GLOBAL LEGAL INSIGHTS

Initial Public Offerings

2022

Sixth Edition

Contributing Editors: **Ilir Mujalovic & Harald Halbhuber**

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GLOBAL LEGAL INSIGHTS – INITIAL PUBLIC OFFERINGS

2022, SIXTH EDITION

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PREFACE

We are pleased to present the sixth edition of *Global Legal Insights – Initial Public Offerings*.

An initial public offering is a key way for companies to raise capital in the global capital markets and list their shares for public trading. Although IPOs are conceptually similar whether made to investors in New York, London or Hong Kong, or in other long-established or newer markets around the world, the regulatory frameworks, market practices, investor communities and subsequent public-company obligations are far from homogenous across jurisdictions.

The *Initial Public Offerings* book provides general counsels, investment bankers, lawyers, business professionals, the investing community and other advisers and interested parties with an overview of the key steps, legal issues and market practices involved in the initial public offering process by examining practices in 14 jurisdictions around the world, with one Expert Analysis chapter focusing on the United States and a Foreword from the SIFMA.

Leading practitioners from each jurisdiction provide their expertise and guidance on navigating their local market practices and regulatory framework. Each chapter follows a similar structure: introduction of the IPO market in the relevant jurisdiction; description of the IPO process and key parties; discussion of the relevant regulators and key regulations; public company responsibilities; and potential risks, liabilities and pitfalls.

We hope you find the book will equip you with an understanding of the legal and market fundamentals necessary for a successful IPO.

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Introduction

Going public may serve several goals: it may help a company to get access to a broader investor base, to raise the capital it needs in order to activate its growth potential and strengthen its market position, and to turn a company's shares into a more liquid and fungible "currency" that may facilitate acquisitions. It may also enable effective employee incentivisation and, last but not least, allow a flexible exit by existing shareholders over time.

Switzerland as a trading venue offers very attractive conditions through a combination of its strong financial centre and the stable and issuer-friendly Swiss legal and regulatory regime. On Switzerland's main and leading stock exchange, SIX Swiss Exchange, around 250 shares across all industries are traded, including some of the largest companies in Switzerland and Europe. It offers a liquid market with state-of-the-art trading conditions. Given its importance, and unless indicated otherwise, references in this contribution to listing requirements and reporting obligations refer to the standard rules set by SIX Swiss Exchange. Switzerland's second stock exchange, the BX Swiss, is more focused on small and mid-size domestic issuers.

With its listing on a stock exchange, a public company becomes subject to additional and more comprehensive regulatory requirements, stricter supervision by regulatory authorities and increased scrutiny by the public. An IPO candidate, its shareholders and its executive management are thus well-advised to prepare the envisaged flotation carefully and familiarise themselves with the additional regulatory provisions and requirements, as early and holistic preparation is key in this process.

Switzerland has seen strong IPO activity over the past few years. In 2020 and 2021, the following companies listed on the SIX Swiss Exchange with an initial market capitalisation of more than CHF 100 million:

- Ina Invest Holding Ltd (CHF 196.8 million, 2020).
- V-ZUG Holding AG (CHF 502.4 million, 2020).
- PolyPeptide Group AG (CHF 848 million, 2021).
- Montana Aerospace AG (CHF 506 million, 2021).
- medmix AG (CHF 315 million, 2021).
- Skan Group (CHF 270 million, 2021).

The above listed IPOs in 2021 achieved an issue volume of around two billion Swiss francs. In comparison to 2020, with an issue volume of close to 700 million Swiss francs and only two companies that had listed on the SIX Swiss Exchange, the Swiss business and financial world can look back on a successful IPO year 2021. This development can be attributed, among other things, to the fact that with the start of the COVID-19 pandemic in 2020, some companies might generally have been ready for an IPO, but temporarily put it off until 2021.

Internationally, the market for special purpose acquisition companies ("SPACs") hyped in recent years, providing for an alternative to classical IPOs. Following a longer regulatory process, the SIX Swiss Exchange approved the listing of SPACs in November 2021. The new regulation addressed FINMA's initial concerns around market transparency, investor protection and market integrity in connection with SPACs. Finally, in December 2021 the first Swiss SPAC VT5 started trading on the SIX Swiss Exchange, taking advantage of the new framework and marking a milestone for Switzerland.

Further, on 1 October 2021 SIX Swiss Exchange launched "Sparks", a new segment specifically designed for small and mid-size companies. This segment facilitates the listing and trading of such companies, giving them the opportunity to broaden their financing options and access a broader investor base.

In terms of legal developments, the Swiss Financial Services Act ("**FinSA**") and its implementing ordinance (the Swiss Financial Services Ordinance ("**FinSO**")) that entered into force on 1 January 2020 continued to be of prime importance, with new practices still evolving. This new regulatory regime resulted in a substantial change of the regulatory environment for IPOs in Switzerland because it provides for detailed requirements regarding the content of a prospectus and its review by the new Swiss Financial Market Supervisory Authority ("**FINMA**") licensed review bodies. Prior to the FinSA/FinSO taking effect, the regulatory framework in Switzerland was primarily based on self-regulation by the Swiss stock exchanges and limited, partly outdated statutory provisions. In contrast, the new regulatory regime converges to the model of the European Prospectus Regulation. However, the new law did not fundamentally change the content of prospective Swiss IPO prospectuses or the timeline of the IPO preparation because IPO candidates already adhered to international disclosure standards under the former regime.

The IPO process: Steps, timing and parties and market practice

The IPO process is largely driven by the characteristics of the IPO candidate itself and by the envisaged IPO structure (primary *vs.* secondary offering, particularities such as a so-called "complex financial history"). In general, four key phases can be distinguished:

- **Phase I**: *Preparation* (approximately four to six months prior to the first day of trading) The shareholders and the issuer, together with their advisors, set up the structure, make strategic decisions for the offering, and implement the IPO-readiness of the issuer:
  - *Selection of advisors*: The issuer chooses its advisers, including in particular the underwriting banks, the legal advisors to both the issuer and the underwriters, the auditors, and often a pre-IPO advisor. In larger IPOs offered internationally, the issuer and the underwriters are each advised by two law firms: a Swiss law firm; and an international counsel, whose task is to ensure compliance with international and U.S. securities laws (which may be necessary to allow re-sales into the U.S. market, such as under a Rule 144A offering). Depending on the IPO structure, a selling shareholder might also engage separate counsel. Most often, the issuer appoints further advisors, such as a specialised PR firm.
  - *Structuring*: The underwriting banks and legal advisors advise the issuer and its current shareholders on the structuring and, in particular, whether it should be structured as a primary offering (sale of newly-created shares) or secondary offering (sale of existing shares only), or a combination of both. They also advise on the listing venue and the review body to be chosen. In case of a foreign issuer,

the structuring involves the decision as to whether the issuer should list its shares on SIX Swiss Exchange or whether it should migrate to Switzerland for the IPO. This decision is typically driven by marketing and/or tax considerations. Structuring may also include the reorganisation of a group, e.g., the establishment of a holding company.

- *Development of equity story*: Together with the issuer, the underwriters develop an equity story to market the shares. A key element is the confidential meetings between the issuer and potential investors to test the water (so-called "pilot fishing" or "early-look meetings"). In case the issuer has publicly traded debt outstanding (in particular, high-yield bonds), these meetings must comply with the relevant requirements regarding disclosure of price-relevant information; in particular, under the European Market Abuse Regulation ("**MAR**"), if the bonds are traded at an EU venue. The development of the equity story leads to the issuer presenting itself to the underwriters' analysts, following which the analysts prepare and publish research reports for the investors to attract their attention. These reports are key elements of the marketing strategy.
- *Corporate governance*: One of the main tasks of the issuer's Swiss legal counsel is advising the issuer on its corporate governance set-up and preparing the necessary corporate documentation. If the issuer has issued several classes of shares, any preferred share classes will typically be converted into common shares prior to listing, as different share classes may adversely impact the liquidity of the listed shares and be viewed negatively under good corporate governance standards. Other corporate governance measures include the adoption of mandatory Swiss "say on pay"-rules (see below) and amending the constitutional documents to ensure compliance with applicable Swiss law, as well as best practice for public companies. Existing shareholders often appoint new members to the board of directors as of the first day of trading. It is advisable to give due consideration to the recent guidelines published by the prominent proxy advisors and the Swiss standards for corporate governance, which recommend a sufficient number of independent board members. Under certain circumstances, issuers may also consider increasing the threshold for mandatory takeover bids from 33⅓% to 49% (opting up), or completely opting out of the mandatory takeover regime, which, however, is typically perceived negatively by investors.
- *Financial statements*: The issuer works closely with the auditors for the preparation and audit of its financial statements. Generally, a listing at SIX Swiss Exchange requires a three-year track record evidenced by audited financial statements drawn up in accordance with one of the eligible accounting standards (see below). In certain situations, the preparation of *pro forma* financial statements becomes necessary and, in this case, the preparation of the financial statements should be initiated as early in the process as possible. The stock exchange may grant exemptions from the three-year track records.
- *Due diligence and prospectus*: The underwriters, the legal advisors and the auditors conduct a detailed due diligence (business, legal and audit, respectively) about the issuer. Based on the outcome of this due diligence and the equity story, the issuer's legal counsel drafts the prospectus. The disclosure must comply with the FinSA/FinSO requirements which are very similar to the former SIX Swiss Exchange requirements and in line with EU standards. A Swiss prospectus should mainly include a summary, an overview of risk factors, information on the use of proceeds, information about dividends/dividend policy, information about the issuer (such as members of the board of directors and executive management, the issuer's business and share capital, as well as capitalisation and indebtedness) and the issuer's major shareholders, as well as information about the offering

and the financial statements. Even though neither SIX Swiss Exchange nor the FinSA/FinSO require an MD&A section, it is standard to include such section in an equity prospectus.

   - *Underwriting agreement*: The Swiss underwriters' counsel drafts the underwriting agreement. The agreement contains the main duties and rights of the underwriters and the issuer. It is market practice that the underwriters commit to a 'soft underwriting', i.e., they only commit to purchasing the shares upon pricing. The Swiss underwriters' counsel prepares ancillary agreements and documents, such as a share lending agreement for the over-allotment option (see below), the agreement among managers, and the lock-up undertakings. Major shareholders, as well as directors and managers of the issuer, typically sign lock-up undertakings confirming they will not sell their shares in the first months following the IPO.
   - *Review of prospectus*: The IPO prospectus must be filed with and reviewed by a review body for completeness, consistency and comprehensibility. Pursuant to the FinSA, the filing must be made at least 20 calendar days prior to publication. However, the IPO timetable should allow for sufficient time to reflect on comments received from the review body and to refile the prospectus.
   - *Listing formalities*: The issuer is obliged to appoint a listing agent which in general must be a bank in line with the meaning set out in the Swiss Banking Act or a securities firm in line with the meaning set out in the Swiss Financial Institutions Act, or have a corresponding authorisation in accordance with the law of the jurisdiction of its registered office. The listing agent is responsible for submitting the listing application, which must be filed with the SIX Exchange Regulation 10 trading days prior to the start of the bookbuilding.
- **Phase II**: ITF and marketing (approximately four weeks)
   - *Intention to float*: This phase is initiated by the issuer publishing an intention to float ("**ITF**"). The issuer's executive team and the underwriters market the issuer. The ITF does not yet contain detailed information about the IPO but is meant to draw the attention of the market to, and create momentum for, the upcoming IPO. Research reports prepared by analysts are distributed shortly after publication of the ITF.
   - *Roadshow and bookbuilding*: If the IPO gains sufficient momentum, the issuer ultimately signs the underwriting agreement with the banking syndicate and publishes the prospectus. This marks the formal 'launch' of the IPO and is followed by a bookbuilding phase, during which the issuer's executive management markets the company on a roadshow with the support of the underwriters. This leads to investors placing orders for the shares within the price range indicated in the prospectus. At the end of the roadshow, i.e., the end of the bookbuilding period, the underwriters evaluate at what price the shares may be placed with the investors.
- **Phase III**: Execution
   - *Allocation*: After the roadshow/bookbuilding, the underwriters calculate at what price all offered shares may be sold and, together with the issuer, allocate them to investors in accordance with their bids. The issuer and the underwriters execute a supplement to the underwriting agreement, which sets out the final offer price of the shares and obliges the underwriters to purchase these shares and sell them to the investors. In addition, the issuer publishes a supplement to the prospectus, setting the final price for the offered shares.
   - *Capital increase*: In case of a primary offering, the issuer conducts a capital increase (typically immediately prior to the first day of trading).

  - *First day of trading*: The start of the trading is the test for the issuer and the underwriters, as they see for the first time how the issuer's shares are traded.
  - *Settlement*: The closing of the IPO occurs a few trading days after the first day of trading.
- **Phase IV**: Stabilisation (the first 30 days after the listing)

  After the first day of trading, one of the underwriters acts as a stabilisation agent. When placing shares in the bookbuilding, the underwriters typically sell more shares to investors than they purchase from the issuer and/or the selling shareholder (typically 15% of the base size) so that these shares can be used to stabilise the market price during the first days of trading. Initially, the additional shares are not purchased from the issuer or a selling shareholder, but are lent under a share lending arrangement.

  Whether or not the over-allotment option (also known as 'greenshoe') is exercised, then depends on the development of the share price:
  - If the share price is not doing well, the stabilisation agent purchases shares in the market to stabilise the price. These shares are then returned to the lending shareholder(s).
  - If, on the other hand, the stock is trading well, the stabilisation agent does not interfere in the market activity and ultimately either purchases the shares from the lending shareholder(s) or from the issuer (which are created in (another) capital increase) and returns these to the respective share lenders.

Regulatory architecture: Overview of the regulators and key regulations

It is noteworthy that several elements of the Swiss regulatory architecture are based on self-regulation by stock exchanges, which still holds true under the new FinSA. In particular, the listing authority is still a body of the relevant stock exchanges, which are privately organised and held entities that enact the listing rules and have considerable discretion and flexibility to address particularities of individual cases. FINMA has admitted two review bodies, one of SIX Swiss Exchange and one of BX Swiss, which can be freely chosen to approve a prospectus regardless of the listing venue. This creates a certain amount of regulatory competition.

<u>Main regulators</u>

- *FINMA*: FINMA is the independent regulatory body in charge of the overall supervision of the securities exchanges and the financial market as a whole.
- *Stock exchanges*: Swiss stock exchanges adapt their own regulations based on the principle of self-regulation. FINMA supervises the stock exchanges and approves their rules. Within SIX Swiss Exchange, the Regulatory Board is the rule-making body and SIX Exchange Regulation enforces the SIX rules. The SIX Disclosure Office is primarily responsible for the supervision of the disclosure of major shareholdings.
- *Review bodies*: The so-called "review bodies" have the responsibility to review prospectuses for completeness, consistency and comprehensibility. Both SIX Swiss Exchange and the BX Swiss have been licensed by FINMA as review bodies under the FinSA.
- *The Swiss Takeover Board* ("**TOB**"): The TOB enacts rules on public takeovers and share buybacks and supervises compliance with such rules.

<u>Key regulations</u>

- The FinSA and the FinSO are the key regulations for IPOs in Switzerland containing, *inter alia*, rules regarding the requirement to publish a prospectus when securities are offered to the public or admitted to trading at a trading venue in Switzerland, as well as its content and a review of the prospectus. The FinSA further contains rules on prospectus liability (see below) and on the recognition of foreign prospectuses.

- *The listing rules of SIX Swiss Exchange* (the "**SIX-Listing Rules**") lay down the main requirements for companies to list their shares on the SIX Swiss Exchange and to maintain the listing.
- The *Financial Market Infrastructure Act* ("**FMIA**") governs the organisation and conduct of the Swiss financial market. Among other things, it prohibits insider trading and market manipulation and requires shareholders with a shareholding of 3% or more to disclose their shareholding (see below). It also contains the main provisions for public takeovers.
- The *Swiss Code of Obligations* ("**CO**") sets out the legal framework for stock corporations (*Aktiengesellschaften*) and includes rules for listed companies with regard to the publication of their annual reports.
- The *Ordinance against Excessive Compensation* ("**OaEC**") addresses Swiss listed companies and was adopted on an interim basis after the vote of the Swiss people on "say on pay"-rules (see below). In connection with the ongoing Swiss corporate law reform, which is expected to enter into force on 1 January 2023, the OaEC will be incorporated directly into the CO.

Public company responsibilities

Public companies in Switzerland are subject to several additional obligations. These include the Swiss "say on pay"-rules, reporting obligations relating to price-relevant information, management transactions and financial statements. Shareholders of a Swiss public company are obliged to report shareholdings of 3% or more to the stock exchange and the issuer, which subsequently arrange for the publication of these shareholdings on the stock exchange's website. The disclosures must be made by (and must identify) the beneficial owner of the shares, i.e., the person controlling the voting rights and bearing the associated economic risk. This identification can be particularly complicated in complex private equity structures. Additionally, shareholders of Swiss public companies are obliged to launch a mandatory bid for all shares in case they acquire (alone or acting in concert) more than 33⅓% of the issuer's voting rights – unless the articles of the issuer include an increased threshold (opt-up) or have waived this obligation (opt-out).

<u>Say on pay</u>

Switzerland has "say on-pay" rules and related executive compensation regulations for listed companies that were introduced following a public vote on a popular "say on pay"-initiative in 2013. These rules are currently still based on an executive ordinance, the OaEC, but they are being incorporated in the CO as part of the Swiss corporate law reform, which is expected to enter into force on 1 January 2023, as mentioned above, subject to very few adjustments.

The OaEC is applicable to Swiss stock corporations if their shares are listed on a stock exchange in Switzerland or abroad. The OaEC primarily contains rules on the remuneration of directors and executive management, as well as the election of directors and an independent proxy.

The key element of the OaEC is the mandatory shareholder approval of the total compensation of both members of the board of directors and the executive management. The general meeting of shareholders must approve the total compensation for these corporate bodies by separate vote on an annual basis. Details of the vote are to be included in the articles of association, and most companies approve compensation prospectively as a "budget" for the next year, but retrospective approval is also permitted. Pursuant to the OaEC, the main principles for performance-based compensation, including any incentive plans, must be set out in the company's articles of association. Hence, changes to these principles also require shareholder approval, but it is permissible to phrase such principles flexibly.

The OaEC also imposes limitations on severance payments, pre-paid compensation and takeover bonuses. The corporate law reform will also specifically regulate post-employment non-compete payments and "golden handshakes" by largely codifying the current practice. These substantive requirements are supplemented by the obligation to publish an annual remuneration report that provides disclosure on quantitative elements of the remuneration paid. This information is also typically included in the annual report.

In addition, the OaEC sets out requirements for the election and maximum term of certain corporate bodies. All board members, the chairman, all members of the mandatory remuneration committee and an independent proxy must be elected by the shareholders on an annual basis. In addition, the OaEC limits notice periods (or, if applicable, a fixed term) of employment agreements with the members of the executive management to a maximum of one year.

Ad hoc publicity

The rules on *ad hoc* publicity are not statutory obligations in Switzerland, but are regulated in the listing rules of the stock exchanges and are largely comparable to the EU regime set out in the MAR.

The SIX Swiss Exchange requires an issuer to inform the market of any facts which are capable of triggering a significant change in market prices and which have arisen in its sphere of activity. Typical examples include, *inter alia*, financial figures, personnel changes on the board of directors or management, mergers, takeovers, spin-offs, restructuring operations, changes of capital, takeover offers, significant changes in profits, profit collapses, profit warnings and financial restructurings.

In principle, the issuer must inform the market immediately, but such publication can be postponed if the price-sensitive fact is based on a plan or if the decision of the issuer and its dissemination could prejudice its legitimate interests. The issuer in this case must ensure that the respective fact remains confidential. Immediate notification is required in case of a leak. If the issuer postpones the publication of a price-relevant fact, it is important to constantly monitor if the prerequisites for the postponement are still met, and to implement a contingency plan in case of a leak.

Disclosure of management transactions

The rules on the disclosure of management transactions (directors' dealings) are also set out in the listing rules of the stock exchanges. The rules require issuers to ensure that both the members of the board of directors and the executive management report the issuer transactions in the issuer's equity securities, or in related financial instruments, which have a direct or indirect effect on such person's assets. Related financial instruments comprise, in particular, derivatives or rights which provide for or permit the actual delivery of shares or cash settlement (e.g., such as subscription rights). The reporting obligation includes transactions carried out by related parties if such transactions are carried out under the significant influence of the director or manager.

The issuer itself must then report the management transactions to the respective stock exchange, which publishes the notification on its website on an anonymous basis, i.e., without disclosing the name of the respective director or manager.

Financial reporting

Swiss stock exchanges require issuers to publish and file annual and semi-annual financial reports, which must be drawn up in accordance with one of the eligible accounting standards (currently: IFRS, U.S. GAAP and Swiss GAAP FER). Quarterly reporting is not mandatory, but many public companies voluntarily publish quarterly results or figures, in line with international standards.

Corporate governance and sustainability reporting

The Swiss Code of Best Practice for Corporate Governance issued by economiesuisse, the largest umbrella organisation representing Swiss businesses, contains the main guidelines regarding matters of Corporate Governance. It is non-binding and follows a comply-or-explain approach, allowing companies to deviate from the code's provisions if they provide a suitable explanation. Although compliance with the code is not mandatory, its provisions are widely observed by companies.

SIX-listed companies are also subject to the Directive on Information relating to Corporate Governance requiring disclosure on, e.g., group structure, major shareholders, changes of control, defence measures and compensation, in a separate section of the annual report on a comply-or-explain basis.

From 2024 (i.e., covering the business year 2023), Swiss issuers will have to establish a report on non-financial matters. SIX already permits issuers to voluntarily inform SIX that they have prepared a sustainability report in accordance with an internationally recognised standard (opting-in), which then obliges the issuer to publish a sustainability report in accordance with the chosen standard.

In recent years, the recommendations of the prominent proxy advisors (e.g., ISS and Glass Lewis) have also acquired increased importance for an issuer's corporate governance set-up and are taken into account by a growing number of companies.

Potential risks, liabilities and pitfalls

Prospectus liability

Prospectus liability of the new FinSA (Article 69 FinSA) is in principle based on the previously applicable Swiss corporate law rules and jurisprudence. As such, not having acted with due care remains a condition to such liability. Liability without fault, concepts like "fraud on the market" and the possibility of class actions were discussed but not introduced into the new law.

According to FinSA, anyone making statements in a prospectus (including key information or a similar document) which are either incorrect, misleading or non-compliant with the law, is liable to the acquirers of the securities for any damage caused thereby. Similar documents may include mini-prospectuses (e.g., shareholders' information), official notices and marketing presentations such as roadshow and early-look presentations, invitations to shareholders' meetings and advertisements. Therefore, every communication made in connection with or to promote an offering should be carefully tested against state of the art "publicity guidelines" created specifically for the relevant offer.

Advertisements made in connection with an IPO must be clearly identifiable as advertisements, must include a reference to the prospectus, and must be in line with the prospectus.

The new prospectus liability does not apply to persons solely "distributing" the prospectus (this was intentionally deleted from the previous wording). In general, the legislator's intent was that only persons who also had a certain influence on the actual content of a specific prospectus should bear liability.

A liability claim may be brought not only by the original buyers in the relevant offering but also by the later buyers in the secondary market to the extent that they can show that the prospectus or any other relevant document adequately caused the decision of such buyer to buy (at the relevant price).

Inspired by the EU prospectus regulations, liability for the summary of the prospectus arises only if the summary is misleading, incorrect or contradictory when read together with other parts of the prospectus. Further, inspired by U.S. securities laws, forward-looking statements shall only result in liability if they are made against better knowledge or without a disclaimer pointing the investor towards the uncertainty of future developments. Furthermore, FinSA introduced criminal liability for the intentional violation of the Swiss prospectus rules and regulations.

Customary due diligence (such as due diligence calls and comfort letters) serves to defend against liability claims by providing evidence to the persons involved in making the prospectus and similar documents that they have acted diligently when preparing these documents. In the absence of Swiss law statutory guidelines regarding the level of due diligence to be made, recognised market practice must be followed. In the case of U.S. Regulation S offerings, the legal due diligence will usually be led by a Swiss law firm which will also issue the disclosure letter. In the case of offerings including elements of U.S. Rule 144A, the lead will typically be taken a U.S. law firm.

Insider trading

The Swiss rules regarding prohibition of insider dealing are set out in the FMIA, which provides for both a criminal and an administrative insider trading offence.

The main difference between the criminal and the administrative offence is that the criminal offence requires the realisation of a pecuniary advantage and wilful intent, while the administrative offence only requires that the offender 'knows' or 'should have known' that the fact is insider information, and does not require that a pecuniary advantage is realised. The criminal provision provides a maximum sentence of up to five years' imprisonment or a monetary penalty. The administrative provision provides for a declaratory ruling or the publication of the supervisory ruling. Both provisions also allow the confiscation of profit.

The Financial Market Infrastructure Ordinance ("**FMIO**") contains safe harbours from the prohibition to communicate insider information. In particular, it is permissible to communicate insider information to a person if the communication is required with regard to the conclusion of a contract, and if the information holder: (i) makes it clear to the information recipient that the insider information may not be exploited; and (ii) documents the disclosure of the insider information and such clarification.

Issuers should generally adopt an insider dealing policy outlining the sanctions resulting from insider dealing, and stipulate instances in which certain individuals are banned from trading in shares of the issuer (so-called "blocking periods").

Market manipulation

The FMIA distinguishes between criminal and administrative market abuse offences. Both provisions aim to penalise the manipulation of the share price, either by (i) spreading false or misleading information, or (ii) executing fictitious transactions. The main difference between these provisions is that the criminal offence requires wilful behaviour by the offender and the intention of gaining a pecuniary advantage for themselves or for another, while the administrative offence merely requires that the offender 'knows' or 'should have known' that its acts gave false or misleading signals regarding the supply, demand or price of the securities. The criminal provision provides a maximum sentence of five years' imprisonment. The penalties for the administrative offence are, as a general rule, the same as for the insider dealing provisions. Confiscation of profit is permitted under both provisions.

The FMIO also contains certain safe harbours from the prohibition of market manipulation, e.g., for public buyback programmes as well as for price stabilisation following a public placement of securities. Under these rules it is permissible, in particular, to use shares placed as part of an over-allotment option ('greenshoe') to stabilise the price following an IPO if certain prerequisites are met. These include that the price stabilisation must be carried out within 30 days and may not be executed at a price that is higher than the issue price.

Sanctions by the stock exchanges

In addition to statutory obligations, the stock exchanges may impose sanctions on issuers in case of violation of their respective obligations under the listing rules (e.g., of *ad hoc* disclosure obligations or of rules regarding disclosure of management transactions). These can include fines and the suspension of trading, as well as, ultimately, a delisting.

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