Schweizer Schriften zum Finanzmarktrecht

Herausgegeben von

Prof. Dr. Dieter Zobl

Prof. Dr. Mario Giovanoli

Prof. Dr. Rolf H. Weber

Dr. iur. Karin Lorez

Insider Dealing in Takeovers

Developments in Swiss and EU regulation and legislation

Contents

Contents	VII
Bibliography	XIII
Materials	xxv
Abbreviations	.xxxv
Introduction	1
Chapter I. The Regulation of Insider Dealing	
§ 1. Why is Insider Dealing Treated as Wrong and	
Why Should Insider Dealing be Regulated?	7
I. Information Asymmetry	
II. Market Efficiency and Transparency Issue	
The Efficient Market Hypothesis	
2. Transparency	
III. Investor Protection and Stabilisation of the Financial System	
IV. The Need For Regulation	
Market Supervision in Switzerland	
a. Supervisory Authority	18
b. Monitoring the Markets	19
2. Market Supervision in the EU	20
a. EU Supervisory Bodies	20
b. Monitoring Markets in the EU	21
V. Interim Conclusion	21
§ 2. History of Insider Dealing	22
§ 3. Insider Dealing in Switzerland	23
l. Insider Dealing Before the Amendment of the Stock Exchange Act	24
II. Amendment of the Stock Exchange Act Related to Insider Dealing	25
§ 4. Insider Dealing in Europe	28
l. The UK Legislation	31
II. The German Legislation	34
III. Proposal for a Regulation on Insider Dealing and Market Manipulation	35
§ 5. Markets	36
l. In Switzerland	37
II. In the EU	37
III. Renewals in Switzerland and in the EU	38
§ 6. Interim conclusion	40

Chapter II. Insider Dealing in Takeovers	41
§ 1. The Interaction of Criminal Law and Disclosure Requirements	41
§ 2. Characteristics of Takeovers	42
I. Planning Phase/Deal Assessment/Resolution	45
II. Types of Acquisition	
1. Creeping Takeover	46
2. Block Trades and Package Deals	46
a. Mandatory Offer in Switzerland	46
b. Insider Information in Connection With Block Trades	48
c. Mandatory Offer/Bid in the EU	49
d. Insider Information in Connection With Block Trades	49
3. Takeover Bid	50
4. Management Buyout	50
5. Interim Conclusion	51
§ 3. Insider Information	51
I. In Switzerland	52
1. Information (Tatsache)	52
2. Confidential, Substantial, Foreseeable	55
a. Confidentiality	55
b. Substantiality	56
c. Forseeability	57
3. Act of Dealing	58
a. Using and Disclosing	58
b. Financial Advantage	59
c. Buy or Sell Recommendations	60
4. Renewals Under the Revision	60
II. EU Law Compared to Swiss Law	62
1. Precise Nature of Information	63
a. Rumours	66
b. Probability	67
c. The Daimler Case	69
d. Not Public	
e. Significant Effect/Price Sensitivity	75
2. Prohibition of Dealing	77
a. Using the Information – Spector Case	
aa. Initial Situation	
ab. Interpretation of the MAD	
b. Disclosure and Recommendation to a Third Person	82

c. Grøngaard and Bang	85
ca. Initial Situation	85
cb. Interpretation of the MAD	86
3. Planned Renewals Under the Revision	86
a. Insider Information	86
III. Interim Conclusion	88
§ 4. Who is an Insider?	88
I. In Switzerland	89
a. Members of the Board of Directors and the Management Board	91
b. Auditors and Agents	91
c. Members of a Public Authority and Public Officials	92
d. Auxiliary	92
e. Legal Person	93
f. Shareholders	93
g. Secondary Insiders	94
h. Renewals Under the Revision	94
II. EU Law Compared to Swiss Law	95
1. Insiders under German Law	97
2. Insiders under UK Law	98
3. Executive Bodies	
4. Holding Capital	
5. Professional Activity	
6. Planned Renewals under the Revision	
III. Interim Conclusion	
§ 5. Financial Instruments	105
I. In Switzerland	106
1. Renewals under the Revision	
II. EU Law Compared to Swiss Law	108
1. Planned Renewals Under the Revision	
III. Interim Conclusion	
§ 6. Act and Omission	112
I. In Switzerland	113
II. In the EU	114
§ 7. Safe Harbours	114
I. In Switzerland	115
1. No one can be his own Insider	
2. Purchasing Own Shares	116
3. Renewals under the Revision	117

II. EU Law Compared to Swiss Law	118
1. Dealing on own intentions	118
2. Purchasing Own Shares	119
3. Renewal under the Revision	120
III. Interim Conclusion	120
§ 8. Stock Option Plans	121
I. In Switzerland	121
II. In the EU	122
§ 9. Disclosure -Mandatory Disclosure Rules	123
I. In Switzerland	124
1. Ad-hoc Publicity	124
a. The Obligation to Disclose	126
b. Postponement of Disclosure	128
c. Timing of Disclosure	129
d. Requirements for Distribution Notice	130
2. Disclosure of Management Transaction	132
3. Disclosure of Shareholdings	133
a. Saurer, Sulzer Ascom, Converium and Implenia	134
4. Violation of the Disclosure Obligation	137
5. Renewals Under the Revision	138
II. EU Law Compared to Swiss Law	138
1. Disclosure of Insider Information	138
a. The Obligation to Disclose	138
b. Postponement of Disclosure	140
c. Timing of Disclosure	143
d. Requirements for Distribution Notice	144
e. Selective Disclosure	146
2. Disclosure of Management Transaction	146
3. Disclosure of Shareholdings	149
4. Renewals under the Revision	150
a. Conditions for Delay of Disclosure	151
b. Financial Stability Measures	151
c. Management Transactions	152
5. Interim Conclusion	153
§ 10. Information Processing and Organisational Measures	153
I. Due Diligence	154
1. In Switzerland	156
a. Information Processing During a Due Diligence	156

b. Renewals under the Revision	158
II. EU Law Compared to Swiss Law	158
a. In Germany	159
b. In the UK	160
III. Compliance	160
1. In Switzerland	162
2. EU Law Compared to Swiss Law	164
3. Planned Renewals under the Revision	160
4. The Measures	16
a. Chinese Walls	167
aa. In Switzerland	168
ab. In the EU	170
b. Insider Lists, Watch Lists and Restricted Lists	170
ba. Switzerland	17
bb. In the EU	172
c. Planned Renewals in the EU	173
IV. Interim Conclusion	173
§ 11. Enforcement and Sanctions	174
1. In Switzerland	174
a. Competent Authority	174
b. Supply Evidence	
c. Sanctions	176
d. Renewal under the Revision	
2. In the EU	178
a. Competent Authority	178
b. Supply Evidence	
c. Sanctions	
d. Renewals	180
II. Interim Conclusion	182
Chapter III. Insider Issues in the Developing	
Financial Services Industry	183
§ 1. Globalisation Tendency	183
I. Financial Crisis	185
§ 2. Innovations and Challenges in Financial Markets	187
I. MiFID	188
1. Investor Protection and Best Execution	188
2. Transnarency	190

II.	MiFID and its Impact on Switzerland	190
III.	Hedge Funds	191
IV.	Diversity of Financial Instruments	192
V.	Markets	193
1.	Regulated Markets	193
2.	Alternative Venues	194
3.	Multilateral Trading Facilities	195
4.	Dark Pools	195
5.	Market Surveillance After MiFID	198
VI.	Technology, High-frequency Trading	198
VII.	Loopholes in the Regulatory Framework	200
1.	Market Abusive Behaviour	201
2.	Lack of Transparency in Venues	202
3.	Equal Treatment	203
4.	Algorithmic Trading and High-Frequency Trading	203
VIII.	The MiFID II Proposal	205
§ 3. From D	eregulation to Regulation	205
1.	Over-Regulation	206
II.	Macro-Prudential Regulation in Securities Markets	207
Concludin	σ Remarks	208