert commission wanted to address the international criticism that insider trading and market manipulation are not qualified as felonies and therefore not predicate offences to money laundering. The commission recommended that this should be achieved by adding a "qualified element of an offense" turning insider dealing and market abuse into a felony in specific cases and only for specific insiders: according to the new paragraphs insider trading and market manipulation are felonies for a primary insider or for the offender of market manipulation respectively who "gains a significant pecuniary advantage" instead of "just" a pecuniary advantage.[43]

The Swiss Parliament did not amend the Swiss legislation so that it fully incorporated the FATF recommendations, by turning them into felonies, rather only some acts will now be qualified as a felony under Swiss law.[44] Nevertheless, the Federal Department of Finance accepted the amendments to the legislation that contain the qualification of some acts being a felony as stated above

42 *Koenig* (n. 35), Jusletter April 19, 2010, 2, 4; *Lüthy/Schären* (n. 34), AJP 2012, 500, 505.

43 *Sonja Pflaum*, Revision des Kursmanipulationstatbestandes, Kritische Bemerkungen zur geplanten Änderung des Börsengesetzes in Bezug auf Art. 40a E-BEHG, GesKR 2012, p. 88 et seqq; *Lüthy/Schären* (n. 34), AJP 2012, 500, 502 et seqq.; *Koenig* (n. 35), Jusletter April 19, 2010, 3; Botschaft Börsengesetz (n. 11), p. 6880; Erläuternder Bericht zur Änderung des Bundesgesetzes über die Börsen und Effektenhandel (Börsendelikte und Marktmissbrauch) vom 18. 1. 2010, p. 17, available at <http://www.efd.admin.ch/dokumentation/gesetzgebung/00571/01634/index.html?lang=de> (last visited February 4, 2013).

44 The adaption of the articles and qualifying some acts as a felony was sternly critiqued during the consultation. For instance, the expansion of the insider trading and market manipulation offences to be predicate offences to money laundering does not comply with the original purpose of the AMLA (combatting laundering of significant cash flows originating from illegal trading or trafficking (drugs, arms, children, women, pornography etc.), large-scaled offences against property (theft, fraud, extortion, embezzlement) and the danger that significant parts of entire national economies are hurt by organized crime): Bericht des Eidgenössischen Finanzdepartements über die Vernehmlassungsergebnisse zur Änderung des Bundesgesetzes über die Börsen und den Effektenhandel (Börsendelikte und Marktmissbrauch) vom September 2010, p. 8 and 22, <http://www.efd.admin.ch/doku-mentation/gesetzgebung/00571/02140/index.html?-lang=de> (last visited on January 10, 2013).

has been accepted in September 2012.[45] Based on the expert commission's report of 2009, the Federal Department of Finance prepared a draft bill on insider dealing that was approved by the Federal Council in October 2011 and is expected to enter into force in April 2013.[46] This will be considered in Part IV.

III. The UK Insider Dealing and Market Abuse Offences

Before 1980, the restrictions on insider dealing in the United Kingdom were extremely limited. There was no specific legislation other than the requirements in the Companies Acts for directors, members of their families and substantial shareholders to report dealings in the shares of their companies. While these disclosure obligations were justified on a number of grounds, a significant one was that this would discourage the abuse of inside information. However, these provisions were poorly policed.[47] The common law provided no real possibility for those who dealt with those who abused inside information to seek recovery in the civil courts.[48] The use of inside information absent some affirmative obligation to disclose it, did not and probably in most cases still does not, give rise to a cause of action in the civil law.

By 1980 many in the City recognized the need for insider dealing to be made a specific criminal offence. The Companies Act 1980 then created the specific criminal offence of insider dealing in limited circumstances.[49] This new criminal offence supported the growing recognition in UK company law that fiduciary duties designed to protect the company and shareholders against insider dealing on the grounds that trading on the basis of inside information was a form of theft from the company and indirectly extracted rents from shareholders was inadequate and that stricter criminal sanctions were needed.[50]

1. The Criminal Justice Act 1993 (Part V)[51]

The UK Criminal Justice Act 1993 (CJA 1993) widened the scope of criminal liability by expanding the definition of the terms "insider" and "securi-

45 The draft of the new articles for the SESTA can be downloaded at <http://www.sif.admin.ch/dokumentation/00509/00510/00622/00624/00698/index.html?lang=de> (last visited on January 10, 2013).

46 See discussion of legislation's development in *Lorez* (n. 14), pp. 22–24.

47 See *Kern Alexander/Lisa Linklater/Barry Rider*, Market Abuse and Insider Dealing, 2002, pp. 31–33. By contrast, the US enacted anti-market manipulation legislation in 1934 in §§ 9 and 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78(i), 78(j).

48 *Percival* v. *Wright* (1902), 2 Ch. 421.

49 Part V of the Companies Act 1980 first introduced the offence of insider dealing in certain specified circumstances. See Companies Act 1980, §§ 68–73.

50 Companies Act 1980, Part V.

51 Criminal Justice Act 1993, c. 36 (Eng.). The CJA 1993 Pt. V came into force on March 1, 1994, together with two ancillary statutory instruments (both reproduced

ties".[52] The CJA 1993 expansion of the offence of insider dealing was enacted as a result of the UK Government's implementation of the 1990 European Community Insider Dealing Directive.[53] The use of the criminal law however to control insider dealing continue to prove ineffective in curtailing the rampant abuse of insider information and manipulative practices in UK securities markets. Nevertheless, as discussed below, the UK Financial Services Authority has increased the number of prosecutions in recent years and has coordinated insider dealing enforcement with the FSA's enforcement of the market abuse offence.

The CJA 1993 Part V provides for the offence of insider dealing that aim to prevent individuals from engaging in three classes of conduct in certaincircumstances: 1) knowingly dealing in price-affected securities based on inside information;[54] 2) encouraging another to deal in price-affected securities based on inside information; 3) knowingly disclosing inside information to another.[55] To prove an offence under § 52, it is necessary to demonstrate two elements: (a) the status of the person charged as an insider and (b) the type of information in its possession to be inside information.[56]

Criminal liability for each offence can only attach to an individual because the term "individual" is defined to exclude corporations and other entities (e.g., public authorities). The definition of individual did cover, however, unincorporated partnerships or firms comprising a collection of individuals. Moreover, it should be noted that a company could be liable for insider dealing by committing the secondary offence of encouraging another person to deal.

in the "Rules and Regulations"); namely, the Insider Dealing (Securities and Regulated Markets) Order 1994 and the Traded Securities (Disclosure) Regulation 1994. The relevant provisions are in the "Ancillary Acts".

52 Criminal Justice Act 1993, c. 36 (Eng.).

53 Council Directive 89/552 of November 13, 1989 co-ordinating regulations on insider dealing, O.J.E.U. November 18, 1989, L 334/30.

54 CJA 1993 Pt. V, § 52(1).

55 CJA 1993 Pt. V, § 52(1) and (2).

56 Section 52 provides in the relevant part:
(1) An individual who has information as an insider is guilty of insider dealing if, in the circumstances mentioned in subsection (3), he deals in securities that are price-affected securities in relation to the information.
(2) An individual who has information as an insider is also guilty of insider dealing if
(a) he encourages another person to deal in securities that are (whether or not that other knows it) price-affected securities in relation to the information, knowing or having reasonable cause to believe that the dealing would take place in the circumstances mentioned in subsection (3); or
(b) he discloses information, otherwise than in proper performance of the functions of his employment, office or profession, to another person.
(3) The circumstances referred to above are that the acquisition or disposal in question occurs on a regulated market, or that the person dealing relies on a professional intermediary or is himself acting as a professional intermediary.

The statute defines as insiders as:

"Insiders
To commit the offence of insider dealing, an individual must have information as an insider, which is defined in the CJA 1993 § 57 as follows:
(1) ... a person has information as an insider if and only if –
(a) it is, and he knows that it is, inside information, and
(b) he has it, and knows that he has it, from an inside source.
(2) For the purposes of subsection (1), a person has information from an inside source if and only if –
(a) he has it through
(i) being a director, employee or shareholder of an issuer of securities; or
(ii) having access to the information by virtue of his employment, office or profession; or
(b) the direct or indirect source of his information is a person within paragraph (a)".

The CJA 1993 § 57 created a distinction between a primary insider (a person who has direct knowledge of inside information) and a secondary insider (a person who learns inside information from an inside source). The primary insider usually obtains inside information through being a director, employee or shareholder of an issuer of securities or any person who has information because of his employment or office. A secondary insider obtains inside information either directly or indirectly from a primary insider. Section 57 would impose liability on brokers or analysts as secondary insiders if they act on 'market intelligence' that they know comes from a primary insider.

The insider dealing offence could only be committed if the acquisition or disposal of securities occurs on a regulated market or if the person dealing relied on a professional intermediary or is himself a professional intermediary.[57] The CJA 1993 defines "professional intermediary" as a person who carries on a business of acquiring or disposing of securities (whether as principal or agent) or a business of acting as an intermediary between persons taking part in any dealing in securities.[58] An individual employed by such a person to car-

57 CJA 1993 § 52(3).

58 CJA 1993 § 59(1)(a).
(1): a professional intermediary is a person –
(a) who carries on a business consisting of an activity mentioned in subsection (2) and who holds himself out to the public or any section of the public (including a section of the public constituted by persons such as himself) as willing to engage in any such business; or
(b) who is employed by a person falling within paragraph (a) to carry out any such activity.
(2) The activities referred to in subsection (1) are –
(a) acquiring or disposing of securities (whether as principal or agent); or
(b) acting as an intermediary between persons taking part in any dealing in securities.

ry out these activities are also defined as "professional intermediaries". The definition of professional intermediary does not include a person whose activities are merely incidental to other activities or if those activities are only conducted occasionally.[59] Under this definition, a person will rely on a professional intermediary only if the professional intermediary either acquires or disposes of securities (whether as principal or agent) in relation to the dealing or acts as intermediary between persons taking part in the dealing.[60] If deals in securities do occur on a regulated market (i. e., investment exchange), the insider dealing offence will be relevant unless the transaction is truly a private deal off the market without the intervention of a market professional.[61]

2. The Elements of Dealing Offence

The two essential requirements for the dealing offence are that: (a) an individual must have information as an insider and (b) the insider must deal in securities that are price-affected securities in relation to the information.[62] With respect to inside information, the prices of price-affected securities will likely be significantly affected if information related to such securities is made public.[63] Accordingly, if an insider has inside information, he must not deal in the securities to which that information relates. The CJA 1993 adopts a broad definition of "dealing in securities" to cover any acquisition or disposal of a security, including an agreement to acquire or dispose of a security and the entering into a contract which creates the security or the bringing to an end of such contract.[64] Moreover, such acquisitions or disposals are within the definition irrespective of whether they are made by an individual as principal or as agent.

The securities to which the Act applies are price-affected securities which are defined in the CJA 1993, Schedule 2. They include shares and debentures in companies, as well as their derivatives. They also include gilts and local authority stock (even of foreign public bodies) and their derivatives. Contractual rights of differences are also included. The list conforms to the EC Directive on Insider Dealing,[65] so that not only corporate securities and instruments

59 CJA 1993 § 59(3)(a)–(b).
60 CJA 1993 § 59(4).
61 The offence of insider dealing cannot apply to anything done by an individual acting on behalf of a public sector body in pursuit of the government's economic policies (e.g., managing monetary policy through the adjustment of exchange rates, interest rates or the public debt or foreign exchange reserves). CJA 1993 § 63(1). These exclusions, however, would not apply to the government's sale of shares in a privatization.
62 CJA 1993 § 52(1).
63 CJA 1993 § 56(2).
64 CJA 1993 §55(3)(b).
65 Article 1(2) Council Directive 89/552/EEC.

based on such securities are included, but also that other contractual rights in other futures and derivatives markets are covered.

The relevant time at which to consider whether or not an offence has been committed would appear to be at the time of agreement to acquire or dispose of the security. At that time, if the individual had inside information about these securities he will have committed an offence. However, if he received inside information only after making the agreement, he will probably not have violated the provision if he completes the deal and actually acquires or disposes of the securities. On the other hand, if the individual had the inside information at the time when he agreed to acquire or dispose of the security, it would seem that he will still have committed an offence, even if he does not complete the bargain.

The acquisition or disposal may be made by an individual acting either as principal or agent. Accordingly, if an agent has inside information, he will be within the scope of the offence if he deals in the relevant securities even though, in a direct sense, he will not gain from the transaction. This has special relevance to a trader who is engaged in a transaction as agent to benefit his principal. The fact that the individual deals as agent and not principal is irrelevant. However, where the agent deals on an execution basis only, such an approach hardly seems justified and is unfair to the principal who gave the instruction if the agent then feels inhibited from processing the order. Fortunately, it appears that a defense in this situation would allow the agent to act on instructions notwithstanding that, incidentally, he has inside information.[66]

A person is also regarded as dealing in securities if he procures, directly or indirectly, an acquisition or disposal of the securities by another person.[67] Such procurement may occur in a number of ways, including where the person who actually acquires or disposes of the security is acting as an agent, nominee or at the direction of another in relation to the acquisition or disposal of a security.[68] This aspect of the definition of "dealing in securities" is designed to cover transactions through an agent or nominee where the principal has relied on inside information without purchasing or selling the securities himself. Transactions are also covered that are undertaken at the direction of a sole shareholder who uses its influence over a company to deal in its shares.[69]

The buying or selling need not necessarily relate to securities of the company with which the person concerned is in an access relationship. It is also the case that dealing in the securities of related companies on the basis of relevant unpublished information would also be considered insider dealing. Deal-

66 CJA 1993 § 53(1)(c).
67 CJA 1993 § 55(1)(b).
68 CJA 1993 § 55(4).
69 See Parliamentary Debates, House of Commons, Standing Committee B, June 10, 1993, column 171 (per the Economic Secretary).

ings in securities other than equity securities that are price-affected by the information would be considered to be insider dealing in the UK and most other jurisdictions. Thus, acquiring options to acquire or dispose of underlying securities would be objectionable, as would dealings in other types of derivative securities. The question is simply whether the decision to deal in the relevant securities is influenced by the information that the person concerned has acquired and is using improperly.

In most jurisdictions and under EU law, the term "insider dealing" is wide enough to encompass deals on or off an organized securities market. But this is not the case under Swiss law which has applied the insider dealing offence only to transactions on organized securities markets or to pre-market transactions.Indeed, while Switzerland – but not other advanced jurisdictions – has effectively confined the operation of their legal rules on insider dealing to transactions that occur on an organized securities exchange or on or through an organized over-the-counter market, the elements of the abuse are the same whether the transaction is on a market or in a private direct transaction. One of the reasons why jurisdictions have confined the operation of their laws to public markets is the idea that the wrong indicated by insider dealing is one against the market as a whole. It saps confidence in the integrity and fairness of the market. Consequently, some countries like Switzerland have made available only their criminal laws to sanction this essentially public wrong or, rather, crime. Off-market transactions are left to the ordinary law that governs the commercial dealings of private persons. The fallacy is to attribute the description of insider dealing to one type of transaction and not to the other. While there may be justifications for distinguishing market and off-market insider transactions in regard to the remedies that are made available and in relation to enforcement, the nature of the abuse and its elements are the same. Therefore, it is appropriate to regard insider dealing as taking place on organized markets as well as in private and even face-to-face transactions.

3. The Market Abuse Offence

In 2000, the UK Parliament enacted the Financial Services and Markets Act 2000 (FSMA), which created a civil offence for market abuse and enhanced criminal penalties for insider dealing and three criminal offences for misleading statements and practices.[70] Section 118 FSMA created three distinct categories for the market abuse offence: 1) misuse of information, 2) creating false or misleading impressions and 3) market distortion. Unlike the above criminal offences, the market abuse offence could be enforced in regulatory administrative proceedings in which unlimited civil penalties could be imposed based on

70 FSMA, 2000, §§ 118–123 (Market abuse regime), and § 402 (authorising FSA to bring insider dealing prosecutions and imposing 7 year custodial sentence for insider dealing); and § 397 (1)–(3) creating 3 criminal offences for making misleading statements and acts.

a lower evidentiary standard defined as the regular user test. Significantly, the market abuse offence was concerned not only with protecting legally privileged information belonging to issuers of securities against abusive behaviour by insiders and other third parties, but also was directed against behaviour that could undermine market confidence, including systemic stability. The market abuse offence was designed therefore to enhance market confidence and investor protection by prohibiting *any* person – not just insiders who owed a duty to corporate issuers not to benefit from the use of inside information – from misusing information (*i.e.*, legally privileged information), or creating false or misleading impressions in the market, or distorting the market concerning qualified investments traded on recognized exchanges. By defining the offence in broad terms, the regulatory authority could police the market for behaviour that was not only abusive to particular issuers, but to the market as a whole. As discussed below, the EU Market Abuse Directive 2003 has required the UK to elaborate the definition of market abuse in key areas.

a) What Constitutes Market Abuse?

In contrast to the criminal offence of insider dealing, the statutory framework creating the market abuse offence is very broad, covering "behaviour" that is both on market and off market, including trading activity and disseminating false or misleading information. The Market Abuse Directive extended the three categories of market abuse under the original § 118(2)(a)-(c) – misuse of information, creating false or misleading impressions, and market distortion – to seven categories as set forth in § 118(2)-(8):

(1) insider dealing; or
(2) improper disclosure of inside information; or
(3) misuse of relevant information where the behaviour falls below the standard of behaviour reasonably expected by a regular user of the market or a person in the position of the alleged abuser; or
(4) manipulating transactions in the relevant market unless for legitimate reasons and in conformity to accepted market practices on the relevant market; or
(5) manipulating devices; or
(6) information dissemination that gives or is likely to give a false or misleading impression; or
(7) misleading behaviour or distortion of the market where the behaviour falls below the standard of behaviour reasonably expected by a regular user of the market or an alleged abuser;

unless such behaviour conforms with a rule which expressly provides that behaviour which conforms with the rule will not amount to market abuse; or conforms with Commission Regulation 2273/2003/EC which implements the Market Abuse Directive in relation to exemptions for buy-back plans and stabilization of financial instruments; or does not amount to market abuse under the Code of Market Conduct, or some other FSA position.

In addition, the UK regime maintains its separate civil offence of requiring or encouraging another to commit market abuse if the act in question would have amounted to market abuse if committed by the requirer or encourager.[71] It states in relevant part that the requirement or encouragement offence can be committed if "by taking or refraining from taking any action, a person has required or encouraged another person or persons to engage in behaviour which if the person themselves engaged in such behaviour would amount to market abuse".[72] In considering whether to bring an action for this offence or the market abuse more generally, the FSA will take account of factors such as acceptable market practices and level of knowledge and skill of person concerned.

The Financial Services and Markets Act 2000 (FSMA 2000) creates civil liability for the market abuse offence and under § 123 authorizes the FSA to enforce it through regulatory tribunals. The civil offence of market abuse is broad and includes behaviour (misuse of inside information) which could fall under the ambit of the Criminal Justice Act.

b) Prescribed Markets, Qualifying Investments and the *Jabre* Case

The FSA enforcement action against the hedge fund manager *Phillipe Jabre* and his employer GLG partners raised an important issue regarding the scope of the term "qualifying investments". In the *Jabre* case,[73] the defendant Jabre had entered into agreements to short sell the stock of the Japanese bank Sumitomo Mitsui Financial Group (SMFG) a few days after receiving price-sensitive information about the bank from a Goldman Sachs salesman. Jabre argued that his conduct in short selling SMFG stock was not, as a matter of law, market abuse contrary to § 118 because his trades in SMFG shares occurred on the Tokyo Stock Exchange and therefore were not qualifying investments on a prescribed market. He argued that it would violate the "territoriality" principle for a market abuse penalty to be imposed in the exercise of the FSA's power under § 123. The FSA found, however, that Mr. Jabre's behaviour did occur in relation to qualifying investments (SMFG shares) that were traded on a prescribed market. SMFG's shares were qualifying investments of a corporate body (SMFG) and, crucially, those shares were quoted at the relevant time on the London Stock Exchange's SEAQ International Trading System, which

71 FSMA 2000, § 123 (1)(b)(authorizing the FSA to impose a penalty on a person if it is satisfied that that person, by taking or refraining from taking any action, has required or encouraged another person or persons to engage in behaviour which, if engaged in by the encourager, would amount to market abuse.

72 FSMA 2000, § 123 (1)(b).

73 *Jabre* v. *Financial Services Authority* (Jurisdiction), 2006, Court of Appeal – United Kingdom Financial Services and Markets Tribunals, July 10, 2006, (Eng.) (Hearing on appeal by Mr Jabre of the Financial Service Authority's Decision Notice to Philippe Jabre and to GLG Partners, February 28, 2006).

was a market to which § 118 applied.[74] Jabre contended that the actual shares he shorted were not traded by him on the London market, but rather on the Tokyo market, and that the term "qualifying investments" applied only to the shares actually traded, and not to all the shares of the same kind. Moreover, he argued that the purpose of § 118 (prior to the Market Abuse Directive) was to regulate conduct in relation to UK markets, and not in respect of markets outside the UK which were not prescribed by the UK Treasury; and that his conduct on the Tokyo market had no effect on the shares listed on the London market and therefore could not constitute market abuse simply because the shares in question were listed on both markets.

The Tribunal rejected this argument by reasoning that the statutory phrase "traded on a market to which this section applies" in subsection (1)(a) does not mean that the actual shares traded were the same shares that were subject to the abusive behaviour. The Tribunal held that behaviour constituting market abuse "does not require the identification of any particular shares as being the qualifying investments to which the behaviour relates." Indeed, the Tribunal reasoned that, if Jabre's argument were accepted, it would be nearly impossible for a regulator in market abuse cases involving, for example, disclosing inside information or disseminating false rumors, to identify any particular share or group of shares which were the subject of wrongful behaviour. Moreover, Jabre's assertion that his conduct on the Tokyo market did not have an effect on the London market was inapposite because the real issue was whether Jabre's behaviour on the Tokyo market could be reasonably expected to undermine confidence in the shares traded on the London market. The Tribunal held that Jabre's insider dealing by shorting the shares of the Japanese bank, wherever it occurred, had the effect of destroying confidence in the global market for the bank's securities and therefore constituted market abuse with respect to qualifying investments on UK prescribed markets.

c) The Duty to the Market

The *Jabre* case also highlights the duty of market participants to the market to maintain transparency and overall market confidence. An important aspect of the market abuse offence was that, unlike the criminal offence of insider dealing, it established a duty to the market for anyone whose conduct – whether on or off market – was defined as being market abuse. This meant that it was not necessary for prosecutors to prove that the defendant breached

74 The Tribunal observed that SEAQ International (the Stock Exchange Automatic Quotation System for International equity market securities) is a quote-driven trading service in which securities traded on SEAQ International required at least two market makers registered with the London Stock Exchange and that two-way prices must be displayed on the LSE system for the security in question. SEAQ International was a prescribed market because of its link with the LSE and SMFG's shares, which were listed on the LSE system through SEAQ were qualifying investments.

a duty to an investor or to the company or firm whose financial instruments were being traded. It was sufficient for the regulator to show on a balance of probabilities that the behaviour in question in respect of qualifying investments had impacted the market itself by undermining investor confidence and the integrity of the market as perceived by regular users of the market. In imposing liability, however, the FSA may still under certain circumstances need to show that the state of mind of the alleged abuser was relevant for committing the offence.

Market abuse is therefore defined as behaviour which occurs in relation to qualifying investments admitted to trading on a prescribed market, or in respect of which a request for admission to trading has been made. It also applies to qualifying investments and to investments that are related to qualifying investments. These related investments can be traded on exchanges that are not prescribed UK exchanges. For instance, related investments could be traded on prescribed exchanges or off exchange in other EEA jurisdictions, or on or off exchange outside the EEA, if they relate to qualifying investments on a UK prescribed market. Although relevant in some circumstances, the state of mind of the market abuser is not necessarily relevant for a successful prosecution of the civil offence.

4. EU Insider Dealing and Market Manipulation Directive

The EU Insider Dealing and Market Manipulation Directive[75] has defined insider dealing as a form of market abuse that can constitute both a civil and a criminal offence. The Directive expands the scope of personal liability for primary insiders by excluding any requirement that they have "full knowledge of the facts" in order for criminal or civil liability to be imposed. The repeal of this requirement recognizes the market reality that primary insiders may have access to insider information on a daily basis and are aware of the confidential nature of the information they receive. In addition, the Directive adopts an information connection requirement to the definition of secondary insider.[76] According to this definition, a secondary insider would be any person, other than a primary insider, "who with full knowledge of the facts possesses inside

75 Directive 2003/6/EC of the European Parliament and of the Council of January 28, 2003 on insider dealing and market manipulation (market abuse), O.J.E.U. 2003, L96/16.

76 Directive 2003/6/EC, Article 2 (prohibiting "any person [...] who possesses inside information from using that information by acquiring or disposing of, or by trying to acquire or dispose of, [...] either directly or indirectly, financial instruments to which that information relates"), and Article 4 (prohibiting "any person", [....] who possesses inside information while that person knows, or ought to have known, that it is inside information" from disclosing inside information to any other person). See EC Market Abuse Directive, 2003, O.J. E.U. L96/21, arts 2, 3 and 4.

information." They would be subject to the same prohibitions on trading, disclosing and procuring as primary insiders.

The UK regulations implementing the Directive replace the original § 118(2)(a)-(c) with new definitions of who are the "insiders" and of what constitutes "inside information." Rather than having three definitions of abusive behaviour in § 118, there are now seven categories which provide more specific definitions of prohibited or restricted behaviour. This includes "behaviour", "where an insider deals, or attempts to deal, in a qualifying investment or related investment on the basis of inside information relating to the investment in question". By § 118A, behaviour is taken into account only if it occurs "in the United Kingdom" or is taken outside the UK with respect to a qualifying investment (or related investment) on a prescribed UK market or a qualifying investment (or related investment) on a market prescribed by another EEA state. This provides extraterritorial jurisdiction for the FSA or other EEA authorities to enforce their market abuse legislation against parties who engage in behaviour outside their territory that amounts to market abuse if it relates to qualifying investments on prescribed markets in an EEA Member State.

Section 118B defines *insiders* as any person who has inside information, amongst other things, "as a result of having access to the information through the exercise of his employment, profession or duties".7 The term *insiders* also applies to any person who has inside information as a result of his membership of the administrative, management, or supervisory bodies of an issuer of qualifying investments, or as a result of his holding in the capital of an issuer of qualifying investments, or as a result of his criminal activities, or obtained by other means and which he knows, or could reasonably expect to know, is inside information.8

Section 118C defines "inside information" for the purposes of Part VII of the Act as the following:

> [...]
>
> (2) In relation to qualifying investments, or related investments. . . . inside information is information of a precise nature which –
>
> (a) is not generally available;
>
> (b) relates, directly or indirectly, to one or more issuers of the qualifying investments or to one or more of the qualifying investments; and
>
> (c) would if generally available, be likely to have a significant effect on the price of the qualifying investments or on the price of the related investments
>
> [...]

This broad definition of "inside information" derives from the Directive's definition of inside information as "precise, not been made public, relates directly or indirectly to issuers, and if made public, would have a significant effect on price of qualifying investments (i. e., financial instruments actually is-

sued by issuer)". Information is regarded as generally available to users of the market if it can be "obtained by research or analysis conducted" by or on their behalf.

The EU Market Abuse Directive's broader definition of inside information has reinforced the powers of EU member states to bring market abuse cases based on misuse of information and privileged or confidential information that is leaked by insiders. This was demonstrated in the FSA's enforcement action in 2008 against *Richard Ralph* and *Philip Boyens*. This case showed how insiders who acquire inside information in relation to their professional and employment duties can be subject to civil liability for market abuse.[77] In this case, Mr. Ralph, a former UK Ambassador to Belgium, was, at the relevant time, the executive chairman of AIM-listed Monterrico Metals plc (Monterrico) when he asked Mr. Boyen to buy £30,000 ($46,500) worth of shares on his behalf. At the time, it was public information that the company was in takeover talks, but Mr. Ralph also knew that a takeover had been agreed in principle at a premium price that substantially exceeded the then share price. Mr. Ralph was involved in the takeover discussion and knew he was not allowed to deal in the company's shares while the material information on the takeover had not been disclosed. He nevertheless directed his broker to execute trades on his behalf before the material inside information was disclosed.[78]

5. Post-2008 FSA Enforcement

The UK Financial Services Authority was criticized in several government reports and by the House of Commons Treasury Committee for following a "light touch" prudential regulatory approach and for failing to investigate and enforce effectively investor protection, market abuse and insider dealing rules before the global credit crisis began in 2007. Between 2003 and 2007, the FSA brought only 9 enforcement actions for market abuse and insider dealing. After the crisis began, however, since 2007 the FSA has toughened its approach considerably by embarking on a number of high profile investigations, including pre-dawn raids on banks and investment firms, and increasing the number of enforcement actions against those accused of market abuse or insider dealing.[79] For example, the FSA has averaged since 2008 18 enforcement actions a year involving alleged market abuse and has imposed over £214 million ($331.4 million) in civil fines.[80] Regarding the criminal offence of insider dealing, it has obtained 21 convictions and prosecuted an additional 16 cases in 2012. Indeed, the FSA's enforcement approach has become more aggressive in order to send a message to the market that market misconduct will not be tolerated and it has enhanced its coordination in cross-border prosecutions with foreign regulators.[81] This was demonstrated in the case against *James* and *Miranda Sanders*, which resulted in the FSA obtaining convictions in May 2012, when these British defendants were convicted for illicitly using inside information about US issuers to trade index futures on a London exchange.[82]

Over the years responsibility for prosecuting crimes involving insider dealing has proved to be something of a "hot potato" and has been shared by several UK agencies and prosecuting authorities. The police have never been particularly enthusiastic about such cases and the Serious Fraud Office took the view in the late 1990s that the vast majority would not come within its statutory remit. Indeed, the SFO dismissed such offences as being of a "technical and regulatory" nature. With the realization that "real" criminals may engage in the deliberate gathering and exploitation of price sensitive information attitudes have possibly changed and even the Serious Organized Crime Agency has exhibited some interest. However, given the FSA's exclusive responsibility for policing the market abuse regime it is sensible that the FSA is now the lead prosecutor for cases under the Criminal Justice Act.[83] It should be remembered, however, that serious cases of insider abuse will often involve other criminal conduct and more general offences, such as money laundering and terrorist financing.

77 FSA Notice to *Richard Ralph*, (November 12, 2008/Ralph); and FSA Notice to *Philip Boyen*, (November 12, 2008/Boyen).

78 See FSA Notice to *Richard Ralph*, (November 12, 2008/Ralph); and FSA Notice to *Philip Boyen*, (November 12, 2008/Boyen). Mr. *Ralph* agreed to a fine of £117,691.41, while Mr. *Boyen* agreed to a fine of £81,982.95.

79 Section 402 of Financial Services and Markets Act 2000 authorizes the Financial Services Authority to enforce the criminal offence of insider dealing. See Financial Services and Markets Act 2000, c. 8, (Eng.), § 402 (authorising FSA to bring insider dealing prosecutions and imposing 7 year custodial sentence for insider dealing).

80 See Financial Services Authority, 'Five arrested in FSA insider dealing investigation', FSA/PN/006/2013 (London) http://www.fsa.gov.uk/library/communications/pr/2013/006.shtml.

81 In the recent FSA insider dealing enforcement action against *James* and *Miranda Sanders*, FSA acting director of enforcement and financial crime, *Tracy McDermott*, said that the FSA is sending "a clear message about our willingness, and ability, to tackle serious, organised insider dealing." In cases involving cross-border investigations and enforcement, the FSA acting enforcement director has observed that the FSA "and our overseas counterparts, are committed to working together to tackle abuse wherever it occurs". See <http://www.fsa.gov.uk/library/communication/pr/2012/060.shtml> (last visited 8 October 2012).

82 Ibid.

83 The FSA has so far secured 21 convictions in relation to insider dealing since 2008, some of whom include: *Thomas Amann* in December 2012; *Christopher McQuoid* and *James William Melbourne* in March 2009; *Matthew* and *Neel Uberoi* in November 2009, *Malcolm Calvert* on March 11, 2010, *Anjam Ahmad* on June 22, 2010, *Neil Rollins* on January 21, 2011, *Christian Littlewood* and *Angie Littlewood* on October 8, 2010 and *Helmy Omar Sa'aid* on January 10, 2011 and *Rupinder Sidhu* on December 15, 2010. As of July 2012, the FSA is prosecuting 11 other individuals for insider dealing.

The FSA's stricter approach was demonstrated in several highly publicized cases in 2011 and 2012 involving senior bankers and fund managers who allegedly leaked insider information on UK-listed companies in violation of the UK market abuse regime. Specifically, the FSA imposed a civil penalty of £450,000 ($725,000) on *Ian Hannam*, JP Morgan Chase's global head of equity capital markets, in April 2012 for illicitly disclosing inside information to a third party investor about the likelihood of a takeover of a company by one of Mr. *Hannam's* clients. Mr. *Hannam* has appealed the penalty to the UK Financial Markets Tribunal on the grounds that the information he disclosed was not privileged inside information and that he did not make a profit or avoid a loss personally on the leaked information. Nevertheless, the UK Listing Authority has strict prohibitions on insiders leaking inside information to third parties outside of approved reporting channels. This type of unauthorized disclosure of inside information constitutes misuse of privileged information, a form of market abuse, which, although may not be criminal insider dealing, is a civil offence for which unlimited fines can be imposed.

The other high profile case involves prominent investment manager *David Einhorn*[84] and his hedge fund Greenlight Capital[85] which together were fined £7.2 million for trading on the basis of confidential information in the shares of a British pub chain. In this case, Mr. *Einhorn* and Greenlight Capital traded on the basis of inside information about a UK listed company. Mr. *Einhorn* denied wrongdoing by arguing that he committed the trades in question in New York and that he did not fully understand the breadth of the market abuse offence. He decided not to appeal the FSA's decision and to a pay a settlement.[86]

The FSA enforcement approach aims to expose and deter market abuse which has been rife in UK financial markets for many years. Prior to 2007, many traders in the UK markets were aware that the benefits of engaging in market abuse and insider dealing, such as passing on inside information, far outweighed the potential costs of being caught, in part because the penalties were low and enforcement unlikely. However, after a number of Parliamentary hearings that exposed the FSA's passive posture as a supervisor, the FSA has taken on a more proactive stance in enforcing prudential regulation and conduct of business rules. As discussed this has resulted in increased enforcement of market abuse and insider dealing laws. The FSA, however, will be disbanded at the end of 2012 as new UK legislation that restructures financial regulation will take effect. The FSA will be replaced by a Twin Peaks regulatory model consisting of a Prudential Regulatory Authority (PRA), whose responsibility will be to supervise financial institutions, and a Financial Conduct Authority (FCA), whose responsibility will be to protect investors and consumers and enforce conduct of business rules. Under the Financial Services Bill, the FCA will be the primary enforcer of the UK market abuse regime and insider dealing laws. Most of the FSA's enforcement and market conduct divisions will be transferred to the Financial Conduct Authority where it is expected that the tougher enforcement will be continued.

84 See FSA Decision Notice to *David Einhorn*, January 12, 2012. The FSA imposed a fine of £3,638,000 for engaging in market abuse in violation of § 118 (2) FSMA.

85 See FSA Decision Notice to Greenlight Capital, Inc., January 12, 2012. The FSA decision imposing on Greenlight Capital, Inc. a fine of £3,650,795, pursuant to § 123 (1) of FSMA for engaging in market abuse in violation of § 118 (2) FSMA.

86 FSA Decision Notice, supra n. 81.

It is generally accepted amongst market practitioners that before the FSA adopted this more proactive regulatory approach, market participants had rarely been charged with market abuse, let alone the criminal offence of insider dealing, which required prosecutors to prove beyond a reasonable doubt that the defendant knew or should have known that he was an insider and that he knew or should have known that he possessed inside information. Nevertheless, the FSA's tougher enforcement approach since 2007 and the new judgment-led regulation approach has had the effect of deterring market misconduct and led to a greater number of enforcement actions for market abuse and criminal prosecutions for insider dealing. The FSA asserts that its more aggressive enforcement posture has deterred significant amounts of market misconduct, especially with respect to insider dealing during takeovers. The FSA provides data to suggest that in 2009 unusual share price movements occurred before thirty percent of UK-based mergers and acquisitions, which suggests the likelihood of leaked inside information before the official takeover announcement. By 2011, however, the figure had dropped to twenty percent. This lower figure has been attributed to an increase in the number of publicised investigations, enforcement actions, convictions and penalties. Although it remains debatable whether the FSA's more proactive enforcement posture has actually deterred insider dealing and market abuse, it certainly marks an important move away from its previous light touch enforcement approach that had resulted in pervasive market misconduct to a less cavalier, more compliance-based approach to market misconduct.

IV. The SESTA 2011 – Enhancing the Criminal Law and Administrative Offence against Insider Dealing

As discussed, Switzerland's approach to enforcing the criminal offence of insider dealing has been ineffectual and as a result has come under pressure from international bodies and the European Union to enhance the effectiveness of the criminal offence of insider dealing and to adopt a civil or administrative offence to prohibit insider dealing. In response, Switzerland has attempted to improve its reputation in recent years by amending the Stock Exchange Act (SESTA) to move the substantive criminal offence of insider dealing from the criminal code to SESTA and by shifting responsibility for enfor-

cement from local cantonal authorities to a federal authority.[87] An important principle underpinning the SESTA insider dealing law has been the equal treatment of investors in capital markets. This is an important principle of Swiss stock market law, especially with respect to takeovers and in restricting the preferential treatment of controlling shareholders in listed companies.[88] SESTA also promotes a level playing field for investors and transparency and effective functioning of markets (article 1 SESTA). Moreover, article 6 SESTA provides the legal basis for the supervision of financial market activities, including "price formation, execution and settlement of transactions in such a manner so as to ensure that insider trading, price manipulation and other breaches of the law may be detected" (article 6 para. 1 SESTA). All of these provisions serve as justification for the expansion of the scope of the criminal offence of insider dealing and market manipulation under SESTA.

SESTA enhances the coverage of the insider dealing criminal offence in the following ways: a wider definition of insider (everybody having knowledge of inside information) in recognition that the fiduciary duty will no longer be a legal principle supporting the application of the insider dealing offence; not only stock exchanges, but also alternative trading facilities will be covered exchanges; a five year custodial prison sentence for conviction of insider trading; market participants and firms will have to review their risk management procedures and governance rules to mitigate insider dealing risks; the Criminal prosecution authority of the Confederation will be responsible for prosecuting insider dealing; and the prosecution of criminal insider dealing and the regulatory offence of insider dealing can both occur cumulatively or sequentially.

In addition, Switzerland has long been under pressure to create an administrative or regulatory offence for market abuse and to harmonise its definition and scope of coverage of the insider dealing and market manipulation offences with EU law.[89] The 2011 amendments to SESTA include the creation of an administrative or regulatory offence prohibiting insider dealing for persons and entities supervised by the Swiss Financial Market Authority (FINMA) and for non-supervised entities and persons.[90] These provisions came into effect on April 1, 2013.[91]

87 It is generally recognised that the cantonal authorities provided inadequate oversight of market misconduct and weak – nearly non-existent – enforcement of the insider dealing statute (*Lüthy/Schärer* [n. 34], AJP 2012, 500, 505).

88 Article 1 SESTA expressly provides for the objective of ensuring transparency and equal treatment of investors. In takeovers, Article 24 para. 2 SESTA provides that "the offeror shall treat all holders of equity securities of the same class equally".

89 The legal basis for Switzerland to make its financial market laws more harmonious with international and European standards can be found in article 8 of SESTA, which provides that "[t]he stock exchange shall take into account internationally recognised standards".

90 Botschaft Börsengesetz (n. 11), p. 31.

91 Botschaft Börsengesetz (n. 11), p. 37.

Presently, under SESTA, FINMA can impose civil sanctions (but not fines or penalties) for the violation of the administrative offence of insider dealing for supervised market participants only.[92] In doing so, FINMA can impose the following administrative measures: a reprimand (declaratory ruling, article 32 FINMASA), specific orders to restore compliance with the law (article 31 FINMASA) and the authority to prohibit individuals from practising their profession (article 33 FINMASA) or dealers from carrying on business (article 35a Swiss Stock Exchange Act), to order a supervised institution to remove a person in a position of responsibility and to revoke licences (article 37 FINMASA). Depending on which law applies, the revocation of a licence may result in liquidation (*e.g.*, article 23quinquies Swiss Banking Act) or, where there is an excess of debts over assets, bankruptcy proceedings (*e.g.*, article 37 FINMASA in conjunction with article 25 et seqq. of the Swiss Banking Act). FINMA may also confiscate any illegal gains or require restitution of losses for investors (article 35 FINMASA) or publish a final and binding ruling (article 34 FINMASA).[93] In addition, where there is substantial added risk because of delay in enforcing sanctions or other special urgency, FINMA may issue necessary and proportionate interlocutory orders to achieve its objectives,[94] for example by appointing an investigating agent (article 36 FINMASA).[95]

Beyond adopting regulatory measures, however, FINMA will not have any power to impose sanctions or penalties on market participants for engaging in insider dealing under the amended SESTA. This compounds the problem that in recent years Swiss prosecutors have followed a rather "light touch" approach in investigating and enforcing insider dealing law. FINMA will take on new powers to investigate insider dealing and to prosecute administrative offences against supervised persons and non-supervised persons in 2013, and it remains to be seen how proactive they will be in investigating alleged violations and enforcing the law.

Although the new civil offence against insider dealing and increased criminal law sanctions for insider dealing are important regulatory and legal developments in Swiss financial market law, the Swiss insider dealing regime still suffers major weaknesses. FINMA is not permitted to impose administrative or civil fines and penalties for insider dealing; it requires enforcement actions to be brought by prosecutors in a court of law, and not before a regulatory tribunal; and it cannot be enforced against firms and individuals who are not supervised by FINMA. Moreover, the Swiss civil offence of insider dealing also

92 FINMA has adopted circulars that create a regulatory or administrative offence of insider dealing to be applied to supervised persons – e.g., authorized individuals and firms. See *Lorez* (n. 14), p. 173.

93 These supervisory procedures are set forth in FINMASA pursuant to article 35a SESTA. See discussion in *Lorez* (n. 14), pp. 173–176.

94 Article 31 FINMASA, article 25 et seqq. Swiss Banking Act.

95 See FINMA: <http://www.finma.ch/e/finma/taetigkeiten/gb-maerkte/enforcement-marktaufsicht/pages/default.aspx> (last visited January 29, 2013).

does not provide adequate legal support under Swiss law to allow FINMA to exchange bank account information in civil enforcement actions to foreign regulatory authorities. These limitations in the administrative enforcement regime render the SESTA administrative offence ineffective in deterring market misconduct and not equivalent to the powers of most EU member state regulators (including the UK) in enforcing the market abuse offence. This will probably result in no appreciable improvement in Switzerland's reputation as a weakly regulated jurisdiction.

V. Summing up the Two Jurisdictions' Different Approaches

The United Kingdom and Switzerland have made important legislative and regulatory reforms to address the problem of insider dealing, but the UK has made far more progress in recent years because of its more robust enforcement of the civil offence of market abuse and increased number of successful insider dealing prosecutions. By contrast, Switzerland has had very few enforcement actions against insider dealing and the few cases that Swiss prosecutors have brought have resulted in minimal sanctions thereby having negligible effect on market behaviour.

Regarding the different approaches of the United Kingdom and Switzerland in controlling insider dealing and market abuse, the criminal law was traditionally the main legal vehicle through which both jurisdictions sought to control insider dealing. In recent years, however, UK policymakers have recognized that insider dealing and market manipulation also pose risks to the efficient functioning of capital markets and when complex financial instruments or trading strategies are involved can lead to serious market distortions and liquidity risks.[96] The UK's market abuse regime addresses these risks by creating the civil offence of market abuse and empowers UK regulators to enforce the offence by imposing unlimited penalties and fines on business entities and individuals and ordering compensation and restitution to investors who have suffered losses. In response to the outcry of public indignation and political criticism of the Financial Services Authority's regulatory failings prior to the financial crisis,[97] the FSA has toughened its supervision and enforcement posture considerably since 2008 by increasing the number of investigations and enforcement actions in the retail and wholesale markets and successfully prosecuting a number of civil actions for market abuse and criminal actions for

96 European Central Bank, Financial Stability Report (January 2, 2011).

97 See House of Commons, Treasury Committee, "The Run on the Rock", Fifth Report of Session 2007-08, Vol. I, Report, together with formal minutes, available at < http://www.publications.parliament.uk/pa/cm200708/cmselect/cmtreasy/56/56i.pdf> (last visited February 4, 2013) criticising the FSA for failings in prudential supervision in both the domestic retail banking markets and in the wholesale capital markets.

insider dealing.[98] For example, the twenty one successful insider dealing enforcement actions between 2008 and 2012 and the over twenty five adjudications of liability for market abuse demonstrate a firmer resolve to stamp out market misconduct.

The EU and its member jurisdictions have also adopted the civil or regulatory offence of market abuse requiring a lower standard of proof to impose liability. The market abuse offence is designed not only to protect shareholders against the misuse of proprietary information belonging to the company and others to whom a fiduciary duty is owed, but also to promote a more efficient functioning of financial markets by fostering minimum standards of fair dealing and transparent practices that reduce market distortions and control systemic risks.[99]

The Swiss Federal Council has approved further amendments to SESTA that would reinforce the criminal and administrative sanctions. Criminal sanctions may consist of imprisonment up to five years, fines and confiscation of the proceeds of crime. In addition to criminal sanctions administrative sanctions may be imposed by FINMA not only for supervised market participants but also for non-supervised market participants. Although this is an expansion of FINMA's supervisory function, financial penalties are still not subject to FINMA's sanctioning power.

In addition, although FINMA can issue orders to supervised market participants to take measures not to deal in inside information, it cannot impose civil fines or penalties on individuals or firms for violating the insider dealing prohibition. Only the federal prosecutor can impose fines or penalties – presumably through a criminal enforcement action – for violating the administrative or criminal offence of insider dealing. FINMA clearly does not have equivalent institutional powers and legal authority to ensure compliance with the SESTA administrative offence of insider dealing, nor does it have the powers (like the UK FSA does) to bring an enforcement action under the criminal offence of insider dealing. This is a major weakness in the Swiss regulatory regime that truly sets it apart from other EU states, especially the United Kingdom, where a more robust market abuse and insider dealing regime has been adopted and is being robustly enforced.

98 See Financial Services Authority, "Investment banker sentenced for insider dealing", FSA/PN/113/2012, December 13, 2012: summarising FSA prosecution and conviction of former investment banker *Thomas Ammann* of Mizuho International plc. who was sentenced to 2 years and 8 months at Southwark Crown Court, London.

99 Systemic risk has become an important focus of the regulatory reform agenda but its definition has been much disputed by academics and policymakers. See European Systemic Risk Board, "Principles of Macro-prudential Regulation and Systemic Risk", April 2012, (Frankfurt: ECB).

VI. Conclusion

The article concludes by arguing that in modern financial markets effective enforcement against insider dealing and market abuse requires that authorities utilize administrative or "civil" offences that allow the imposition of fines and penalties that have a deterrent effect and are calculated based on a range of factors, including the size of the defendant firm, losses suffered by investors, cooperation in settling the action with authorities, and the egregiousness of the behaviour in question. Although the UK market abuse regime was not enforced strictly and was deliberately underutilized by UK regulators during 2001-2007, it has now been more strictly and effectively enforced since 2008 and serves as a model for other countries in building an effective regime against market misconduct. By contrast, Switzerland has failed to effectively enforce its insider dealing law and has responded to international criticism of its weak insider dealing regime by adopting an administrative or regulatory offence for insider dealing. The offence however does not provide the regulator with effective tools to deter serious forms of market misconduct and does not fully meet the international standards of turning insider dealing and market manipulation entirely into predicate offences for money-laundering. It is submitted that for Switzerland to enhance the efficiency and integrity of its financial markets, it should establish a robust regulatory offence of market abuse similar to that required by the EU Market Abuse Directive and to establish a more effectively enforced criminal offence for insider dealing.

Ein Jahr schweizerisches Bundespatentgericht

Cyrill P. Rigamonti*

ZVglRWiss 112 (2013) 293–324

Mit einem Jahr Verspätung hat das neue schweizerische Bundespatentgericht am 1. 1. 2012 seinen Betrieb aufgenommen und seither bereits zu einer ganzen Reihe von Fragen Stellung nehmen können, wobei der Schwerpunkt im prozessualen Bereich liegt. Der vorliegende Beitrag widmet sich den charakteristischen Merkmalen der reformierten Patentgerichtsbarkeit in der Schweiz und stellt die bisherige Rechtsprechung des Bundespatentgerichts dar, um vor diesem Hintergrund im Sinne einer Zwischenbilanz ein erstes Fazit ziehen zu können.

I. Einleitung

Die vielleicht bedeutendste Neuerung im schweizerischen Immaterialgüterrecht der letzten Jahre ist die umfassende Reform des Patentprozesses, die zum einen auf die allgemeine Vereinheitlichung des schweizerischen Zivilprozessrechts und zum anderen auf die Schaffung des Bundespatentgerichts zurückzuführen ist.[1] Damit wurde dem zunehmend als Missstand empfundenen Föderalismus im Patentprozesswesen ein Ende gesetzt. Anstelle von sechsundzwanzig potentiell zuständigen kantonalen Gerichten, die sich auf der Grundlage von sechsundzwanzig verschiedenen kantonalen Zivilprozessordnungen mit oft unbeliebten Patentprozessen abmühen mussten, ist seit 2012

* Prof. Dr. iur., LL.M. (Georgetown), S.J.D. (Harvard), ist Ordinarius für Wirtschaftsrecht an der Universität Bern und leitet das dortige Departement für Wirtschaftsrecht. Er ist in Zürich und New York als Rechtsanwalt zugelassen.

1 Zum Bundespatentgericht, siehe auch *Cyrill P. Rigamonti*, The New Swiss Patent Litigation System, Journal of Intellectual Property, Information Technology and E-Commerce Law (jipitec) 2011, 3; *Simon Holzer*, Das neue Bundespatentgericht, sic! 2009, 744; *Werner Stieger*, Die Zuständigkeit der Schweizer Gerichte für Prozesse über und im Zusammenhang mit Patenten ab 2011, sic! 2010, 3; *Werner Stieger*, Prozessieren über Immaterialgüterrechte in der Schweiz – ein Quantensprung steht bevor, GRUR Int. 2010, 574; *Pierre-Yves Bosshard*, Le nouveau Tribunal fédéral des brevets et les jurisdictions cantonales, SZZP 2010, 191; *Alexandra Gick-Komondy*, Schweizerische Patentgerichtsbarkeit im Vergleich mit der europäischen Entwicklung, 2010, S. 189-213; *Michael Ritscher*, Patent Litigation in Switzerland – At the Brink of a New Era, in: Hansen/Schüssler-Langeheine (Hrsg.), Patent Practice in Japan and Europe, 2011, S. 211-219; *Mark Schweizer*, Das neue Bundespatentgericht: besser, schneller, billiger?, Jusletter vom 12. 3. 2012; *Tobias Bremi*, Das Schweizer Bundespatentgericht – ein neuer schneller Weg zu Verletzungsurteilen in Europa, Mitt. 2012, 529.