Osmosis of Anglo-Saxon Concepts in Swiss Business Law

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An Osmosis of Anglo-Saxon concepts in the field of business law is going on in Switzerland[1]. This process, which goes far beyond a mere fashionable trend, or a superficial takeover of English business jargon, is evidence of a *"change of paradigm"*: the basic points of orientation are shifting fast, and new legislative priorities are displacing old ones.

[1] The starting point for the present Article was a speech held in a private circle in Basel, in November 1993. The author owes many thanks to *Ian Gibson*, Esq., of Frere Cholmely Bischoff, London, for his linguistic polishing work and several most helpful indications.

Indeed, we have come a long way. When in the fall of 1963 the author started working as a trainee in a New York law firm[2], the *"Westinghouse/Allis Chalmer"* Antitrust case was a predominant topic of conversation around Wall Street. The author was puzzled as, firstly, he did not know what *"price fixing"* was, in fact, at the time of that Antitrust case, Switzerland did not even have a Cartel Law in force and effect[3]. And the first Swiss Cartel Law, when it became applicable (it lasted until 1986), was particularly ineffective. It did not provide for any *"per se"* Cartel (or Antitrust) prohibitions and may from today's point of view best be described by a reference to its title: It was indeed a "Cartels' Law", guaranteeing almost unhampered legal existence to Swiss cartels. At that time, any Swiss would have been astonished to hear that US executives who were caught *"price fixing"* had to go to jail – this meant confinement for a behaviour which the 1962 Swiss Law expressly permitted[4].

In the meantime, the picture has totally changed. To understand what happened, one might shed a brief glance at the first wave of foreign – and among it, Anglo-Saxon – influence on Swiss law, and then at what is going on today.

I. The First Wave: French, Anglo-Saxon and German Influence

1. The "French" Phase

It would be unrealistic to deny a simple fact: Switzerland was under the conceptual influence of the dominant power in every single instant of its recent history. While the influence of French legal thinking in the 18th century was strong in certain "salons" of its cities, it had less factual and political impact, and only when Napoleon's troops occupied Switzerland in 1798 was the legal system renewed, even turned upside down to an almost unbelievable extent. Business Law in the first half of the 19th century clearly remained under the spell of French concepts, whether it was the law on the *"société anonyme"* and the *"société en commandite"* or the influence of the *"Code de Commerce"*.

[2] *White & Case*, then at 14 Wall Street.

[3] Dated December 20, 1962, the law entered into force and effect only on February 15, 1964.

[4] The old Swiss *Cartel Law* of December 20, 1962, in its Article 5 expressly permitted price-fixing if the cartel could name "predominant interests" which were to be protected by the means of the cartel.

2. The "German" Phase

Yet after the German victory over France in 1871, an even more lasting mark was left by the laws of Bismarck's Empire. The core of commercial law still in effect today is a transcript, or a more or less "autonomous" later adaptation, of the "General German Commercial Code" of 1861[5], even if it took the Swiss just about 20 years to come out with their clone, the *"Obligationenrecht"* of 1881[6]. The last act in this long-lasting period of "reception" of German business law occurred, albeit quite reluctantly[7], in 1936, when Switzerland adopted another German brainchild, the Limited Liability Company (*"GmbH"*)[8] which had been dreamed up, as a hybrid between limited partnerships and corporations, by a German legislative commission in 1892[9].

3. Influence of American Constitutional Concepts

But interestingly enough, prior to this "German phase" of the late 19th century, there had been a time of strong Anglo-Saxon influence, not in the field of Business Law, but rather in that of the Organization of Government and Constitutional Law in general. There is a tendency to forget that the Swiss Cantons had, for centuries, simply lacked an adequate form of organization. Our predecessors may have been fierce mercenaries brandishing gruesome halberds and muskets, but they had some trouble with legal innovation. The Conglomerate of Cantons that existed up to its occupation by Napoleonic troops had never been able – or willing – to create anything resembling a working national structure. The French, with their feeling for small differences, used to express this in a delicate way: They put on their maps, on a white spot between the Alps, the Rhine and the Jura mountains, the plural *"Les Suisses"*. They did not want to evoke the idea of something which did not exist, a national State to be called "Switzerland".

Of course, the Unitary State dictated by Napoleon for the *"République Helvétique une et indivisible"* changed this at 180 degrees, but still the Swiss, once the French had withdrawn, were unable to develop a working combination

[5] Allgemeines Deutsches Handelsgesetzbuch ("ADHGB"), cf. *Werner Schubert* (1986).

[6] *Federal Law on Obligations* [its subject matter is not only contracts and tort law, but also the law on Commercial Companies] of June 14, 1881.

[7] Until 1920, there was a feeling of hostility to the *"GmbH"* which changed in the Government Bill of February 21, 1928. Still, there were many adversarial voices in the *"Nationalrat"*, in 1934.

[8] The *"GmbH"* was created by German Imperial Law of April 20, 1892.

[9] The German model of 1892 was, of course, influenced by the English *"limited liability companies"* which were well-known from the mid-century, but the German model was specifically designed as a hybrid and to date is quite difficult for Anglo-Saxon legal minds to grasp.

of a national state with autonomous local entities. They needed the input of the ideas that had been developed in America between 1774 and 1787[10]. In 1847, when the brief Swiss civil war between the conservative foes of a national state and the "federalists" was over – the war left 104 Swiss dead on the battlefields[11] –, the handful of individuals who in 1848 drew up the legal outlines of the modern Swiss national state[12] could solve the problem only on the basis of three fundamental Anglo-Saxon concepts:

(1) *The idea of a Parliament with two Chambers*: Switzerland in its traditional set-up never had a nucleus of a freely debating body of lawmakers, based upon general elections. This idea, adopted in 1748 by Montesquieu[13] from the United Kingdom and embodied as a *"bicameral Parliament"* in the Federal Constitution of the United States in 1787[14], was adopted almost to the last detail;

(2) *The idea of a National Government*: Old Switzerland had for centuries cherished many scattered sealed documents (or "letters") which had some constitutional relevance[15], but there was nothing which could be designated as a written constitution. A central governing authority was totally lacking. This idea, while adopted from the French, was finally implemented in the Federal Constitution of 1848 along the lines of the Constitution of the United States of America;

(3) *The idea of a structured Federal State*: It is a fact that no Swiss has ever been able to conceive a political solution for Switzerland's fragmented political, religious and linguistic set-up: A neatly separated double-tier legislative mechanism for the Cantons and the Federal Government, and a top-tier Federal Parliament with *two* houses (one of them essentially representing the people, the other the Cantons). Again, this was adopted from the US Constitution.

[10] *Thomas Jefferson* (1774); *Hamilton/Madison/Jay*, The Federalist (1787/88).

[11] *"Sonderbundskrieg"*, broken out on November 3, 1847, it was finished 26 days later, on November 29.

[12] *Erwin Bucher* (1977) II, 1013/14.

[13] *Montesquieu* (1748): *"Il [i.e. le peuple démocratique] a besoin ... d'être conduit par un conseil ou sénat. Mais, pour qu'il y ait confiance, il faut qu'il [i.e. le peuple] en élise les membres"*.

[14] The Federal House of Representatives became the *"Nationalrat"*, and the Senate the *"Ständerat"*.

[15] e.g. the original *"Bundesbrief"* (Federal Charter of the first three Cantons' confederation), the *"Sempacherbrief"* etc., with some ill-fated attempts again in the 17th and 18th centuries.

Conversely, there is one domain where Switzerland has, for 150 years, steadfastly refused to borrow from the US Constitution: To the present day there is no possibility for a citizen to challenge a federal law before the highest Court in Lausanne[16]. On this point, the popular distrust of a really *"Supreme"* Court, a ranking elitist group of somberly clad academics who overrule the legislator and possibly even a popular vote, had been stronger than any other consideration[17].

But the influence of American or generally Anglo-Saxon thinking in the present Swiss Constitution goes very far. The configuration of all of the three top bodies of the country has been taken from the US Constitution of 1787 lock, stock and barrel. There is a bicameral Parliament, a Federal Supreme Court, and a President, although the anti-elitarian Swiss in 1848 thought it a wise thing to split the President up into *seven* individuals: the *"Bundesrat"* (or "Federal Council"). The original idea of 1848 had been to divide the *"President"* by *five*. After discussions, the idea arose to increase the denominator by two to reach *seven*, thus assuring more of the protagonists to hold a seat within their brand-new creation[18]. All features of the original U.S. idea of a powerful president were stripped off the Bundesrat: The right to appoint the Cabinet and the justices of the highest Court (subject to approval), the right to declare war and to veto federal laws. It was the price that the Swiss "federalists" had to pay to the conservatives: a federal level, yes, but a forceful federal executive, no. The conservative Swiss had read with disgust in *Montesquieu* (1748): *"Les affaires menées par un seul, il y a plus de promptitude dans l'exécution"*[19]. The *"Bundesrat"* also was designed to be elected by the Federal Parliament (contrary – of course – to the US system), again a modification designed to take away from the federal executive body the special legitimation brought about by popular election. There had been a proposal at an early stage to have the *"Bundesrat"* elected by direct popular vote[20], but the debate ended in one further deviation from the American guiding example.

The touchstone of this concept of a *"President split-up into seven"* is the fact that the *"Bundesrat"* does not, as foreigners often surmise, function as a normal Government in the popular sense of the word. The *"Bundesrat"* is not really governing at all, it just coordinates the moves of the seven top administrative bodies

[16] (*"Bundesgericht"*); Article 133 (3) of the Federal Constitution today in effect.

[17] The present process of revising ("updating") the Federal Constitutions is again bringing this subject up. Cf. *Federal Register* 1997 I, 1 et seq., esp. 493/94.

[18] Cf. *Erwin Bucher* (1977) II, 1011/12.

[19] L'ésprit des lois, Livre V, Chapitre X.

[20] The so-called *"Ochsenbein"* amendment, providing for the election of the *"Bundesrat"* by direct popular vote, was only narrowly defeated in the 1848 constitutional debates, cf. *Erwin Bucher* (1977) II, 1012.

of the Federal Bureaucracy. In a crisis, the *"Bundesrat"* proves to be unable to take the lead, until the bureaucracies below it finally come up with a solution it can approve reactively. And the President of the Federal Council is not the "Head of State". He is only one-seventh of it, and the "Presidency" as such rotates every calendar year. This becomes visible whenever an important foreign President or the Queen herself has to be greeted at Zurich or Geneva Airports: all seven members have to stand in a row, because only the seven members together formally constitute the Swiss "Head of State".

4. British Influence in Industrial Law Matters

The first wave of Anglo-Saxon legal influence in the 19th century can be noticed not only in constitutional law, but also in the field of *regulation of industry*. In fact, Switzerland, contrary to its milk, cheese and chocolate imagery, was the first industrialized country on the Continent, far ahead of France and, more surprisingly, in some respects also ahead of Germany. It was the Canton of Glarus[21] that appears to have introduced, following certain English models, the first *Industrial Labor Law* on the entire Continent.

In this context one wonders why industrialized Switzerland was so late in introducing a patent law[22], a system protecting industrial inventions (it happened in 1888), and was blithely continuing to exclude protection of chemical and pharmaceutical substances or processes until 1907. The reason was to be seen in the enthusiasm with which Swiss industry did what some Third World countries do today: They simply copied British, French and German inventions for free[23] and produced them at low labor cost. The culprit was first the emerging textile and tool manufacturing industries around Zurich, and later on the thriving Basel Chemical Industry[24] spreading on both sides of the Rhine in the last decades of the 19th century.

[21] The first *Labor Law* was adopted, in some respects even ahead of England, in the *Canton of Glarus* in 1848: It made, among other subjects, the change of shifts compulsory and limited work to 13 hours per day (later lowered to 12, or 11 hours overnight, respectively). Child labor, which still was a concern of the US Federal Legislator after the First World War, *Bailey v. The Drexel Furniture Co.*, 259 US 20, had been chastised already in a *Zurich Decree* of 1832. The *Swiss Federal Industrial Labor Law* was in the head group of European legislation; it dates from 1877.

[22] The basis of modern patent laws is in the English *"Statute of Monopolies"* from 1624.

[23] The first Swiss *Patent Law* of July 29, 1888 excluded chemical substances and processes.

[24] "The privileged treatment of Switzerland, particularly its border cities of Basel and Geneva, is to be attributed to the fact that the country did not have any patent protection for chemical inventions until 1907, i.e. 30 years longer than Germany. *The Swiss Chemical Industry in this period of time was in a position to use for free the processes of foreign patents* [...]", *Alfred Bürgin* (1958) 222/23, (the translation is the author's) emphasis added.

Switzerland finally introduced patent protection in the area of chemicals and pharmaceuticals only upon a *formal ultimatum* of the Imperial German Government in 1907. The Swiss Parliament procrastinated up to exactly a month before the threatened retaliatory measures of the German Empire – an instant stop for imports of dye-stuffs from Switzerland to Germany – would have been put into force and effect[25].

II. The Second Wave: American Influence

In our century, Switzerland long held on to the values of the thirties, quite undisturbed by the cataclysm of the Second World War. Contrary to what happened in most other industrialized countries, there was no chasm, no new beginning, and no thorough re-examination. The banking secrecy, introduced in 1934[26], was a brain-child of that philosophy. In the thinking of the thirties it was natural to steadfastly refuse the *right to vote to adult women* on the Federal level, a position which was maintained for more than 25 years after the war. The voting right for women was introduced on the Federal level in Switzerland, by a *male* majority to be sure, on February 7, 1971. The last Canton, *Appenzell Interior Rhodes*, steadfastly refused to grant voting rights to its adult women to the end, and had to be forced by the Supreme Court to do it in 1990[27]. Another telling example is the warm affection which the Swiss until recently felt when dealing with the phenomenon of *business cartels*, be it price fixing, boycotts or other quite ghastly violations of good market practices.

All the more astonishing is the *accelerating osmosis of Anglo-Saxon business law concepts* especially noticeable from the eighties. The second wave of Anglo-Saxon and, let's face it, mostly American influence that now hits Switzerland, a hundred and fifty years later, has resulted, in the last decade, in thorough modifications of Swiss law, especially, of course, business law. This affects substantive legal provisions as well as the underlying legal thinking in general. Many of the traditional legal concepts were (and still are) based upon Roman law and more modern celebrations of strictly categorical legal thinking: It looked more important to many to classify a given legal problem as one of a "civil law nature" or a "public law nature" than to pragmatically provide for a solution. It was a concern

[25] *Alfred Bürgin* (1958) 223.

[26] *Swiss Federal Law on Banks and Savings Institutions* of November 8, 1934 (as amended), Article 47.

[27] BGE 116 Ia 359.

of first order to think of a Roman law equivalent when analyzing a legal problem, and consequently, lawyers' *"old speak"* was full of Latin quotations until a few years ago. This was not all wrong, of course, but one is faced with a new wave of *"reception of law"* which expresses a methodologically different and more pragmatic approach to problems that elude Roman law tradition altogether. As always when a country is absorbing foreign ideas, the adoptation of words and phrases is the most visible trace of the process. Only a little more than a decade ago, such terms as *"deregulation"*, *"soft law"*, *"full disclosure"*, *"put-options"*, *"money laundering"*, *"stock price manipulation"* and *"insider dealing"* would indeed only have been understood by a few specialists in Switzerland. Today, these terms are not only in general use, but in fact some of them are nothing less than brief descriptions of Swiss Federal Laws being in force and effect.

It is worthwhile making a *"tour d'horizon"* of this second wave of Anglo-Saxon influence on Swiss legal thinking, especially in the field of Business Law, by taking a closer look at seven most telling examples. But doing this, one should keep in mind that the process of absorption goes far beyond these specific examples. It is as *Wolfgang Wiegand* has pointed out[28] an on-going "reception" of style, legal thinking and methodology.

III. Examples of the Osmosis of Anglo-Saxon Legal Concepts

1. Insider Dealing Law of 1987

The most striking paradigm of the absorption of a legal concept which before was considered totally alien to Swiss legal thinking was the introduction of the new penal provision on *Insider Trading of Securities*[29]. In Parliament, an overwhelming vote in December 1987[30] adopted the new law while deputies could not dwell enough on the question whether this was to be understood as a *"Lex Americana"*[31]. In reality, this new Article of the Federal Penal Code was not only enacted under the explicit pressure of American enforcement agencies[32] but it

[28] *Wolfgang Wiegand* (1988) 229, (1991) 229 and (1996) 137.

[29] *Peter Forstmoser* (1973) 133 was instrumental in this change of paradigm.

[30] On December 17, 1987: it is Article 161 of the *Federal Penal Code*, in force and effect from July 1, 1988.

[31] Affirmative and denying, *Official Minutes* of the *"Nationalrat"* (Swiss House of Representatives) 1987, 1370/71, 1373/75.

[32] Especially the *Securities Exchange Commission* ("SEC"), cf. the description of events by *Peter Forstmoser* (1973) 139, and the *Explanatory Government Message* of May 1, 1985, Federal Register 1985 II, 74.

casted into neatly coordinated German, French and Italian words, the legal concept which then existed under the last US court decisions based upon Section 10 (b) and Section 16 (b) of the Securities Exchange Act 1934 and in particular the SEC Rule 10 (b) – 5 (1).

In the process of the making of this milestone law, it is quite revealing that earlier in the law-making process it had been contemplated that only so-called *"effective insiders"* where to be punished, as was the predominant practice in the United States until the late fifties. This was dropped after a fast glance over the Atlantic Ocean: Having taken note of the stringent practices developed by the SEC and the US Courts after 1961[33], the Government in its Bill introduced the much more far-reaching and problematic concept of penalizing also constructive insiders or *"outside tippees"*[34].

After the hasty introduction of this new law, Switzerland was ahead even of the persistent law-making endeavors of Brussels' European Community bureaucracy. The latter adopted its Directive on Insider Dealing only two years later, in 1989[35]. And Germany followed with its own Insider Trading Law another five years later, in 1994[36].

These days, many cannot stop deploring the fact that Swiss prosecutors have not, so far, caught any "big shot" red-handed while dealing in securities based upon privileged knowledge. The reason for this can easily be traced back to the debates of 1987. Parliament wittingly opted for narrow limits to the scope of the Insider Dealing Law. And the Federal Council blithely stated *that it preferred not to grant anybody in this field special enforcement powers*[37]. In Switzerland, a similar conclusion may also be drawn in other areas: The Swiss may happily introduce new laws, but they shy away from the institutional consequences as soon as it is discovered that enforcement is not for free.

[33] Cf. *David L. Ratner*, Securities Regulation (1992) 147.

[34] *Insider Dealing Bill* of May 1, 1985, cf. *Explanatory Government Message*, Federal Register 1985 II, 78 and 84. Cf. *Peter Forstmoser* (1988) and *Peter Böckli* (1989).

[35] *EC Directive 89/592* of November 13, 1989, L 334/30. Cf. Peter Böckli (1993) 769.

[36] Gesetz über den Wertpapierhandel und zur Änderung börsenrechtlicher und wertpapierrechtlicher Vorschriften vom 26. Juli 1994, § 14. France, in fact, had been the front-runner (so to say) on the Continent, having introduced its first law against the "délit d'initié" already in 1967.

[37] *Explanatory Government Message* of May 1, 1985, 70 and 79 (quoted above): "Im übrigen wollen wir in diesem Zusammenhang davon absehen, neue Verwaltungseinheiten zu schaffen". (In the author's translation: "As for the rest, we would like to refrain in this context from creating new administrative units").

2. *Stock Price Manipulation Law of 1995*

In 1993 the Federal Government introduced a Bill in Parliament providing for a new Article in the Penal Code on *"stock price manipulation"*. The law was adopted on March 24, 1995[38]. Again, one faces a legal concept that earlier generations of Swiss businessmen and lawyers alike would have considered to be thoroughly *"un-Swiss"*.

Indeed, the concept of "manipulation" is difficult to cast into clear legal terms. But the novelty of the 1995 law goes far beyond the scope of technique: The entire idea that the legislators should take care of creating a *"level playing field"* for market transactions, and assure, both by means of penal and administrative law, the *"efficient functioning of capital markets"* was, as an express concept, practically unknown in earlier Swiss law[39]. Until the mid-eighties the term *"Capital Markets Law"* itself was rarely, if ever, used in Switzerland. But the Government in its Explanatory Message to the Bill of 1993 could already point to a general consensus reached in the meantime: it now was, in the first place, the Swiss lawmakers' duty to take care of (as the Government expressly stated) the *"efficient functioning of the Swiss financial system"*[40]. The Government pointed out that the protected interest behind the law was "the confidence of market participants in a clean and undistorted capital market offering equal opportunities". This sounds like a newspaper clipping from an Anglo-Saxon business newspaper, but in fact it is the language of the Swiss "White Book".

The wording of the 1993 draft Article went, however, too far in its almost zealous restatement of SEC rules. Parliament woke up to its traditional role of guardian of the *"Bestimmtheitsgrundsatz"* in matters of Penal Law, a principle which is as unpronounceable in English as it is unknown West of Ireland. It set out to cast the Bill's hazy generalities ("artificially influencing Stock Exchange prices") and sweeping condemnations of manipulative behavior (which were understood to be left for clearer definition by judges later on[41]) into a more restrictive legal framework:

[38] *"Börsengesetz"* (or, more precisely, Federal Law on Securities Exchanges and Securities Dealings), put into effect as regards its Chapters 1 to 3 on February 1, 1997. The remainder is expected to become effective on January 1, 1998.

[39] Cf. *Wolfgang Wiegand* (1996) 144.

[40] Securities Exchange Bill, *Explanatory Government Message* (1993) 6.

[41] "Whoever
- knowingly (i) effectuates *securities transactions* or (ii) *releases misleading information*,
- with the intent thereby *artificially to influence a Stock Exchange price* and from this to derive an unlawful pecuniary advantage,

shall be liable for not more than 3 years' confinement."

Whoever

> **with the intent to materially influence the listed price of securities** traded on a Stock Exchange in Switzerland in order to derive from this a unlawful pecuniary advantage either for himself or for a third party,
>
> [1] releases, contrary to his better knowledge, misleading information, or
>
> [2] **effectuates purchases or sales** of such securities which, on both sides of the transaction, are made directly or indirectly **for the account of the same person** or for the account of persons who act in concert for such purpose,
>
> shall be liable for not more than three years' confinement or a fine.[42]

In doing this, the Parliament fell into another pitfall well known in the field of "osmosis" of foreign laws: The wording finally hammered out by Swiss Parliament and reflected above does not go far enough in its "transactional" second part, the one which aims at the core of stock price manipulations. The manipulatory behavior now so carefully described by the Swiss Lawmakers covers just *one* kind of many possible stock price manipulations. The new Article falls short of the SEC rules it set out to emulate[43] and secures a broad field for other kinds of manipulation.

3. *Stock Ownership Notification Requirements of 1991/95*

If there ever was one belief deeply rooted in any Swiss businessman until a few years ago, it was the conviction that nobody should meddle with his assets, least of all the Government. The idea was: *Transparency may be fine, but secrecy is better.*

Securities Exchange Law, Explanatory Government Message (1993) 60/61 and 91 (emphasis added).

[42] Article 46 of the *Securities Exchange Law* of March 24, 1995, introducing a new Article 161bis ("Stock Exchange Price Manipulation") into the Swiss Penal Code. The translation is the author's; the exact rendering of the last sentence is most difficult (*"... die beidseitig auf Rechnung derselben Person oder zu diesem Zwecke verbundener Personen erfolgen."*). The numbers [1] and [2] as well as emphasis were added for better understanding. The three years' confinement is not in the Article 46 itself, but must be read into the text due to Article 36 of the Penal Code.

[43] *Securities Exchange Act*, § 9, § 10 (a) and the Rulings under § 10 (b).

The Federal Government Bill introduced in 1993 and voted into law on March 24, 1995, contained, again, a departure from such ideas. Following a rather timid disclosure provision in the new Business Corporation Law of 1991[44], the law-makers enacted a most striking reception of American legal ideas: The obligation for anybody (under severe penal consequences) to notify any and all acquisitions or sales of listed shares which passed the well-known thresholds of 5, 10, 20, $33^{1}/_{3}$, 50 and $66^{2}/_{3}$ per cent of voting rights[45].

Most striking is the retroactive effect given to such ownership notification duty[46]. Any person already owning 5 % or more of the listed shares of a Swiss corporation, whether such person may be residing within or without Switzerland, will be required to notify both the Board of the respective Swiss company and the new Stock Exchange Supervision Authorities of its share holdings above 5 % within three years from the entering into force and effect of the new article[47]. This will be applied with respect to all shares listed on a Stock Exchange in Switzerland[48].

4. *Takeover Regulations of 1989/95*

Just as Switzerland rushed ahead of the European Community with respect to Insider Trading Laws, it did as regards *Takeover Regulations*. Non-member Switzerland today stands as a monument to overfulfillment: it implemented a Draft of an EU Directive that never went, and never will go, into force and effect.

In fact, the first European *Draft Directive on Takeovers* of 1989[49] had provided for far-reaching regulations quite clearly along the lines of the London *"City Code"*. But in the end it was not adopted by the Council, due primarily to stub-born German objections. In 1996 the European Commission withdrew the 1989 concept altogether and replaced it by a watered-down, almost meaningless new proposal. Yet the determined German resistance, felt from the beginning, had not dissuaded the Swiss Government from introducing these Takeover Regulations in

[44] Article 663c of the Law of October 4, 1991, cf. *Peter Böckli* (1996) Notes 1187/88, 1193.

[45] Article 20 (1) of the *Swiss Securities Exchange Law* of March 24, 1995. The main body of Chapters 1 to 3 of the law entered into force and effect on February 1, 1997.

[46] Art. 51 (Final Provisions) of the *Swiss Securities Exchange Law* of March 24, 1995.

[47] *Swiss Securities Exchange Law* of March 24, 1995, Article 51.

[48] This general notification requirement of Article 20 should not be confused with the one arising upon the introduction of a public takeover bid in accordance with Article 31 of the *Swiss Securities Exchange Law*.

[49] Original Proposal for a *Thirteenth EC Council Directive* on Company Law concerning Takeover and other General Bids, of January 19, 1989 (as amended).

its Stock Exchange Bill of 1993. The Bill became law on March 24, 1995 with astonishingly little debate and even less resistance.

The switch to the *"City Code"* approach will have serious consequences. The existing Swiss "soft law" on Takeover Rules – which was introduced on a self-regulatory basis by the Stock Exchange organizations in 1989[50] and still was in force and effect in the first half of 1997 – carefully omitted any position on the hot *"control premium"* issue. It thereby in fact permitted some selling families to get away in perfect legal order with a control premium which was said to have exceeded 100 % in certain cases. The discussion between the two incompatible basic concepts (*"City Code Rule"* versus *"German Rule"*) went on a long time without a clear winner. Yet as from 1992 several takeover cases in Switzerland shocked public opinion and made it switch over to the *"City Code"* ideas. The new law clearly enacts the essence of the "equality" principle of the *"City Code"* and the protection for minority shareholders through their right to sell on equal terms.

The concept of what is now *Section 5* on *"Public Purchase Offers"* (Articles 22 to 33) of the Securities Exchange Law is a clear product of an "osmosis" from the guiding ideas of the *"City Code"*. Whoever has experience in the British Financial Markets will not at all be surprised to hear the message of Article 32 of the law of March 24, 1995:

> Whoever acquires shares whose voting rights go beyond the threshold of $33^{1}/_{3}$ % is obligated to submit a bid at the latest stock price for all listed shares of the company.

One of the few major deviations from the *"City Code"* is some additional flexibility. To the benefit of ruling groups or families, the bid price may be 25 % lower than the price paid by the bidder during the last twelve months, and the companies in their Articles of association may set the threshold at 49 %.

The idea of a forced offer, and also the idea of a minimum price defined by law, were totally contrary to customs not only in Switzerland. A deep conviction had prevailed that whoever invested in a listed share knowing there was a controlling group or family impliedly accepted that he or she would not participate in the control premium were the ruling shareholders to sell out. The shareholder was supposed to grudgingly accept a new majority.

[50] *Schweizer Übernahme-Kodex* (Takeover Code), dated September 1, 1989, Original English text to be found in: *Dufour/Hertig* (editors) (1990) 760 et seq. (in the meantime the text was amended in some details).

While the new body of law on takeovers – which is still not in force and effect in the second half of 1997[51] – will bring about a noticeable change of direction in Swiss Business Law, a new exception, unknown to the *"City Code"*, has been designed to keep the many Swiss "ruling families" happy: a typically Swiss pragmatic idea allows companies partially owned by a private group to modify their Articles of Association, to *"opt out"* from the *"City Code"* type rule of a compulsory bid. The opting-out clause effectively reserves the control premium to the selling group or family and deprives minority shareholders of their right to sell on equal terms. This pragmatic approach is likely to create a lower grade category of shares on the Swiss Stock Exchange, where supposedly a negative premium will affect the price of shares that are earmarked to have been issued by a company having *"opted out"*. But the idea of an *"opting-out"* for family-dominated companies certainly is a pragmatic idea that may warrant a "reverse osmosis" back to London.

5. *Fast Transfer to Foreign Authorities of Swiss Securities Market Information (1995)*

The Swiss, had they decided to join the European Economic Area on December 6, 1992, would have had to swallow quite a large package of Brussels-generated law (the so-called *"acquis communautaire"*). But it would have been done in one "big bang", and generally the EEA treaty contained only those parts of the entire European Union law that were advantageous to Switzerland, carefully omitting all road-blocks like tax law, social law, agriculture, and the realm of banking secrecy. These days, many of the EEA subject matters have to be swallowed by Switzerland anyway, but piecemeal. Among this piecemeal approach apparently so much favored by the people there is an international information exchange provision as regards bank and stock exchange transactions. Even though Switzerland has opted to stay outside of the reciprocal and comprehensive legal network of both the European Union and the European Economic Area, the Government was nevertheless practically compelled to unilaterally introduce the EEA type concept of information exchange.

The Swiss federal top bureaucracy which had edited its 1993 Bill to this effect stated in the Explanatory Message, as regards future Swiss information exchange:

[51] On December 2, 1996, the Federal Council decided to put into force and effect on February 1, 1997 only the general provisions of Chapters 1 to 3 of the *Securities Exchange Law* of March 24, 1995. The transparency and takeover provisions of Chapters 4 and 5 will probably become effective on January 1, 1998.

> For an efficient cooperation of the Supervisory Authorities in their struggle against Insider Dealing, Stock Exchange Price Manipulation and Money Laundering, information [i.e. on the broker and on his client] should be exchanged quickly.[52]

While it is recognized that enforcement of these laws is urgent indeed, no SEC or EU bureaucrat could have asked for much more. In the parliamentary debate, however, reservations were brought up, and the first Chamber (*"Ständerat"*) deleted the possibility for Swiss Authorities to send names and specifics on transactions abroad about persons who are obviously not involved in the matter to be investigated[53]. In general, however, the language used by the Explanatory Government Message quoted above and the law finally adopted show the extent of the osmosis that has taken place in the last four years: Much of this language could easily have been taken from a word processor of the Securities Exchange Commission.

6. *Consolidation of Corporate Accounts under IAS Standards after 1990*

Up to the early eighties, Consolidation of Accounts was a red flag matter for a great number of Swiss industrialists. Consolidation led to more transparency, and transparency was viewed as a matter of the evil one. Ideas changed, however, with increasing speed in the following ten years. In 1991, a rule providing for Consolidation of Accounts was finally adopted in the new Swiss Corporation Law[54].

Events have greatly speeded up changes in the last five years: The overwhelming majority of listed companies in Switzerland went far beyond the corporation law requirements. They adopted the London Committee's *"International Accounting Standards"* or *"IAS"*, thus introducing not only consolidation, but far-reaching standards of quality, consistency and transparency. The IAS rules are thoroughly Anglo-Saxon in their concept, wording, and details, so that in this respect there is another example of osmosis, leading in fact to a *double standards* situation in the country as regards accounting:

[52] *Securities Exchange Law*, Explanatory Government Message (1993) 56.

[53] *Securities Exchange Law* of 1995, Article 38 (3) (last sentence). There was also some considerable fine-tuning as regards Article 38 (2).

[54] *Swiss Corporation Law* of October 4, 1991, Article 663e, put into force and effect on July 1, 1993. Cf. *Forstmoser/Meier-Hayoz/Nobel* (1996) § 51 Note 190; *Peter Böckli* (1996) Note 1203.

(1) ***non-listed companies***: simplified accounting standards closer to, but still below, the level of the requirements of the European Union Directives[55];

(2) ***listed Swiss companies***: compliance with International Accounting Standards[56].

7. *Swiss Cartel and Antitrust Law of 1995*

Switzerland has long (and with justification) been described as the *"Wonderland of Cartels"*. There has been a wide-spread conviction of both the business community and the public that practices in restraint of trade were in fact the most natural and necessary means of survival for almost every Swiss businessman who was not totally out of his mind. In no field was there a wider discrepancy between American concepts – which go back to the 1890 Sherman Act and even earlier Common Law rules on restraint of trade – and the Swiss legal landscape. Cartels were, from the thirties when they were first discussed, to the eighties, conceived as a *"legitimate means of common self-defense"* for both blooming and endangered industries. Cartels were, in this line of thinking, perceived to be good by definition.

In 1962, in this spirit, the Parliament found the perfect solution[57]: It stated in a toothless law that cartels might under certain grave circumstances be "harmful", but instituted a hapless Cartel Commission in Berne whose ineffectiveness was assured both through its composition (the author was at times a member of it), its lack of organizational support (there was a minimum of staff), and the sheer length of its procedures (which took up to and beyond five years).

The new Law on Cartels and other Practices Restricting Competition of October 6, 1995 (in force from July 1, 1996) disturbed this cozy relationship. It most strikingly introduced Anglo-Saxon antitrust concepts in Switzerland. Although restrained by a relatively narrow basis in the Swiss Constitution in this respect, it contains such inherently Anglo-Saxon concepts as a *"per se"* interdiction of any suppression of competition in a relevant market, and it also introduced

[55] Especially the 4th and the 7th European Community Directives of 1978 and 1983, respectively.

[56] Some still balk, of course, but the new *Securities Exchange Law* of 1995 will do the job. The Swiss Stock Exchange will make compliance with *"FER"*, a Swiss (somewhat simplified) adaptation of IAS standards, a listing requirement.

[57] The first *Cartel Law* dating from *December 20, 1962* produced a lot of ink but was, take it all, ineffective except as a safe haven for cartels and oligopsones, which just loved it. The law was amended, with a somewhat more stringent concept of "efficient competition" (*"wirksamer Wettbewerb"*), on *December 20, 1985*, and was totally revamped and considerably strengthened, based upon the Government Bill of September 24, 1993, by the Law of *October 6, 1995*.

a legal presumption using three terms which are so obviously taken over from American Antitrust Law that it is hard to refrain from smiling:

(1) *"price fixing"*;

(2) *"volume fixing"*;

(3) *"market segmentation"*[58].

The law even went so far as to introduce *Merger Control* in its Article 32. The idea of controlling mergers was for decades considered to be thoroughly alien and despicable in Switzerland. Fighting against merger control was one of the ten commandments of the Swiss Industry's top organizations. The new control provisions for mergers are nothing but a takeover of the European Union's basic rules[59] which, in turn, were modeled in 1957 on the background of American concepts then prevailing. Henceforth, Government approval will be necessary in Switzerland for a merger whenever the companies participating in it have combined annual sales of at least two billion Swiss Francs (whereof at least 100 million Swiss Francs are realized in Switzerland by each one of at least two of the participating companies)[60].

IV. Conclusion

There are, of course, other examples of the legal Osmosis which is going on today. One might quote the introduction of the *"Money Laundering Law"* or *"Product Liability"*, the idea of *Self-Regulation* with an early predecessor, the self-regulatory rules on *"Due Diligence"* of banks as regards new clients' accounts[61], the *"Chinese Walls"* being erected and the *"Compliance Officers"* being introduced in Swiss financial institutions since the early nineties, the *"Authorized Capital"* or the *Share Buyback Rules* which were made part of the new Corporation Law of 1991[62], and the *"Audit Committees"* which are succes-

[58] Article 5 (3) of the new Cartel Law of October 6, 1995.

[59] *Treaty of Rome*, dated March 25, 1957, Articles 85 and 86. Cf. *Homburger/Schmidhauser/Hoffet/Ducrey* (1996) Art. 32 Note 32.

[60] Article 9 (a) of the 1995 Law contains an *alternative* for the 2 billion threshold: both participating companies together "have sales of at least 500 million Swiss francs in Switzerland".

[61] The first such set of self-regulatory rules was proposed by the *Swiss National Bank* in the aftermath of the *"Chiasso"* events in 1977. Today the Rules are administered on the basis of a Convention concluded by the Member Banks of the Swiss Bankers' Association.

[62] Article 651 and Article 653 as well as Article 659 of the *Swiss Corporation Law* of October 4, 1991.

sively being introduced in large Swiss companies[63]. This brings about the question: ***Where is this Osmosis leaving Switzerland in the field of Business Law***?

Firstly, no doubt, Switzerland is heading generally more and more in the direction of Anglo-Saxon and, more often than not, American concepts.

Secondly, one should bear in mind the deep schism between the elitist top of the Federal Bureaucracy in Berne and the masses of voting people who, each time a new law is contested in the Referendum procedure, have the last word. The Federal Bureaucracy tends to be *center-left and internationally-minded* in almost all of its proposed legislation, while in parliamentary and popular voting, conservative feelings prevail. As a result, Switzerland, after a protracted process of searching for compromise, usually ends up with a watered-down pragmatic solution in every single point originally taken over from abroad. In short, the result is a genuine Swiss *"Müesli"*: The whole thing remains quite edible, as aggressive kernels are mixed into a milder mass of tasteless barley, domestic nuts, and a lot of exceptions.

63 Cf. *Peter Böckli*, Swiss Business Law Review 68 (1996) 156.

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