CapLaw

SWISS CAPITAL MARKETS LAW

No. 5/2024

Securities

Regulatory

News | Deals & Cases

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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Observations on the Current System of Major Shareholder Disclosure in Switzerland and its Planned Expansion

Reference: CapLaw-2024-83

The Swiss system for major shareholder disclosures requires investors to report holdings crossing thresholds (e.g., 3%, 5%, 10%) within four trading days. While these disclosures can significantly impact stock prices, the system is complex and prone to errors, partly due to intricate rules and limited guidance from disclosure offices. Violations are treated as misdemeanors, punishable by fines of up to CHF 10 million, though settlements

are common to avoid criminal records. However, the system struggles to improve compliance, with around 5% of reports leading to complaints annually. Key issues include excessive fine ranges, a lack of preventive effects, and limited due process for accused parties. Proposed solutions include simplifying rules, reducing fine limits, and reclassifying violations as mere administrative offenses. Additionally, plans to extend this system to ad hoc and management reporting face criticism for replicating current inefficiencies.

By Matthias Courvoisier / Yves Mauchle

1) How the Current System Works

Major shareholder disclosures for public companies are known to have statistically significant impacts on share prices. Even in jurisdictions where investors are not required to disclose their intentions (unlike in the U.S.), announcements often result in price changes. Positive impacts are generally associated with institutional investors, activists, or strategic partners, especially for larger stakes. Conversely, passive investors or those lacking a strong reputation can lead to neutral or even negative market reactions.

Disclosure thresholds in Switzerland are set at 3%, 5%, 10%, 15%, 20%, 25%, 33 1/3%, 50%, and 66 2/3%. When these thresholds are reached or crossed, disclosures must be made to both the stock exchange where the company is listed and the company itself within four trading days.

Switzerland's disclosure framework is complex and to a certain extent unique. For example:

1. Thresholds are measured against entries in the commercial register, which can be difficult for foreign investors to access and permanently supervise.

2. Rules for collective investment schemes differ based on whether they are admitted in Switzerland.

3. There are specific requirements for disclosure of delegated discretionary voting rights.

These complexities make disclosure compliance a specialized field of law handled by a small number of experts.

In recent years, the disclosure offices of Swiss stock exchanges have become less accessible for informal consultations, operating instead in a mechanistic, formal manner. This change, reportedly due to accusations of investors relying on informal guidance to defend violations, has increased the risk of reporting errors, potentially undermining market transparency.

2) Handling Violations

If a potential violation is identified, the disclosure office reports it to FINMA. If FINMA finds merit in the claim, it refers the case to the Federal Department of Finance (FDF). Below are annual statistics of disclosure reports and complaints filed:

Year	*Reports*	*Complaints*	*Complaint Rate (%)*
2014	1,371	46	3.4%
2015	1,267	41	3.2%
2016	1,587	83	5.2%
2017	1,855	33	1.8%
2018	1,906	156	8.2%
2019	1,465	110	7.5%
2020	2,117	45	2.1%
2021	1,546	63	4.1%
2022	1,652	79	4.8%
2023	1,440	71	4.9%

Violations of disclosure rules are punishable by fines of up to CHF 10 million for intentional violations and CHF 100,000 for negligent violations. However, negligent violations are rare, as misunderstanding the legal requirements does not qualify as negligence under Swiss law and the facts are most often known to those possibly violating the rules.

The FDF has power for both investigations and decisions, with accused parties able to request court review. Settlements are common, allowing investors to avoid criminal records or further proceedings, while also easing the workload of authorities.

3) Problems with the Current System

1. Lack of Preventive Effect:

Despite penalties and settlements, around 5% of reports result in FDF complaints annually, suggesting that fines fail to improve compliance or enhance market transparency.

2. Excessive Fine Range:

The maximum fine of CHF 10 million is rarely applied, as such severe penalties are intended for cases akin to market fraud, not minor reporting errors.

3. Vulnerable Defendants:

Both private individuals and companies often lack the possibility to defend themselves effectively. The reason is that they can hardly afford to be sentenced to a criminal fine because of their exposure to supervisory authorities in their home country or because they depend on clean criminal records. As a result, they need to settle with FDF. This undermines due process.

4) Proposed Solution

1. Separate Provisions for Market Fraud:
Introduce a dedicated legal framework for market fraud, categorizing it as a criminal offense (*Vergehen*) akin to insider trading, with specific requirements like market deception for financial gain. The market manipulation rule goes into that direction, but needs better tailoring.

2. Shift to Administrative Fines:
Reclassify violations as administrative offenses, with penalties that do not result in criminal records. This aligns with the German Administrative Offenses Act (*Ordnungswidrigkeitengesetz*). This would improve the situation of accused substantially and would remove the criminal aspect from the violation which is more appropriate given that it is a mere violation of an information duty.

3. Streamlined Processes:
Implement faster procedures for these minor violations, akin to issuing speeding tickets, reducing complexity and delays.

4. Reduced Fine Limits:
Cap fines at CHF 50,000 or less per violation, reflecting typical settlement amounts and focusing criminal punishment on serious cases of market fraud.

5. Simplify Disclosure Rules:
Clarify and streamline the rules to make compliance more straightforward, reducing the risk of unintentional violations.

5) Planned Expansion to Other Reporting Obligations

The Swiss government plans to extend the current system to cover violations of ad hoc reporting rules and management transaction reporting rules. However, this approach risks replicating flaws in the current framework. Before expanding the system, reforms should address the inefficiencies and weaknesses in its application to shareholder disclosures. Moreover, one should consider not to address ad hoc reporting and management transaction reporting in state rules. The current rules of the stock exchanges are fully fit for purpose and do not require a state regulation.

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