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6) Outlook

Because of the switch to CoCo structures by some (but not all) Swiss banks, the topic of the disclosure obligations for the syndicate may need to be considered more regularly. It certainly is worth considering the introduction of a general exemption with respect to underwriters of equity securities and equity-linked instruments, including CoCos, in the FMIO-FINMA. This would take the technical role of underwriters into account in the placement of securities of issuers, while not taking away the deal certainty issuers get from a (firm, in contrast to mere best-efforts) underwriting of their securities generally subject to a disclosure obligation under the FMIA.

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LEGAL UNCERTAINTIES AND PRACTICAL ISSUES OF TRANSACTION REPORTING (ARTICLE 134 FMIA) FOR NON-TRANSACTIONAL EVENTS BASED ON AN AMBIGUOUS CROSS-REFERENCE IN TAKEOVER ORDINANCE

Reference: CapLaw-2025-22

This contribution addresses the legal uncertainties and practical issues surrounding transaction reporting pursuant to article 134 FMIA for non-transactional events due to an ambiguous cross-reference at the ordinance level. If the „mutatis mutandis" cross-reference in article 40 Takeover Ordinance is taken to mean that all reporting events under the ordinary shareholder disclosure rules, as reflected in article 10 to 19 FMIO-FINMA, are also reportable within the takeover process, then simple passive and administrative, non-transactional reporting events become reportable on a daily basis and with forms that are not suitable for such purpose. Not only are there no legal grounds for such extensive interpretation beyond the wording of the law, but such interpretation also contributes to unnecessary breaches that are threatened by criminal prosecution and fines of up to CHF 10 million.

By Yves Mauchle / Matthias Courvoisier

1) Ordinary shareholder reporting (article 120 FMIA)

a) Scope

Article 120 of the Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading (FMIA) mandates that individuals or entities, whether acting

alone or acting in concert with others, who acquire or dispose of shares, acquisition rights, or sale rights in a company with listed equity securities in Switzerland must notify the company and the relevant stock exchanges if their voting rights reach, fall below, or exceed certain thresholds. These thresholds are set at 3%, 5%, 10%, 15%, 20%, 25%, 33⅓%, 50%, or 66⅔% of the voting rights, regardless of whether they are exercisable.

The triggering events of the duty to notify shareholdings are manifold and include the following, as detailed in articles 10 et seqq. of the Ordinance of the Swiss Financial Market Supervisory Authority on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading (FMIO-FINMA):

- Crossing or reaching a limit by directly or indirectly acquiring, selling, writing, exercising or not exercising
- Group formation, dissolution or change
- Capital changes
- Transfer of voting rights for exercise at discretion (see article 120 paragraph 3 FMIA)
- Change of relevant information: Transfer date, details of the persons involved (direct holders and beneficial owners), ISIN for derivatives, conditions of the derivatives and details for securities lending

b) Purpose

The goal of this disclosure requirement is to promote market transparency by ensuring that significant shareholders are identified for both market participants and companies. The FMIA seeks to safeguard financial markets' proper functioning and protect investors' interests by mandating timely disclosure of significant changes in share ownership and control of the issuer of the securities. This transparency is considered crucial in maintaining investor confidence in the financial markets.

c) Content

Pursuant to article 22 FMIO-FINMA, the following content in particular must be included in shareholder disclosure notices:

- Share of voting rights:
  - Type of equity securities (shares, conversion rights, options, etc.)
  - Number of equity securities
  - Voting rights associated with the equity securities (e.g., shares subject to options)
- Facts triggering the reporting obligation
- Date on which the reporting obligation arises

- The securities transfer date
- Surname, first name and place of residence or company name and registered office of both the ultimate beneficial owner and the direct holder
- Number of shares for the free exercise of voting rights and reference to consolidated notification
- In case of a group notification: composition of the group and type of agreement and representation
- Further information in case of derivatives (ISIN or relevant conditions), collective investment schemes and lending transactions

d) Reporting forms

The disclosure offices (*Offenlegungsstellen*) of the stock exchanges traditionally provided disclosure forms for individual shareholders, group notifications and collective investment schemes. More recently, SIX Exchange Regulation has set out an online notification form available at *<https://disclosure.six-exchange-regulation.com/gui/en/shareholding/new-notification>* with the same three types of forms. The use of the forms is not legally mandated but common in practice.

e) Timing

The company and stock exchanges must be notified within four trading days of the relevant disclosure event. The company then has two trading days to publish the notification via the electronic platform of the disclosure office.

f) Sanctions

Noncompliance is threatened with a criminal fine of up to CHF 10 million (article 151 paragraph 1 subsection a FMIA). The Federal Department of Finance (FDF) acts as prosecuting authority.

2) Transactional reporting during takeover procedure (article 134 FMIA)

a) Scope

The reporting of transactions applies during the takeover procedure, i.e., from the pre-announcement or publication of the offer until the end of the supplemental offer period.

Article 134 of the FMIA mandates that the offerors or individual or group shareholders of over 3% of voting rights must report all transactions related to the acquisition or disposal of shares in the target company. This also includes the target company, as article 38 Takeover Ordinance (TOO) — beyond the wording of article 134 FMIA — obliges all parties to the takeover procedure to report according to article 134 FMIA. As opposed to ordinary shareholder disclosures, all

transactions are reportable and not just those with which a threshold is reached or crossed. Except for the target company, the transactional reporting pursuant to article 134 FMIA replaces the ordinary shareholder disclosures according to article 120 FMIA. These are suspended during the takeover procedure and re-activated at the end. Events that occurred during the takeover procedure must be reported after the end of the grace period in accordance with the provisions of article 20 paragraph 2 FMIO-FINMA.

Article 40 TOO further determines that the shareholder disclosure rules of the FMIO-FINMA apply mutatis mutandis, which might be interpreted to significantly extend the scope of the transactional reporting duties and are the key discussion points of the present contribution (see heading 3 below).

b) Purpose

The special transactional reporting duties applicable during the takeover procedure aim to ensure that investors and the Takeover Board (TOB) are informed at all times during the entire offer period about transactions in shareholdings of parties subject to the duty to notify and thus also about the success of the offer. This is intended to help monitor the market, prevent price manipulation and ensure equal treatment of shareholders, including compliance with the best price rule.

c) Content

Article 41 TOO requires the following content in a transactional report:

- Object of the transaction (equity securities or equity derivatives)
- Type of transaction (acquisition, sale, securities lending and comparable transactions, exercise of equity derivatives, etc.)
- Price
- Time of trade
- On-exchange or off-exchange settlement and identity of the securities dealer
- Type and number of all equity securities or equity derivatives and the associated voting rights held by the reporting person at the end of the day

d) Reporting forms

The TOB provides the reporting forms at <https://www.takeover.ch/forms> and expects reports to be handed in using these forms. The reporting forms are Excel sheets and reflect the content required under article 41 TOO. These are strictly geared toward purchase and sale transactions rather than non-transactional events that may occur under the ordinary shareholder disclosure rules (e.g., changes in capital of the target company).

e) Timing

Transactions must be reported on a daily basis and within a strict time frame: transaction reports must be received by the TOB by 12:00 Swiss time on the following trading day (articles 41 and 42 TOO).

f) Sanctions

As regards the ordinary shareholder disclosure, noncompliance is threatened with a criminal fine of up to CHF 10 million (article 151 paragraph 1 subsection b FMIA), and the FDF is the prosecuting authority.

3) Application of ordinary shareholder disclosure rules (articles 10 to 19 FMIO-FINMA) during takeover procedure based on article 40 TOO

a) Ambiguous „mutatis mutandis" cross-reference

While the scope, purpose, content and forms of the ordinary shareholder disclosure rules and the takeover transaction reporting rules significantly differ, article 40 TOO states the following: articles 10 to 19 FMIO-FINMA apply mutatis mutandis (*sinngemäss*) regarding the reporting duty set out in this chapter (article 38 et seqq. TOO).

The question arises whether this „mutatis mutandis" reference is supposed to include all reportable events under the ordinary shareholder disclosure regime. A general applicability of the rules under article 120 FMIA during the takeover procedure would mean that the scope of article 134 FMIA is significantly extended through reference to articles 10 to 19 FMIO-FINMA: While article 134 paragraph 1 FMIA requires the reporting of „every acquisition of sale" (*jeden Erwerb oder Verkauf*) of equity securities, the ordinary shareholder notices of article 120 and the FMIO-FINMA are, among others, also triggered by the formation or changes of groups, by passive crossings of thresholds (e.g., by way of a capital increase or reduction reported in the Gazette) or by simple administrative matters such as a shareholder's change of domicile (see section 1a above).

b) Extensive interpretation based on cross-reference lacks legal basis and is inconsistent with a teleological and systematic interpretation of the law

While article 120 FMIA aims, in particular, to disclose the actual control of an issuer, article 134 is primarily concerned with monitoring the takeover procedure and ensuring equal treatment of the offerees. Accordingly, the notification obligation under article 134 covers all transactions of any relevant equity securities, including derivatives with such securities as underlying. In contrast to the reporting obligation under article 120 FMIA, there are no thresholds that must be reached, fallen short of or exceeded (see subsection 2a above).

Legal writers concur that the wording of article 134 FMIA is to be interpreted broadly based on its purpose (teleological interpretation) and the general principles of the ordinary stock exchange disclosure and notification rules (systematic interpretation). For instance, while article 134 only references „sales" (*Verkäufe*), it seems hardly contestable that all relevant disposals should be reportable (e.g., exchanges). Further, as in the ordinary shareholder disclosure regime, indirect acquisitions and disposals are also reportable, even though they are not explicitly referenced in article 134 FMIA.

It is already quite a stretch to include the formation of a group through agreements, other coordinated behavior or the establishment of the exercise of voting rights at one's own discretion (cf. article 120 paragraph 2 FMIA), in each case without an actual transaction in equity securities, under article 134 FMIA. This goes far beyond the wording of the legal basis and could, if at all, best be justified by the teleological interpretative element. An argument would be that the formation or changes of groups could be relevant to monitoring compliance with takeover rules, in particular the best price rule.

However, if one interprets the „mutatis mutandis" cross-reference of article 40 TOO to extend the scope of the transactional reporting during the takeover procedure so far as to include *all* reportable events under ordinary shareholder disclosure, including completely passive or administrative events from the perspective of the shareholder, one not only completely departs from the wording of the legal norm but also from any possible teleological or systematic interpretative justification under the FMIA. In particular, a passive reaching or crossing of thresholds due to changes in capital of the target company, a change in the ISIN of a derivative or a change in address of the person subject to a reporting obligation is not in the least similar to an „acquisition or sale" or any other relevant transaction. The reporting of such facts is not necessary for the proper supervision of the takeover process. The transactional reporting does not aim to communicate to the market all details regarding shareholders beyond the reporting process and their participation. The latter market transparency objective is sufficiently achieved by reimposing the ordinary shareholder reporting after completing the takeover procedure (article 20 FMIO-FINMA).

Given that there are no relevant thresholds for the transactional reporting duties under article 134 FMIA, and taking the reference in article 40 TOO literally, one could also make the argumentative case that a consistent interpretation requires that any passive reporting events, in particular a change in capital, triggers the duty to notify by virtue of articles 134 FMIA and 38 et seq. TOO — independent of any thresholds. That means that the offeror, all shareholders holding at least 3% of the voting rights in the target company and the target company itself would have to report a „transaction" under article 134 FMIA based on ever so small changes in the capital, for instance when the target company records a few conditionally issued shares in the commercial register following its financial year-end. Granted, this is a reductio ad absurdum argument, and it seems rather unlikely for any practical-minded lawyer to seriously propagate such a result. However, it shows that the inclusion of all reportable events under articles 10 to 19 FMIO-FINMA in the transactional reporting of the takeover procedure is already flawed in principle.

Lastly, the content of a transactional report as required by article 41 TOO is a significant mismatch for any passive or administrative, non-transactional reporting events. For example, when a shareholder passively crosses a reporting threshold due to a change in the target company's capital, there is no pertinent „type of transaction", „price", „time of trade" or relevant settlement information, and the number of securities held at the end of the day is no different from the status quo ante. This supports the view that not even the TOB, the issuer of the Takeover Ordinance, intended to include passive or administrative reporting events at the time.

Not surprisingly, the transactional reporting forms provided by the TOB, and which the reporting persons are required to use, do not set out any options for disclosing non-transactional events. While the misaligned reporting forms are the least of the practical problems arising from an extensive interpretation of the transactional reporting duties, this hardly leads to a readily comprehensible disclosure and supports the view that cross-reference in article 40 TOO was not intended to expand the reportable events to non-transactions.

c) Undesirable and disproportionate practical consequences

In its recent practice, the TOB applies the transactional reporting duties in a manner that all reportable events specified in articles 10 to 19 FMIO-FINMA must be disclosed by means of the transactional reporting during the takeover procedure. This inclusion of non-transactional reporting events entails the following significant practical consequences:

- The reporting to be handed in at 12:00 Swiss time on the following day (instead of a deadline of four trading days as for the ordinary shareholder disclosures) means a significantly shorter deadline for parties that are subject to the reporting requirement and may require a clarification of their duties.
- The imposition of a reporting duty in such a short time frame, based on a merely passive crossing of a threshold or an administrative event, is problematic, especially for shareholders located in foreign countries. When shares are actively bought or sold, it is realistic to expect that the shareholders' compliance function raises reporting duties and consults with their Swiss counsel if needed. However, it would be rather quixotic to expect that a foreign or even overseas shareholder would monitor the Swiss Gazette each day for any capital changes that may occur and have a reporting form ready within a day.
- The interpretation of the „mutatis mutandis" reference in article 40 TOO that leads to non-transactional events being reportable is so far beyond the wording and deemed purpose of article 134 FMIA that even if advice from Swiss counsel is promptly sought, it seems questionable whether Swiss counsel would even advise filing a transaction report.
- The crux of the matter is that this is not a discussion of a purely formal or administrative duty without significant consequences. Rather, the fine of up to CHF 10 million is quite significant for market participants.
- Both private individuals and companies often lack the possibility of defending themselves effectively in a criminal procedure. 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 the FDF (see also *CapLaw-2024-83*). This aggregates the impact of a potential prosecution upon failing to meet a reporting duty imposed through extensive interpretation.

Overall, and especially considering the impact of the potential sanctions for a breach of reporting duty, subjecting non-transactional events to strict reporting duties under article 134 is not only highly questionable from a legal-technical point of view but also unnecessary in light of its legal purpose and disproportionate for the concerned parties. Market transparency for the purposes of article 120 FMIA is sufficiently established after the takeover procedure through the obligations under article 20 paragraph 2 FMIO-FINMA.

4) Possible solutions

To clear up the legal uncertainties and avoid an improper and disproportionate application of the law, the following should be contemplated:

- A clarification in the published practice of the TOB that non-transactional events are not considered within the scope of the reporting pursuant to article 134 FMIA
- An amendment of article 40 TOO to the same effect, clearly specifying which elements of the FMIO-FINMA shall apply „mutatis mutandis" to transactional reporting
- More generally, legislative amendments to the FMIA in the following manner (see also *CapLaw-2024-83*):
  - shift to administrative fines (pecuniary administrative measures) rather than full-fledged criminal prosecution
  - capped fines, especially for smaller violations and missed deadlines
  - simplify disclosure rules

Until the matter is further clarified, it can be expected that legal uncertainty will endure and market participants will fail to meet the transactional reporting duty in the non-transactional context. While not every such case may eventually lead to criminal prosecution, this unsatisfactory status should be addressed.

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