

Establishing a Federal Capital Market Court of First Instance – Why not?

Jean-Marc Schaller

Schweizerisches Kapitalmarktrecht gilt gemeinhin als ein interdisziplinäres und daher besonders komplexes Rechtsgebiet. Ein fundiertes Verständnis der sich aus den Bereichen des Kapitalmarktes ergebenden Rechtsprobleme setzt sowohl spezifische Fachkenntnisse als auch Berufserfahrung voraus. Ein künftiges erstinstanzliches Bundeskapitalmarktgericht würde einerseits einen Beitrag zur Verfahrensökonomie leisten und andererseits durch sachkundige Entscheide deren Akzeptanz unter den Marktteilnehmern erhöhen.

Table of Contents

- 1) Introduction
- 2) Incoherent and Inefficient Court System
- 3) Specialized Courts as a Solution
- 4) Legal Framework for a Federal Capital Market Court
 - a) Commercial Courts and Federal Patent Court as Prototypes
 - b) Judges, Law Clerks and Proceedings
 - c) Competences, Seat and Language
- 5) Conclusion

1) Introduction [^]

[Rz 1] Recent financial turmoil has raised questions about the adequacy of existing financial markets *regulation*. In particular topics such as higher threshold for banks' equity ratio, modification of compensation systems, increased regulation of derivatives and the «too-big-to-fail»-issue have caused heated debates. The issue of modifying the capital market *court system* has however been neglected insofar. The considerations set forth below allow for the issues of the Swiss capital market court system, the need for specialized courts as well as the legal framework for a «Federal Capital Market Court»¹ of first instance (*abbr.* «FCMC»).

2) Incoherent and Inefficient Court System [^]

[Rz 2] Capital market law is referred to as a highly complex legal field as market participants operate in various fields like stock-trading, advisory, mortgages, insurances etc. These businesses require different rules which aim to protect creditors, investors as well as the stability and integrity of capital markets. The corresponding law consists of several subfields: (i) *private* law, in particular the law of contracts stipulating rights and obligations of the contractual parties such as the crucial duties of care and loyalty, see e.g. article 398 Code of Obligations («CO»); (ii) *regulatory* law providing governmental rules and provisions market participants are required to consider when acting on financial markets, e.g. the rules of conduct under article 11 of the Stock Exchange and Securities Trading Act («SESTA»); (iii) *criminal* law which regards certain market participants' behaviours as a criminal offence, such as fraud (article 146 Swiss Penal Code [«SPC»]), insider trading (article 161 SPC), price manipulation (article 161^{bis} SPC) or money laundering (article 305^{bis} SPC).

[Rz 3] This multidisciplinary nature of capital market law entails *different procedural competences* of courts, authorities and/or non-governmental bodies depending on the rule or stipulation which has been violated: Competence may lie with a civil or criminal court of first instance (the latter after a

prosecution conducted by a governmental attorney), the FINMA (Swiss Financial Market Supervisory Authority), the SIX (Swiss Exchange), the Federal Administrative Court, the commercial courts, and (when challenging a decision) with the courts of appeals and/or the Federal Supreme Court. When, e.g., a senior asset manager of a bank is suspected of having infringed the contractual duty of care (article 398 CO), this could at the same time be regarded as a criminal offence if and to the extent the manager fraudulently misinformed his client. This could then also cause an investigation by the FINMA, e.g. with reference to article 3 (2) lit. c Banking Act («BankA») which states that the persons entrusted with the administration and management of a bank must have a good reputation and provide for proper conduct of business operations.

[Rz 4] A number of issues arise from such an *incoherent court system*: The involved courts and authorities are not on the same level of required know how. This leads to a mismatch of power and influence. FINMA and SIX respectively their employees are well grounded in capital market issues, whereas the judges and the law clerks at civil and criminal courts of first instance, at the courts of appeals and at the Federal Supreme Court are in charge of a wide range of cases and therefore do not have sufficient opportunity to gather expert knowledge and professional experience in respect thereof. This imbalance of knowledge and experience may jeopardize unbiased legal findings and, as a consequence, their acceptance among market participants. Furthermore, different authorities frequently deal with cases which refer to the same (respectively similar) facts and particulars, for instance in the issue described above. This may, in the end, lead to (time-consuming²) *double investigations* and *different rulings*, the latter affecting certainty and reliability of capital market law.

3) Specialized Courts as a Solution [^]

[Rz 5] A lack of expert knowledge and professional experience may preferentially be offset by establishing courts specialized in legal fields which require particular understanding. Within the Swiss jurisdiction, such specialised courts have already been established: *commercial courts* (Zurich, Berne, Aargau, St. Gall) being in charge for corporate and commercial matters, *employment courts* and *rent courts* resolving disputes between either employers and employees or landlords and tenants. Moreover, a person who alleges patent infringement by another (third) party may file a lawsuit with the *Federal Patent Court of first instance*. The corresponding Federal Act on the Federal Patent Court («PCA») entered into force as per 1 March 2010³.

[Rz 6] Foreign jurisdictions, such as *Germany* and the *UK*, have already established courts dealing with particular areas of law, e.g. Commercial Courts (Queen's Bench Division of the High Court, London), Federal Patent Courts (Munich) and the (so-called) «Family Courts» (divisions of the German district courts).

4) Legal Framework for a Federal Capital Market Court [^]

a) Commercial Courts and Federal Patent Court as Prototypes [^]

[Rz 7] A future legal framework for a Federal Capital Market Court should preferably base on structures which have proven successful, such as the existing set-up for specialized courts: First, the appointment to serve as a (so-called) «commercial judge» or as a judge with the Federal Patent

Court requires an *expert knowledge* (§ 59 (2) of the Zurich Judicature Act («ZJA»); article 8 para. 1 PCA). Second, the commercial courts as well as the Federal Patent Court are *courts of first instance* (see §§ 61-64 ZJA; article 1 PCA). This is to adopt for a Federal Capital Market Court as well, since it would guarantee a short and efficient dispute resolution. Third, a claim may not be filed with the Federal Capital Market Court unless the *value* of the claim *exceeds* a certain prescribed *amount* (CHF 30,000 with regard to the Zurich Commercial Court, see § 62 (1) ZJA). This provision is to prevent parties from filing minor complaints.

b) Judges, Law Clerks and Proceedings [^]

[Rz 8] With regard to a forthcoming FCMC, both the judges and the law clerks should have an adequate knowledge of the capital market law. The judge positions in particular should solely be awarded to persons who qualify as respectable experts by their education and professional experience⁴. To ensure *professionalism* and *acceptance* among the market participants, a balanced appointment of legally and technically qualified judges with regard to finance and economics is preferred. These requirements would help increase the *efficiency* of legal proceedings since appointments of external legal experts would no longer be required: the members of the court would already qualify as specialists. This again would lead to cost- and time-saving trials.

c) Competences, Seat and Language [^]

[Rz 9] The Federal Capital Market Court should represent a *Swiss-wide*⁵ *court of first instance*, *i.e.* FCMC's competence encompasses *all legal disputes* which are governed by *private, regulatory and/or criminal* (Swiss) capital markets law. In order to ensure efficient proceedings by bundling of knowledge and experience, the FCMC's competence should be *mandatory*. The Federal Supreme Court should then act as an appellate court and review FCMC decisions. When competence for a case lies with the *FINMA*, parties should be entitled to challenge the decision with the *FCMC* and afterwards with the *Federal Supreme Court*.

[Rz 10] Furthermore, the FCMC should have its seat in *Zurich* due to the international standing as a major financial centre. Practice shows that most major banks and insurance companies are headquartered in Zurich, as well as the SIX (Swiss Exchange). The closeness of the FCMC would entail efficiency in exchanging both information and human resources, *e.g.* high-qualified lawyers (and other employees) who intend to take a position with the FCMC⁶.

[Rz 11] Strong recommendation of the author is to establish *English* as an additional language of proceedings (besides German, French and Italian) in order to ensure that participants on the international capital markets will appoint the FCMC either to a *litigation* or an *arbitration court*⁷.

5) Conclusion [^]

[Rz 12] Capital markets nowadays qualify as areas of high complexity. This requires specialization in courts in order to match the demand of arising legal issues. Further development of the current commercial court system, *i.e.* more efficient proceedings as well as sophisticated court rulings regarding capital market matters can be achieved by involving both legally and technically qualified judges and law clerks. Since international reputation of the Swiss capital markets jurisdiction is at

stake, the topic is at least worth discussing: Why not establish a Federal Capital Market Court of first instance?

Jean-Marc Schaller, PhD, Associate Professor (Privatdozent) for Private Law and Banking Law (University of Zurich), Attorney-at-law (Zurich)

¹ See WEBER ROLF H./SCHALLER JEAN-MARC, Auf dem Weg zu einem kohärenten Finanzmarktrecht in der Schweiz?, SZW 2003, p. 177 *et seq.*/p. 189 («*Bundeskapitalmarktgericht*»), with further reference to VON DER CRONE HANS CASPAR, Ein Aktienrecht für das 21. Jahrhundert, SZW 1998, p. 157 *et seq.*/p. 169 («*Bundesaktiengericht*»). – See further GERICKE DIETER, Funktioniert der Rechtsstaat im Kapitalmarkt?, in: Aktuelle Fragen des Bank- und Finanzmarktrechts, FS Zobl, Zurich 2004, p. 359 *et seq.*/p. 373 (fn. 66); see then (later, but in more detail) KILGUS SABINE, Effektivität von Regulierung im Finanzmarktrecht, Zurich 2007, p. 425 *et seq.* («*Bank- und Finanzmarktgericht*»).

² See GERICKE (fn. 1), p. 369 *et seq.*

³ SR 173.41.

⁴ See WEBER/SCHALLER (fn. 1), p. 189 (fn. 81).

⁵ See also KILGUS (fn. 1), p. 430.

⁶ KILGUS (fn. 1), p. 428.

⁷ See also KILGUS (fn. 1), p. 428.

Rechtsgebiet(e): [Kapitalmarktrecht](#)

Erschienen in: [Jusletter 19. April 2010](#)

Zitiervorschlag: Jean-Marc Schaller, Establishing a Federal Capital Market Court of First Instance – Why not?, in: [Jusletter 19. April 2010](#) [Rz]