

New emergency measures to protect Swiss stock exchange infrastructure

18 December 2018 | Contributed by [Niederer Kraft Frey](#)

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As a result of political pressure from the EU Commission with respect to negotiations of an institutional framework agreement between the European Union and Switzerland, Swiss stock exchanges may lose third-country equivalence for purposes of Article 23 of the EU Markets in Financial Instruments Regulation (2014/64) (MiFIR) by the end of 2018. This would restrict EU investment firms' ability to trade shares on Swiss stock exchanges that are also admitted on a regulated market or traded on a trading venue in the European Union.

In order to facilitate EU investment firms' access to trade Swiss shares on Swiss stock exchanges and limit the potential negative impact on the Swiss stock exchange infrastructure once Switzerland loses EU third-country equivalence, the Federal Council has enacted emergency measures that will take effect from 1 January 2019.

Overview

Switzerland is not an EU member state. Since signing the first free trade agreement in 1972, Switzerland and the European Union have formalised their relationship with an increasing number of bilateral agreements (currently 20 main agreements and over 100 ancillary agreements). Over the past 10 years, the European Union has been pushing for a broader institutional framework agreement to define its ties with Switzerland. In 2014 Switzerland and the European Union entered into negotiations. Progress was slow and the EU Commission toughened its stance towards Switzerland.

In December 2017 the EU Commission used its wide discretion in third-country equivalence decisions under EU rules to put pressure on Switzerland by granting temporary equivalence for Swiss stock exchanges (the SIX Swiss Exchange and BX Swiss) pursuant to Article 23(1) of MiFIR on a temporary basis only until 31 December 2018. On 17 December 2018 the EU Commission announced that the temporary recognition would be extended by the European Union for six months, pending the results of the consultation by the Federal Council on the framework agreement that commenced in early December 2018.

Third-country equivalence of Swiss trading venues under MiFIR is important because MiFIR restricts where EU investment firms can trade shares. EU investment firms must trade shares that are "admitted on a regulated market or traded on a trading venue in the EU" either:

- on a regulated market, multilateral trading facility or systematic internaliser in the European Union; or
- on an equivalent third-country trading venue.

This MiFIR share trading obligation is subject to only limited exemptions (eg, if trading in the

AUTHOR

[Daniel Bono](#)



European Union is non-systematic, *ad hoc*, irregular or infrequent.

While very few Swiss issuers with listings on a Swiss stock exchange also have a listing on a regulated market in the European Union, Swiss shares are frequently admitted to trading on EU multilateral trading facilities. Further, EU investment firms account for a significant trading volume on Swiss stock exchanges. For these firms, trading Swiss shares on a Swiss stock exchange is in the interest of their clients because Swiss stock exchanges typically offer the highest liquidity for Swiss shares (best execution).

Because of the MiFIR share trading obligation, the expiry of the temporary third-country equivalence recognition for Swiss stock exchanges may remove EU investment firms' access to trade shares on Swiss stock exchanges for shares that are also "admitted on a regulated market or traded on a trading venue in the EU".

To limit the negative effect of a potential loss of EU third-country equivalence recognition of Swiss stock exchanges with respect to Swiss shares, the emergency measures enacted by the Federal Council would ban EU trading venues from trading in shares of Swiss issuers that are listed on a Swiss stock exchange or traded on a Swiss trading venue (subject to a carve-out for existing dual listings) in the event that the third-country equivalence recognition expires. This would remove those shares from the scope of application of the MiFIR share trading obligation and any potential new barriers for EU investment firms to trade Swiss shares on Swiss stock exchanges and trading venues.

Emergency measures

The emergency measures enacted by the Federal Council on 30 November 2018 are set out in the Ordinance on the Recognition of Foreign Trading Venues for the Trading of Equity Securities of Companies with Registered Office in Switzerland.

The new ordinance requires foreign trading venues where shares of Swiss issuers that are listed on a Swiss exchange or traded on a Swiss trading venue are traded or that facilitate the trading of such shares to be recognised by the Financial Markets Supervisory Authority (FINMA), subject to a carve-out for existing dual listings. This obligation applies from 1 January 2019.

FINMA cannot recognise trading venues in any jurisdiction deemed ineligible for recognition and included in a list maintained by the Federal Department of Finance (FDF). Ineligible jurisdictions are those which restrict access by local market participants to trading of shares of Swiss issuers on Swiss trading venues. In the absence of third-country equivalence, the European Union would impose such restrictions on EU investment firms based on the MiFIR share trading obligation; the European Union and its member states are currently listed on the FDF list (subject to automatic removal on the granting of third-country equivalence for Swiss stock exchanges by the EU Commission).

As FINMA cannot recognise EU trading venues as equivalent, they would effectively be banned from trading in shares of Swiss issuers that are listed on a Swiss stock exchange or traded on a Swiss trading venue. The goal of this measure is that Swiss shares would fall outside the scope of the MiFID trading obligation because they would no longer be "admitted on a regulated market or traded on a trading venue in the EU". This would remove any potential barriers to Swiss stock exchanges and trading venues for EU investment firms with respect to Swiss shares and may mitigate the potential adverse effect of a loss of EU third-country equivalence on the Swiss stock exchange infrastructure with respect to Swiss shares. Further, the ordinance facilitates direct access by EU investment firms to trading on Swiss trading venues.

Because the ordinance is deemed a financial market act pursuant to the Federal Act on the Swiss Financial Market Supervisory Authority, any wilful or negligent breach of the recognition requirement under the ordinance may result in criminal penalties against foreign trading venues and their responsible bodies.

For further information on this topic please contact [Daniel Bono](mailto:daniel.bono@nkf.ch) at Niederer Kraft Frey by telephone (+41 58 800 8000) or email (daniel.bono@nkf.ch). The Niederer Kraft Frey website can be accessed at www.nkf.ch/en.

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