FinMIA: A revision to reflect regulatory and technological developments

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Key takeaways

- **The Financial Market Infrastructure Act (FinMIA) governs the organisation and operation of financial market infrastructures, and the conduct of financial market participants in securities and derivatives trading.**
- **The Federal Department of Finance (FDF) recently submitted a report on its review of the effectiveness of the FinMIA to the Swiss government.**
- **The Swiss government instructed the FDF to prepare a draft revision of the FinMIA, which is planned to go into public consultation by the first half of 2024.**
- **A revised FinMIA may include more regulations for payment services providers and new rules on digital business and operating models as well as further amendments of a more technical nature.**

Introduction

The Financial Market Infrastructure Act (FinMIA), which came into force on 1 January 2016, was the first cornerstone of the totally revamped Swiss financial markets laws architecture. It was followed by the Financial Services Act and the Financial Institutions Act on 1 January 2020. The FinMIA governs the organisation and operation of financial market infrastructures, and the conduct of financial market participants in securities and derivatives trading. It aims to ensure the proper functioning and transparency of securities and derivatives markets, the stability of the financial system, the protection of financial market participants and equal treatment of investors.

Since the legislative process and the enactment of the FinMIA, there have been various developments on different sides: On the technological side, digitalisation of financial services has seen major progress including in blockchain and cloud services. On the political side,

Brexit led to new borders, with the UK markets leaving the EU common market. On the regulatory side, the Financial Stability Board (FSB) recommended the introduction of a global Legal Entity Identifier (LEI), a Unique Transaction Identifier (UTI) and a Unique Product Identifier (UPI) to improve reporting standards. The Committee on Payments and Market Infrastructures (CPMI) with the International Organization of Securities Commissions (IOSCO) issued technical standards on the definition, format and use of the main OTC derivatives transaction data to be reported to the trade repositories. Finally, the amendments to the European Market Infrastructure Regulation (EMIR; EMIR Refit) that entered into force in June 2019 modified the definition of financial counterparties, the sphere of application and the calculation method for the clearing obligation.

Back in 2014, the Federal Council (Swiss government) tasked the Federal Department of Finance (FDF) with reviewing the effects of the FinMIA within five years after entering into force. Finally, the FDF submitted its findings to the Swiss government on 30 September 2022. The report discusses the main topics identified for potential revision in the areas of financial market infrastructures and the rules of conduct for financial market participants when trading in securities and derivatives.

Main areas for review and potential revision

Payment systems

In the EU, payment services are subject to the rules set by Directive (EU) 2015/2366, the Payment Service Directive 2 or "PSD2". Under national law implementing PSD2 (e.g. in Germany the Zahlungsdiensteaufsichtsgesetz (ZAG)), a firm will require authorisation to carry on "payment services", unless an exemption or exclusion applies. These rules are particularly important to a large number of fintech providers who want to enter the payment services space with innovative tools, without being licensed as a bank. These providers offer a broad variety of services, such as transferring money, initiating payments or issuing payment means (including "e-money") as well as ancillary services such as accounting and reporting. Those services are generally offered via smartphone devices and may therefore easily be used in electronic commerce. Such new market entrants are increasingly active in Switzerland, too.

In Switzerland, however, payment service providers are largely unregulated, except for being subject to anti-money laundering rules. A so-called payment system, i.e. a facility that clears and settles payment obligations, requires authorisation from the Swiss Financial Market Supervisory Authority (FINMA) only if this is necessary for ensuring the proper functioning of the financial market or the protection of financial participants (Art. 4 para. 2 FinMIA) and if the payment system is not operated by a bank or by the Swiss National Bank (SNB) (Art. 4 para. 2 and 3 FinMIA).

Since the SIX Interbank Clearing (SIC) payment system is presently operated on behalf of the SNB, no payment system has obtained an authorisation in accordance with the FinMIA so far. In view of the fintech market trends referred to above, objectives such as consumer protection may raise the question of regulating payment services more generally.

Derivatives trading

The reporting duty on derivatives transactions was introduced to offer the competent regulatory authorities an overview of the derivatives market and its participants. In particular, the supervisory authorities should be able to identify the risk positions of individual financial market participants, the financial dependencies between individual financial market participants, and their dependence on the occurrence of certain risks and thus identify potential instabilities in the financial market at an early stage. In fact, analysts of the European Securities and Markets Authority (ESMA) used EMIR data to analyse (retrospectively!) Archegos positions, showing that it could have been possible to track the steep increase in concentrated exposures that the family office undertook in February and March 2021. [1]

During summer 2022, FINMA conducted a public consultation on amending its ordinance on FinMIA (FINMA-FinMIO). The proposed amendments included additional, more concrete requirements on the content of the transaction reports for derivatives transactions to improve the quality of the reports and to close gaps in trade monitoring and strengthen FINMA's market supervision in the long term.

The upcoming revision of the FinMIA shall likewise improve the quality and thereby increase the relevance of the reports on derivatives transactions submitted to trade repositories. To improve report quality without causing disproportionate administrative cost burdens for those involved, the report contents shall better align with the relevant international technical standards including LEIs, UTIs, UPIs and other CDEs. Likewise, reciprocal access for domestic and foreign authorities to trade repositories shall benefit from an alignment with international standards and the adjustment of provisions on the exchange of data as part of administrative assistance.

With a view towards easing the administrative burdens for smaller players in the market, the reporting duty for small non-financial counterparties (NFC) may be abolished completely. At the same time, the calculation method for monitoring the reporting thresholds shall be aligned with the regulatory simplifications under the EMIR Refit.

Disclosure and takeover law

Simplification is also proposed for the different rules on public disclosures and takeovers. The potential amendments relate to harmonising and expanding the issuer obligations that are important for market integrity such as ad hoc publicity, publication of management transactions and the keeping of insider lists.

While the 3% limit for reporting participations might be abolished, the reporting duty may be extended to shares traded on trading facilities based on distributed ledger technology (DLT). A first reporting threshold of 5% of voting rights would not only be compatible with international standards but also be justifiable in terms of market transparency as the current 3% reporting threshold makes it increasingly difficult for market participants to filter out the relevant information from the mass of disclosure notifications. Moreover, criminal liability should be limited to material breaches of the disclosure obligation.

Digitalisation

Digitalisation is, of course, not confined to payment services. In 2020, the Swiss Parliament enacted the Federal Act on the Adaptation of Federal Law to Developments in Distributed

Ledger Technology (DLT Act). It entered into force in stages completed on 1 August 2021 and amended a number of federal acts and ordinances to support new technologies like blockchain and DLT. In particular, the concept of DLT securities and a new licence category for DLT trading facilities was introduced in the FinMIA. The FinMIA review might include investigating whether the technology-neutral approach is sufficiently clear to offer legal certainty for the various new financial instruments offered or administrated on the blockchain.

A noteworthy development occurred in 2019, when a provider announced the launch of a global stablecoin from Switzerland. The licence application to FINMA was eventually suspended after initial discussions and a redesign of the project. While not successful, this project showed that the Swiss regulatory framework is suitable for complex international infrastructures or payment systems. Certain refinements may be indicated, though, to better deal with the opportunities and risks of such projects.

Powers of FINMA

In the past, FINMA has been criticised for engaging in rule setting beyond its official mandate, i.e. with circulars being limited to summarising the relevant administrative practice. In 2018, the Federal Council instructed the FDF to examine the delegation norms in favour of FINMA in the financial market laws and associated ordinances within the framework of respective reform proposals, and to propose amendments if necessary. Within the scope of the FinMIA, the FDF found that the legislative delegations contained in the FinMIA and its ordinance (FinMIO) are generally appropriate and that the FINMA enactments are essentially consistent with the relevant legal bases. This concerns the FINMA-FinMIO and a series of FINMA circulars: Circular 2008/4 on the securities journals, Circular 2018/1 on organised trading facilities, Circular 2018/2 on the duty to report securities transactions and Circular 2013/8 on market conduct rules.

The FDF noted that only in isolated cases might existing delegation norms need to be further specified – with blanket delegations being abolished – and in some cases, rules should be moved from the level of the ordinance up to the level of the act, to gain more legal weight (e.g. the rules for payment services).

Next steps

The Federal Council instructed the FDF to prepare a draft revision of the FinMIA, which is planned to go into public consultation by the first half of 2024.

As reported above, one idea is to abolish the reporting duty for derivatives transactions for small NFCs. Therefore, on 30 September 2022, the Federal Council decided that this reporting duty will not come into force on 1 January 2024, as planned, but further postponed until 1 January 2028 (Art. 130 para. 1 lit. c FinMIO). Should Parliament decide to abolish this reporting duty, NFCs will not have to invest efforts in implementing a regulatory obligation for just a couple of years. The existing reporting duties applicable to other market participants are unaffected.

[1] ESMA, Leverage and derivatives – the case of Archegos, May 2022

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No legal or tax advice

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