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Proposed Amendments to the FMIA: Impact on Rules for Disclosure of Significant Shareholdings

The Federal Council recently concluded a public consultation on proposed amendments to the Financial Market Infrastructure Act (FMIA). The proposal consists of a wide range of amendments and modernizations covering topics and rules on financial market infrastructures, takeover law, management transactions, ad hoc publicity, insider and derivatives trading. The proposed amendments also include amendments to the Swiss regime on disclosure of significant shareholdings. Specifically, in order to reduce the administrative burden, the notification duty should in the future only apply if the threshold of 5% is reached, exceeded or fallen below (as opposed to the current 3% initial threshold). In addition, the Federal Council stated a goal that in the future only serious breaches of the disclosure obligations should be prosecuted by means of criminal proceedings, thereby relieving institutional investors and individuals in minor cases. These changes are intended to make the Swiss financial market more competitive and at the same time more even-handed. The proposed amendments thus promise to make things noticeably easier for market participants, but are by no means thought through to the end. Rather, the proposed legislative changes in the revision should be taken as an opportunity to more comprehensively rethink key aspects of the Swiss regime on disclosure of significant shareholdings.

By Patrick Schärli / Patrick Schleiffer / Charlotte Arndgen

1) Proposed Changes

The Financial Market Infrastructure Act (FMIA), in force since 2016, regulates the organization and operation of financial market infrastructures as well as the conduct obligations of financial market participants in securities and derivatives trading. Introduced in response to the financial crisis in 2008, it aims to stabilize and make the Swiss financial market more competitive and to protect investors and ensure their equal treatment. An initial review of the law by the Federal Department of Finance (FDF) in 2022 showed that the FMIA has proven its worth, but requires adjustments due to technological and international developments (see Änderungen des Finanzmarktinfrastrukturgesetzes, Erläuternder Bericht zur Eröffnung des Vernehmlassungsverfahrens des Eidgenössischen Finanzdepartements EFD vom 19. Juni 2024 FMIA Explanatory Report), Evaluation des Finanzmarktinfrastrukturgesetzes – FinfraG-Review, Bericht des EFD vom 22. September 2022 FMIA Review Report

The Federal Council's proposal for the amendments to the FMIA is intended to address the need for action identified during the review of the FMIA by the FDF. In addition to the proposed amendments to financial market infrastructures, takeover law, management transactions, ad hoc publicity, insider and derivatives trading, the following two proposed amendments to the rules on disclosure of significant shareholdings are of particular relevance:

– **Raising the thresholds for the notification duty**: The notification duty to disclose shareholdings in listed companies pursuant to article 120 et seqq. FMIA is proposed to be amended to the effect that the current lowest threshold of 3% will be raised to 5% of the voting rights. See section 2 below for further details.

– **Limitation of criminal liability to material breaches of the notification duty**: The possible breaches of the notification duty in article 151 FMIA are proposed to be specified by law in order to avoid minor violations to trigger criminal liability. The disclosure requirements of the stock exchanges are intended to give those responsible the opportunity to make corrections in the event of breaches of the notification duty so that only serious cases are prosecuted by way of criminal proceedings. See section 3 below for further details.

We take the view that the proposed changes should not be assessed in isolation, but rather, the Swiss regime on disclosure of significant shareholdings requires a comprehensive and critical analysis that reassesses such regime in light of current market developments and identified shortcomings in practice. Such holistic assessment can help to strengthen the effectiveness and coherence of disclosure law and to ensure that it meets the requirements of a changing financial market.

2) Proposed Changes to the Duty to Disclose Significant Shareholdings

The current rules around the disclosure of significant shareholdings (article 120 et seqq. FMIA) lead to a relatively high number of disclosure notices compared to international standards, which causes considerable effort for investors, the listed companies and stock exchanges. The large number of disclosure reports also makes it difficult for market participants to identify really relevant information, which jeopardizes the desired transparency purpose of the disclosure rules (see 2022 FMIA Review Report, p. 22).

The Federal Council proposes to remedy the existing shortcomings of the Swiss disclosure regime by amending article 120 (1) FMIA. By abolishing the lowest reporting threshold of 3%, the minimum threshold for disclosing shareholdings in listed companies is raised to 5%.

The abolition of the 3% reporting threshold in article 120 (1) FMIA is, inter alia, welcomed for the following reasons:

– It is in line with **international standards** and the practice of many countries, including the majority of the EU member states, the USA, Hong Kong and Singapore, which likewise only require notification once 5% of the voting rights have been acquired;

– It is better aligned with **Swiss company law** and contributes to a more uniform regulation. A threshold of 5% of the shares or votes is relevant for various important shareholder rights under the Code of Obligations (CO) which governs Swiss corporations. For example, it entitles shareholders to exercise their right to inspect company files (article 697a (1) CO), to request a special investigation in the case of listed companies (article 697d (1) (i) CO), and to convene a general meeting of a listed company (article 699 (3) (i) CO);

– It continues to promote **market transparency** and **contributes to a simplification of the notification duty**; and

– It offers **advantages for investors, listed companies and the capital market as a whole** by reducing the administrative burden and increasing efficiency.

Having said the above, in connection with the proposed amendments to the FMIA, we also consider it a good opportunity to review and amend certain other disclosure related rules and propose changes at the level of the FMIA. Specifically, the following reporting rules should be reviewed and amended:

a) Amendment of Reporting Rules on Positions held by Collective Investment Schemes

The disclosure rules related to the reporting of positions held by collective investment schemes should be reviewed and clarified at the level of the FMIA (as opposed to only at the level of the implementing ordinance, i.e., the Financial Market Infrastructure Ordinance of the Swiss Financial Market Supervisory Authority (FINMA) (FMIO-FINMA)). This is particularly necessary given that the current reporting regime (see the rules in article 18 FMIO-FINMA) creates legal uncertainties and are not straightforward to apply in practice.

Article 120 FMIA provides for two notification duties: that of the beneficial owner (Article 120 (1) FMIA) and that of the third party who has the discretionary power to exercise the voting rights (article 120 (3) FMIA). The beneficial owner is defined in article 10 (1) FMIO-FINMA as the party controlling the voting rights stemming from a shareholding and bearing the associated risk, which is often a natural person.

Under the FMIO-FINMA, if collective investments schemes are not approved for being offered to the public in Switzerland, they are treated in the vast majority of cases in accordance with article 18 (4) FMIO-FINMA. This means that positions must be reported at the level of the beneficial owner in accordance with article 120 (1) FMIA, which assimilates the sponsor of the collective investment with the beneficial owners. However, this assimilation does not reflect the economic reality, as the sponsors of collective investments typically do not bear the economic risk. This lies exclusively with the beneficial owners, i.e., the investors in the relevant collective investment scheme.

The provision in article 18 (4) FMIO-FINMA also leads to rather absurd results, such as the reporting of fund positions at the level of natural persons who, however, do not bear this risk (and regularly do not even know about it). Incorrect reports then – unfairly – also lead to criminal investigations against these persons (see also section 3 below for more details). The most important player with regard to the disclosure of shareholdings is the manager of the collective investment scheme, who decides on the transactions carried out by the fund and its influence on the companies invested.

In order to rectify the current legal situation, it is sufficient to expressly stipulate that positions held by or on behalf of collective investment schemes must be reported in accordance with article 120 (3) FMIA (and not article 120 (1) FMIA). In order to prevent circumvention of article 120 (1) FMIA, corresponding principles could be included in the ordinance.

b) Review of, and Amendment to, the FMIO-FINMA

Furthermore, the revision of article 120 FMIA – once passed by Parliament – should be used as an opportunity to review and amend certain of the disclosure-related provisions in the FMIO-FINMA. For example, it would be worth considering to adjust the rules regarding the calculation basis for disclosure notifications in connection with forthcoming capital increases (i.e. post capital increase share numbers as basis) in order to avoid difficult to understand or even confusing disclosure reports (e.g. by commitment providers in the context of capital increases).

We would also suggest to reflect the well-established practice of the disclosure office regarding disclosure in connection with lock-ups, underwritings, sub-underwritings and backstop commitments and similar circumstances, for which the disclosure office regularly grants exemptions or simplifications, in the implementing ordinance itself, and thereby reducing the administrative burden for market participants. Reflecting such practice in the FMIO-FINMA itself could prevent unnecessary expense – on all sides – that arises from the fact that a specific application must always be submitted to the disclosure office for these matters. Although these applications and recommendations are now largely standardized, their administrative burden remains. It is precisely because of their standardization that the relevant matters are suitable for regulation at ordinance level.

3) Limitation of Criminal Liability to Material Breaches of the Notification Duty

In practice, the high complexity of the disclosure rules regularly leads to legal uncertainties and minor, negligent breaches of the notification duty, all of which are subject to criminal liability (see article 151 FMIA). This means that violations must be reported by the disclosure offices to FINMA, which must file a complaint and then be assessed by the FDF. This effort appears disproportionate and resource-intensive in view of the often very minor and negligent infractions (see 2024 FMIA Explanatory Report, p. 18; 2022 FMIA Review Report, p. 22).

The proposed amendments in this context aim to improve the current legal situation by limiting criminal liability to material breaches of the notification duty in article 151 FMIA. By doing so, the aim is to prevent all breaches of certain ancillary provisions of the FMIO-FINMA from being subject to criminal liability. Only breaches of the main disclosure related rules (article 10-19 and 24 FMIO-FINMA) would remain subject to criminal liability, while breaches of article 22 and 23 FMIO-FINMA would no longer be prosecuted in most cases (see 2024 FMIA Explanatory Report, p. 50).

While the proposed limitation of criminal liability for breaches of the notification duty to cases that are not trivial is welcomed in principle, the proposed revision of article 151 FMIA is not entirely convincing. Pursuant to article 151 FMIA, anyone who intentionally violates a reporting obligation is liable to a fine of up to CHF 10 million; in the case of negligence, the fine is up to CHF 100,000. Not only are these fines very high (in comparison to their minor nature), they also lead to drastic consequences (especially in comparison to other jurisdictions that "only" provide for administrative sanctions) due to the sanction proceedings qualifying as criminal proceedings in Switzerland. There is a general agreement that the criminal liability under article 151 FMIA is appropriate in cases of intentional non-disclosure, late disclosure or concealment of reportable

content and that such conduct should be sanctioned accordingly. In other cases, however, even the proposed amendment to the provision in article 151 FMIA proves to be disproportionately strict:

– **Criminal liability of institutional investors**: In addition to Swiss disclosure obligations, institutional investors are obliged to comply with corresponding disclosure and notification duties in all the jurisdictions in which they invest. In order to meet this complex requirement, the respective institutional investors have complex systems and specialized staff in place to ensure that the notification duties in the various jurisdictions are met in a timely and formally correct manner. Despite these considerable organizational precautions, there may still be delays or inaccuracies in disclosure reporting which would be subject to criminal liability according to article 151 FMIA. In such cases, i.e. where an investor has put in place appropriate systems and processes designed to ensure compliance with reporting obligations, it does not seem proportionate to apply the same criminal law instruments ñ in particular article 151 FMIA and the associated administrative criminal proceedings ñ as in the case of clear breaches of negligence.

– **Criminal liability of individuals**: Irrespective of the size of institutional investors and their complex structure, the notification duty often lies with a single natural person which may often be the chairman of the board or the CEO (as is also the case with article 18 (4) FMIO-FINMA as explained in section 2). This shifts liability to the level of an individual, who typically does not bear the economic risk and often neither knows nor can know of the notification duty. The criminal provision in article 151 FMIA and the associated administrative criminal proceedings in Switzerland entail disproportionate consequences for such persons, which appear excessive compared to international standards.

In these circumstances, the question arises as to whether delays in reporting – despite appropriate organizational precautions – are actually “negligent” within the meaning of article 150 (2) FMIA. The assumption that every delayed disclosure report is automatically due to negligence does not always correspond to the actual circumstances. Hence, we propose to specify in article 151 FMIA that, in the absence of intent, the offense is only fulfilled if the person concerned has not taken the measures appropriate in the circumstances to comply with article 120 FMIA. In addition, we propose to fundamentally reconsider whether it is always proportionate to hold individuals liable for breaches of the reporting obligation.

The proposed amendment to article 151 (1) (a) (i) FMIA clarifies that an incorrect report is considered “non-disclosure” and is therefore punishable by law (see 2024 FMIA Explanatory Report, p. 50). However, no further details are given as to what exactly is considered “non-disclosure”. In our view, minor errors should not be considered as “non-disclosure” and therefore should not be sanctioned. A corresponding clarification in the upcoming Federal Council Dispatch would be desirable.

In this proposal to amend the FMIA, criminal law (as in article 147 et seqq. FMIA) is used to an exaggerated extent as an enforcement instrument. This should be critically questioned, as criminal law should primarily serve to protect the highest legal interests. The current criminal provision in article 151 FMIA is not very appropriate from a practical point of view and leads to disproportionate and sometimes unfair consequences.

4) Conclusion

The proposed amendments to the Swiss regime on disclosure of significant shareholdings aim to reduce the administrative burden for investors, the listed companies and the stock exchanges by increasing the current 3% initial threshold to 5% and by limiting the criminal liability to material breaches of the notification duty. Irrespective of these proposed changes, the current situation in disclosure law and the upcoming revision of the FMIA should be used as an opportunity to review the existing weaknesses and practical challenges of the Swiss disclosure framework in general and make fundamental improvements (also later at the level of the implementing ordinance, the FMIO-FINMA). A revision of the notification duties for shareholding in collective investment schemes, a more differentiated approach for criminal liability (also in light of rules in other international financial markets) as well as a general overhaul of the FMIO-FINMA appear particularly important.

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