CapLaw

SWISS CAPITAL MARKETS LAW

No. 2/2018

Securities

Regulatory

News | Deals & Cases

Events

New Reporting Obligations for Securities Dealers and Participants of Swiss Trading Venues

Reference: CapLaw-2018-14

On 1 January 2018, FINMA's new circular 2018/2 on the reporting of securities transactions ("**FINMA Circular 18/2**") entered into effect. The purpose of FINMA Circular 18/2 is to implement the reporting obligations set out in the Swiss Financial Market Infrastructure Act ("**FMIA**") and to further regulate technical aspects of the reporting obligations. Compared to the previously existing reporting obligations, the FMIA and FINMA Circular 18/2 will bring about a number of significant changes, including the reporting of certain derivatives transactions and reporting of beneficial owners.

By Patrick Schleiffer / Patrick Schärli

1) Trade and transaction reporting obligations and to whom they apply

Swiss law provides for trade and transaction reporting requirements according to which securities dealers and other participants of Swiss trading venues have to report sufficient information so as to ensure transparency in the markets. The respective reporting obligations are set forth in the Swiss Stock Exchange and Securities Trading Act ("**SESTA**") and the FMIA, the latter of which regulates, *inter alia,* trading venues and their participants. Historically, the trade reporting obligations were limited to securities listed on a Swiss stock exchange. As further described below, with the enactment of the FMIA in the beginning of 2016, the reporting obligations have been expanded to cover any and all securities admitted to trading on a Swiss trading venue as well as certain derivatives (irrespective of them being admitted to trading on a Swiss trading venue). The expanded reporting obligations were subject to certain transitional periods.

Under the SESTA, the FMIA, its implementing ordinances and FINMA Circular 18/2, the following financial services firms are subject to the trade and transaction reporting obligations:

– Swiss licensed securities dealers, i.e. Swiss incorporated entities licensed as a securities dealer by FINMA;

– Swiss FINMA-licensed branches of foreign securities dealers; and

– non-Swiss participants of a Swiss trading venue (so-called remote members).

In parallel to the amended scope of the trade and transaction reporting obligations, the FMIA also introduced wider transaction documentation obligations. Under these obligations, Swiss securities dealers, Swiss FINMA-licensed branches of foreign securities dealers and foreign participants of a Swiss trading venue have to record their securities transactions in a securities journal. As a rule, transactions that need to be reported under the trade and transaction reporting obligations also have to be recorded in the securities journal of the relevant securities dealer or participant. In light of the expanded trade and transaction reporting obligations, the Swiss law securities journal obligations have thus been amended accordingly and FINMA has also amended the corresponding circular 08/4 on the securities journal.

2) Amended scope of trade and transaction reporting obligations

a) Reporting of certain OTC derivatives

In addition to securities admitted to trading on a Swiss trading venue, under the new Swiss trade and transaction reporting rules, Swiss securities dealers and foreign participants now also have to report transactions in derivatives whose underlying is admitted to trading on a Swiss trading venue, further provided that such Swiss underlying has a weighting of 25% or more. FINMA Circular 18/2 clarifies that if such 25% threshold is exceeded by the sum of several Swiss underlyings, but not by one single Swiss underlying, the duty to report does not apply.

Acknowledging that it may be difficult to assess whether complex and dynamic derivative products may or may not end up having a Swiss underlying with a weighting of 25% or more, FINMA stated in FINMA Circular 18/2 that participants of a Swiss trading venue are entitled to report derivatives that at the time of the reporting do not exceed the 25% threshold.

This new derivative reporting obligation is in addition to the derivative transaction reporting that already exists under applicable derivative trading rules. Thus, a participant of a Swiss trading venue may end up reporting an OTC derivative transaction to a trade repository (i.e. pursuant to the reporting obligations under FMIA or EMIR) and also to the disclosure office of the relevant Swiss trading venue.

b) Reporting of beneficial ownership

In addition to the derivative reporting obligation described above, the new Swiss trade and transaction reporting rules now also provide for an obligation to provide transaction-specific beneficial ownership information. FINMA Circular 18/2 states that for purposes of the reporting obligation, the beneficial owner is generally to be identified in accordance with the rules set out in the Swiss anti-money laundering laws and regulations. By way of exception to this principle, however, operating legal entities, foundations and collective investment schemes are to be reported as beneficial owners, i.e. one does not have to look through to controlling persons and the like. In addition, FINMA Circular 18/2 states that in the case of trusts, the trustee needs to be reported as the beneficial owner.

With respect to the beneficial ownership information, FINMA Circular 18/2 further specifies the type of information and the format in which the beneficial ownership information needs to be submitted to the relevant disclosure office.

c) Exemptions, substituted compliance and alternative means of reporting

The Swiss reporting rules provide for certain exemptions from the reporting requirements and alternative means of reporting. In particular, the following transactions do not have to be reported to the relevant Swiss trading venue, provided such transactions are executed outside of Switzerland and further provided that these transactions are either:

- transactions in non-Swiss securities (or derivatives thereon) admitted to trading on a trading venue in Switzerland that are executed on a recognized foreign trading venue; or
- transactions in securities (or derivatives thereon) admitted to trading on a trading venue in Switzerland, provided the reportable information is communicated to the Swiss trading venue by other means (i.e. agreement between trading venues or information exchange between regulators), and if:
  - the transaction was executed by a non-Swiss participant of a Swiss trading venue; and
  - such non-Swiss participant is authorized to trade by the relevant foreign supervisory authority and is subject to trade reporting obligations in the relevant jurisdiction or in its home jurisdiction;

With respect to the latter exemption, SIX Swiss Exchange has recently entered into an agreement with the London Stock Exchange Group allowing non-Swiss participants of SIX Swiss Exchange to submit their transaction reports through the London Stock Exchange Group's UnaVista reporting platform.

In addition to the reporting through a non-Swiss trade reporting service, FINMA Circular 18/2 explicitly allows that a participant of a Swiss trading venue may submit its trade and transaction reports in the format as it is set out in the European regulatory technical standard 22 on the reporting of transactions to competent authorities ("**RTS 22**") under MiFIR, provided the reporting office of the relevant Swiss trading venue can handle such RTS 22 reports. SIX Swiss Exchange accepts RTS 22 reports (see also the respective notes in paragraph 3 below). Being able to use the already established RTS 22 report should lower the compliance related costs for foreign participants that have to report transactions in Switzerland and in an European jurisdiction.

3) When do the amended rules start to apply?

The amended trade and transaction reporting rules were subject to certain transitional periods, the first of which expired by the end of 2017. Accordingly, starting from 1 January 2018, the amended trade and transaction reporting obligations are being phased in as follows:

- *Swiss securities dealers* (including Swiss branches of foreign securities dealers): While the amended scope of the reporting obligations formally came into force on 1 January 2018, Swiss securities dealers have to submit complete reports (i.e. including beneficial ownership information) and reports on relevant derivatives only from 1 October 2018. With respect to transactions executed between 1 January 2018 and 30 September 2018 there is, however, a back loading requirement, i.e. these transactions have to be reported in full by no later than 31 December 2018.

- *Foreign participants* of a Swiss trading venue: The amended reporting obligations, i.e. derivatives transactions and beneficial ownership reporting, will take effect as of 1 January 2019. Unlike Swiss securities dealers, foreign participants of a Swiss trading venue are not subject to a back loading obligation.

Irrespective of the above statutory deadlines, participants of SIX Swiss Exchange should keep in mind that when they are reporting by way of a RTS 22 report, SIX Swiss Exchange requires such participants to include beneficial ownership information already as of 1 January 2018.

4) Conclusion

While Swiss securities dealers have to be ready to record and eventually report all of their transactions executed after 1 January 2018, foreign participants of Swiss trading venues can still benefit from a transitional period until 1 January 2019 with respect to the additional reports that will be required under Swiss law. Nonetheless, foreign participants need to assess now whether (i) their existing systems capture the additional required data, (ii) they may benefit from exemptions, or (iii) they want to make use of alternative ways of reporting.

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First experiences with the New Disclosure Law

Reference: CapLaw-2018-15

On 1 March 2017, a partial revision of the Ordinance of the Swiss Financial Market Supervisory Authority on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading (FINMA Financial Market Infrastructure Ordinance, FMIO-FINMA) regarding disclosure of significant shareholdings entered into force. On 3 October 2017, the Disclosure Office of SIX Swiss Exchange ("**DO**") published its annual report for 2016 ("**DO Annual Report 2016**") which dealt with many of the questions that lead to the partial revision of the FMIO-FINMA.

This article provides an overview of the first experiences with the new disclosure law, in particular in relation to the reporting requirement for parties with the power to freely exercise voting rights and the reasoning that resulted in the partial revision together with some critical thoughts in this context (Section 1). This article also summarizes the practice of the DO regarding the scope of the term "beneficial owner" (Section 3). Furthermore, FINMA recently made some clarifying comments on the reporting system for collective investment schemes in art. 18 FMIO-FINMA, which will be taken up in Section 2.

By Andrea Rüttimann

1) Partial Revision of FMIO-FINMA

a) Original Regime under Art. 120 Para. 3 FMIA

With the entry into force of the Financial Market Infrastructure Act (FMIA) as at 1 January 2016, new provisions took effect concerning the duty to report voting rights. The biggest novelty was the introduction of a new reporting duty for the discretionary power to execute voting rights pursuant to art. 120 para. 3 FMIA. Art. 120 para. 3 FMIA comes into play, for example, when beneficial owners give their asset manager power of attorney to exercise the voting rights associated with a qualified participation at the general meeting of shareholders at the asset manager's own discretion. Thus, a notification for the power to exercise the voting rights according to art. 120 para. 3 FMIA has a counterpart in a notification of a beneficial owner according to art. 120 para. 1 FMIA, unless each of such beneficial owners do not reach the reporting threshold.

The meaning of "discretion" must be analyzed in two steps (cf. FINMA Erläuterungsbericht zur Teilrevision der FinfraV-FINMA vom 22. August 2016 [FINMA Erläuterungsbericht], p. 5):

(1) in the first step towards the beneficial owner: there, discretion is given, if the beneficial owner has no influence on the exercise of the voting rights. In its *Erläuterungsbericht*, FINMA explains in this regard that "Konkret bedeutet dieses freie

Ermessen, dass keine Weisungen des Aktionärs vorliegen dürfen und der Dritte selbst entscheiden kann, wie er die Stimmrechte ausüben will." (FINMA Erläuterungsbericht zur Teilrevision der FinfraV-FINMA vom 22. August 2016, p. 4 et seq.); and

(2) in the second step within the group of companies or an otherwise controlled entity to which the discretionary power is granted (if no group of companies or a controlled entity is concerned at all, then the analysis ends with step (1)): there, discretion is given if the concerned party's will is actually (*tatsächlich*) decisive when it comes to the exercise of the voting rights.

Most of the struggles with the new regulation came from this second step.

Art. 10 para. 2 FMIO-FINMA was introduced to further specify the duty of art. 120 para. 3 FMIA, in particular the second step of the analysis described above. The original intention of FINMA was for the notification duty to apply to any party authorized to actually decide on how voting rights are exercised. In the first FMIO-FINMA consultation in 2015, however, market participants were critical of the proposal and requested that, as is the principle for the beneficial owner, the notification duty should apply to the "last member in the chain" if the person exercising the voting rights is part of a group or is controlled regardless of the party that *actually* exercises the voting power. The version that finally came into force on 1 January 2016 took this into account and stated that in the context of art. 120 para. 3 FMIA anyone who controls a legal entity either directly or indirectly is deemed to have the discretionary power to exercise voting rights, and thus, is the person subject to the reporting obligation (i.e. within a group the "last member in the chain").

To clarify, in relation to persons or legal entities not being controlled, the question with regard to scope is of no relevance since these persons/legal entities are always the person subject to the reporting obligation. The question only arises in circumstances where the party who has received the discretionary voting power is controlled and/or forms part of a group.

b) Difficulties implementing Art. 120 para. 3 FMIA

The above described rule was apparently not favorable for all group constellations and caused practical difficulties in the implementation for various affected parties after its entry into force on 1 January 2016. The Disclosure Office's Annual Report for the year 2016 lists those questions that were brought by investors and resulted in a formal request for a DO recommendation:

In one case, the applicant was an international banking group active in the field of asset management that was ultimately controlled by an individual (cf. DO recommendation

V-02-16, p. 82 et seqq. Annual Report 2016). The applicant requested a preliminary ruling, among other requests, with respect to the person subject to reporting obligation pursuant to art. 10 para. 2 FMIO-FINMA. Under the version of art. 10 para. 2 FMIO-FINMA valid at the time, the individual would have needed to be disclosed as a person subject to the reporting duty of voting rights. However, according to the applicant such disclosure would, *inter alia*, (i) lack a proper statutory basis, (ii) create potentially unsolvable operational issues and be difficult to reconcile with other regulatory requirements for closely-held asset managers and (iii) be misleading to investors (cf. DO recommendation V-02-16, p. 92 Annual Report 2016). The DO concluded that FINMA had pursuant to art. 123 FMIA been delegated the power to issue provisions on the scope of the notification duty and the provision of art. 10 para. 2 FMIO-FINMA, which does not contradict art. 120 para. 3 FMIA, thus had a sufficient legal basis. The DO also dismissed the second argument and considered it feasible, and moreover, the duty of the controlling shareholder to monitor the positions held. Thirdly, the DO held that like the case under art. 120 para. 1 FMIA, market participants would expect that the notifications show the ultimate controlling shareholder, while also taking into account the at the time undoubtful wording of art. 10 para. 2 FMIO-FINMA. The applicant raised the decision to FINMA; however, since art. 10 para. 2 FMIO-FINMA had been revised in the meantime, the respective request was groundless (cf. also remark of the DO, p. 83 Annual Report 2016 and FINMA Enforcement report of 27 March 2018, p. 23).

In a further case the applicant requested for easing provisions, respectively an exemption from the duty to notify under art. 120 para. 3 FMIA, on the basis that the person *actually* granted the discretionary voting power is subject to the reporting obligation (and not the "last member in the chain") (cf. DO recommendation A-06-16, p. 81 et seq. Annual Report 2016). Since, at the time of the request was filed with the DO, it had already become apparent that FINMA would revise the provision of art. 10 para. 2 FMIO-FINMA, the request was suspended and finally withdrawn (since the applicant's request was one of the alternatives under the final provision, cf. Section 1d below).

In another matter, an applicant was granted easing provisions with respect to the notification duty according to art. 18 para. 1 and para. 4 and art. 22 para. 3 FMIO-FINMA to the extent that the direct shareholders would not need to be disclosed as would be required under art. 11 lit. b FMIO-FINMA. The easing was mainly granted as a consequence of the special organization of the applicant as of one the world's largest asset managers [author's note: BlackRock, Inc.] with a high number of direct shareholders and frequent changes of shareholdings among them. The ordinary reporting duties would have led to numerous notifications which, in the end, would have had a potential negative effect on market transparency (cf. DO recommendation A-05-16, Annual Report, 2016, p. 58 et seqq.). For the filing of the discretionary power to exercise voting rights, which was likely granted to various members of the group at different levels, the version of art. 10 para. 2 FMIO-FINMA valid at the time was the "convenient" solution in the sense that only the top holding entity was the person subject to reporting obligations. For this applicant a reporting regime as first proposed by FINMA (cf. Section a) would have been fatal and would have likely led to a request for a new recommendation (cf. DO recommendation A-05-16, p. 49 et seqq. Annual Report 2016).

The provision in art. 120 para. 3 FMIA also raised other questions. For example, the DO had to determine whether certain contractual provisions result in a duty to report voting rights. The DO concluded that, depending on the circumstances, the duty to report arises only after other conditions are met. Under other circumstances, however, the contract empowered the entitled party to exercise voting rights at its discretion directly upon its conclusion and the duty to report in this case arises at the time of the *conclusion* of the contract (for more detailed description of the different constellations, cf. DO recommendation A-04-16, p. 62 et seqq. Annual Report 2016).

c) FINMA initiated Partial Revision

As a consequence of the accumulation of difficulties investors faced with the reporting system under art. 120 para. 3 FMIA, FINMA started a consultation and proposed an amendment to art. 10 para. 2 FMIO-FINMA with following scope: The person who is *actually* able to make a discretionary decision concerning the exercise of voting rights is subject to the notification duty (FINMA consultation proposal of 22 August 2016, FINMA Erläuterungsbericht, p. 4), which corresponded to the very original proposal of FINMA in 2015 (cf. Section 1a above). At the consultation for FINMA's amended proposal, a vast majority of participants welcomed the change. However, some participants felt it made sense to offer an alternative option for fulfilling the notification duty on the top level for legal entities within a group, i.e. "the last member in the chain" (as it would have made sense for the applicant in the DO recommendation A-05-16, p. 49 et seqq. Annual Report 2016, cf. Section 1b above). The concern that was finally taken into account by FINMA.

d) Revised Provision

The final amended version of the provision has been **in effect since 1 March 2017** and provides that:

– *Primarily* the person who actually decides how voting rights are exercised is the person subject to reporting requirement (FINMA describes this as *originäre Meldepflicht*). When a legal entity within a group has been granted formal right for execution, it has to be assessed in more detail if this entity or any other entity is actually holding the discretionary power (cf. step (2) above). In its *Erläuterungsbericht*, FINMA further explains that "Dabei gilt es zu beachten, dass nicht automatisch diejenige Person meldepflichtig ist, auf welche die Delegation bzw. die Stimmrechtsübertragung formell lautet. Entscheidend ist, wer tatsächlich bestimmt, wie die Stimmrechte ausgeübt werden." (FINMA Erläuterungsbericht zur Teilrevision der FinfraV-FINMA vom

22. August 2016, p. 4 et seq.). Whether the party that has received the discretionary voting power actually uses the voting rights does not play a role (this is self-evident and also corresponds to the concept of the reporting duty in general).

– *Alternatively*, in cases where the reporting legal entity according to art. 120 para. 3 FMIA is controlled or forms part of a group, the reporting requirement can be met on a consolidated basis by a controlling entity or person for the legal entities controlled by them (*konsolidierte Meldepflicht*). A consolidated notification has to (i) have the indication as "consolidated notification" pursuant to art. 22 para. 2 lit. a *cif. 2* FMIO-FINMA (this requirement is additional for consolidated notifications and on top on the requirement under art. 22 para. 2 lit. a *cif. 1* under which it must be indicated which proportion of voting rights vested in the notification regarding the person with full discretionary powers over the exercise of the voting rights) and (ii) must necessarily be done by the top holding or controlling person, i.e. the last member in the chain. A consolidation on a lower, in between level is not permitted. Thus, in many cases, this alternative reporting system will lead to a notification under art. 120 para. 1 mixed with a notification under art. 120 para. 3 FMIA.

In the view of FINMA the new regime will not lead to confusion since, and this is also what the DO concludes, generally, the reporting duty under art. 120 para. 3 FMIA only comes into play if voting rights outside of controlled group have been transferred to a legal entity within a group. A transfer within the controlled group itself will always be a case of the reporting duty according to art. 120 para. 1 FMIA. When having transfers from outside the group (and own holdings within the group), only then, the two reporting duties of art. 120 para. 1 and 3 FMIA mix in the same notification. The DO thus has adapted Form II (Notification by a group; form provided by the DO for filing notifications at SIX Swiss Exchange) and added a section where the reporting subject must indicate whether it reports on consolidated basis (or not). Additionally and already in force since the regime of the FMIA as of 1 January 2016, Form II (as well as Form I for single shareholders) contains the function where it shows which part of the significant shareholdings is reported in the role as beneficial owner and which part is reported as discretionary voting power.

As a result of the above, not only art. 10 para. 2 FMIO-FINMA was amended, but also art. 22 para. 2 lit. a FMIO-FINMA now contains a new obligation in cif. 2 to indicate whether "*the notification duty is exercised by the person with full discretionary powers to exercise voting rights or the person who directly or indirectly controls the person with full discretionary powers to exercise voting rights*".

On the transitory regime (*Übergangsbestimmung*), the revised FMIO-FINMA states for a transitional period of six months until 31 August 2017. Since the partial revision induces, as just described in the previous paragraphs, a new element of the reporting duty in art. 22 para. 2 lit.a cif. 2 FMIO-FINMA by indicating whether the voting rights are reported on a consolidated basis (or not), the notifications at the time needed to be reviewed and updated accordingly in line with the new regime until 31 August 2017.

e) Critical Thoughts

While the revision definitely shows FINMA's intention (and also its flexibility) to react to difficulties market participants faced, the outcome has side effects. First, while FINMA is of the view that the new regime does not lead to uncertainties (cf. Bericht über die Anhörung vom 22. August bis 3. Oktober 2016 zur Teilrevision der FinfraV-FINMA vom 26. Januar 2017 [FINMA Anhörungsbericht], p. 9), the wording "anyone who has full discretionary powers to exercise voting rights" can be vague and leave investors with uncertainties and questions as to who the correct reporting subject is. This might in particular be true for investors not familiar with the high degree of fineness of the disclosure law, and even more true for foreign investors. But in administrative law, and in particular where administrative criminal sanctions are a consequence of violations, ambiguities are generally difficult (principle of legality).

Additionally, the new regime increases the complexity of the notifications, which has on one side the effect that violations of the provisions are more likely to happen, and on the other side generally the handling for all involved parties (investors, issuers, regulatory authorities) gets more complicated (cf. new indication obligation pursuant to art. 22 para. 2 lit. a cif. 2 FMIO-FINMA, cf. Section 1c). Moreover, it is also more complicated for market participants to understand the notifications published on the public platform of SIX Swiss Exchange and to follow the development of a specific shareholding position. On top, FINMA seems not only to provide a choice, but also the possibility to change between the two different reporting regimes (cf. FINMA Anhörungsbericht, p. 10 et seq. where FINMA describes how an investor can switch between the two different regimes of reporting duty).

2) Reporting Regime For Collective Investment Schemes (Art. 18 FMIO-FINMA)

In connection with the hearing on art. 10 para 2 FMIO-FINMA, some participants took the opportunity to bring forward other issues which in their view needed a revision as well, and in this context once more the "infamous" provision of art. 18 FMIO-FINMA gave reason to complain. FINMA made some generally clarifying comments. According to FINMA, art. 18 FMIO-FINMA sets a special regime for collective investment schemes only (FINMA Anhörungsbericht, p. 13). As a consequence, the person subject to reporting duty is defined under this special regime. For collective investment schemes approved for distribution in Switzerland the licence holder is the person subject to reporting duty, (without consolidation of its holdings with the holdings of the group for fund management companies that are dependent on a group) (art. 18 para. 2 lit. b FMIO-FINMA). With this rule a different subject, as in art. 10 and 11 FMIO-

FINMA, is responsible for the reporting duty, since the license holder is not the economic beneficiary of the assets, i.e. not the beneficial owner. Furthermore art. 18 para. 9 FMIO-FINMA states that investors (as the economic beneficiaries) do not need to be disclosed (which is a necessity since they often do not even know). Foreign collective investment schemes not approved for sale or distribution are subject to the same provision, provided that they can provide proof of independence of their fund management company according to art. 18 para. 5 FMIO-FINMA.

For foreign collective investment schemes that are not approved for sale or distribution in Switzerland and are not independent, i.e. form part of a group, another regime comes into place; in this context, in its most recently issued Enforcement report 2017, FINMA reaffirms the pre-existing practice by the DO that the principles in line with art. 120 para. 1 FMIA apply (FINMA Enforcement report 2017, p. 23). As a consequence, the person or legal entity subject to reporting duty in a group is the "last member in the chain" (cf. also FINMA Anhörungsbericht, p. 14). The DO recommendation V-02-16 applying this principle (cf. above Section 1 b) was thus protected by FINMA, but the applicant was granted easing provisions (based on the alternative request of the applicant) also taking into account a declaration of independence by the controlling individual (FINMA Enforcement report 2017, p. 23; which however results in a somewhat inconsistent mix between disclosure as independent (para. 3) and non-independent (para. 4) foreign collective investment scheme).

In its recommendation A-05-16 (cf. also above Section 1b) the DO further confirmed, *inter alia*, that for collective investment schemes under art. 18 para. 4 FMIO-FINMA in line with the interpretation of art. 120 para. 1 FMIA resp. art. 11 lit. b FMIO-FINMA, it is the holder of the legal title of the assets that must be disclosed (and not the licensed holder, as the applicant claimed). With this decision, the DO also confirmed its practice in its recommendation of V-02-14 (cf. Annual Report 2014, p. 30). The DO further reconfirmed that the consolidation within a group for collective investment schemes falling under art. 18 para. 1 FMIO-FINMA is voluntary (art. 18 para. 2 lit. b FMIO-FINMA states that "There is no obligatory consolidation with the group for fund management companies within a group").

3) Scope of the Definition of the Beneficial Owner under art. 10 para. 1 FMIO-FINMA

The entry into force of the FMIO-FINMA also legalized the already valid principle or definition of the beneficial owner (as it has been in practice since the decision of the Federal Supreme Court of 29 July 2013, court order 2C_98/2013). Pursuant to this practice, art. 10 para. 1 FMIO-FINMA states that a beneficial owner is (i) the party controlling the voting rights stemming from a shareholding and (ii) bearing the associated economic risk. In two recommendations the DO had to decide on questions that allowed for a more precise interpretation of the term "beneficial owner" and also confirmed that the two elements must be met cumulatively in order to be concerned by the reporting obligation.

One case concerned a foundation where the beneficiaries where neither directly controlling (contrary to the case in the decision of the Federal Administrative Court (FAC) of 20 July 2010, B-7126/2008 where the beneficiaries where considered to be the beneficial owners [as a group]) nor the controlling parties were the beneficiaries. As a result, a foundation where the control of the voting rights and the economic risk were separated, the foundation itself was the person subject to reporting obligation (DO recommendation V-01-16, p. 26 et seqq. Annual Report 2016).

In the second case the question was analysed in more detail in the context of a partnership limited by shares (*Kommanditaktiengesellschaft*, art. 764 et seqq. CO). The DO came to the conclusion that even though a majority shareholder was known (due to the special organisation of a partnership limited by shares), the partnership limited by shares was the person subject to reporting obligation, since the majority shareholder did not have controlling power over the voting rights in the sense of art. 120 para. 1 nor para. 3 FMIA (DO recommendation V-04-16, p. 36 et seqq. Annual Report 2016).

Thus, it seems that the provision in the FMIO-FINMA provides now for a more stable definition of the term "beneficial owner" and that this definition is also followed and implemented by the DO in a practical manner.

4) Outlook

For the year 2016, the DO mentioned that despite the legislative intentions to reduce unnecessary notifications, the number of disclosure notifications increased significantly (apparently, though, to some extent based on other special factors, i.e. shareholders who filed a multiple number of notifications, the reasons for which were not connected to the revised provisions). It will be interesting to follow whether the number of (insignificant) notifications will actually decrease (since this was the major goal of the new disclosure law). However, for 2017 the additional special factor based on the partial revision of the FMIO-FINMA, requiring consolidated notifications in line with art. 120 para. 3 FMIA to be amended the latest by 31 August 2017, needs to be taken into account.

Additionally, it is likely that not all questions around the reporting duty under art. 120 para. 3 FMIA are cleared up yet; see in this context also the considerations in the DO recommendation A-04-16 regarding securities held in custody for clients with and without an investment management mandate (Annual Report 2016, p. 62 et seqq.) raising some of the questions that might be further relevant for the everyday practice.

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Outsourcing: FINMA Publishes a New Circular 2018/3 on Outsourcing for Banks and Insurance Companies

Reference: CapLaw-2018-16

On 5 December 2017, the Swiss Financial Market Supervisory Authority FINMA published its new circular 2018/3 *Outsourcing – Banks and Insurance Companies*. In contrast to the current rules, the new circular not only covers banks and securities dealers but is also applicable to insurance companies. The main changes are a more flexible definition what constitutes outsourcing based on a case-by-case analysis factoring in the business model and risk profile of each institution, a more differentiated approach to intra-group outsourcing, and a focus on supervisory issues, leaving data protection and banking secrecy out of the scope of the FINMA circular. The new rules entered into force on 1 April 2018.

By Rashid Bahar / Martin Peyer

1) Introduction

On 5 December 2017, the Swiss Financial Market Supervisory Authority FINMA published its new circular 2018/3 *Outsourcing – Banks and Insurance Companies*. The revised FINMA-Circular 2018/3 (Revised Circular), which entered into force on 1 April 2018, is applicable to banks and securities dealers and, in contrast to the current FINMA-Circular 2008/7, also covers insurance companies.

The current regulatory regime was overdue for a complete overhaul. The existing rules on outsourcing for banks entered into force in 1999 and were last revised in 2002, at a time when outsourcing was a nascent phenomenon. Since then, outsourcing became more prevalent, following technical developments and the increased focus on core competencies and cost cutting in the financial industry.

Accordingly, FINMA initiated a consultation process in December 2016, which prompted a strong debate within the industry. Almost a year later, FINMA has now published the Revised Circular, which aims to be more principle-based and, at the same time, ensures that the outsourcing does not prejudice clients and creditors of banks and insurance companies or jeopardize supervision by FINMA (see consultation report dated 19 September 2017, p. 8 ff.).

The main changes in the Revised Circular are (i) a harmonization of the requirements for banks, securities dealers and insurance companies, (ii) a more flexible definition of what constitutes outsourcing based on a case-by-case analysis factoring in the business model and risk profile of each institution, (iii) a requirement to hold an inventory of outsourced functions indicating the service provider (including subcontractors) and further changes regarding the organizational framework for outsourcing projects, (iv) a relief regarding the requirement to formally document that the regulatory auditor and FINMA can exercise and enforce its rights of inspection and auditing in connection with cross-border outsourcing and (v) a more differentiated approach to intra-group outsourcing.

Moreover, the Revised Circular focuses on supervisory matters and, consequently, no longer addresses the requirements on data protection and banking secrecy. This signals a more focused approach to dealing with outsourcing projects. However, it also means that financial institutions will no longer be able to turn to FINMA to obtain comfort on these issues, but will need to look for guidance from the Federal Data Protection and Information Commissioner (FDPIC) or cantonal prosecutors, who may not be willing to respond to requests or may be less attuned to outsourcing in the financial industry.

2) Scope

In contrast to the current FINMA-Circular 2008/7 on outsourcing which only applied to banks and securities dealers, the Revised Circular will also apply to insurance companies, including Swiss branches of foreign insurance companies. The Revised Circular, thus, covers both main sectors of the financial industry and subjects them to fundamentally the same regulatory framework, allowing for some exceptions due to differences in the supervisory concept.

Other supervised entities such as fund management companies, asset managers for funds and financial market infrastructures, however, continue to remain out of scope under the Revised Circular. This raises the question to what extent the principles set forth in the Revised Circular can and should apply to these other supervised entities. On the one hand, they are all subject to fundamentally similar regulatory requirements in terms of organization, with a few exceptions on the framework applicable to the delegation of functions by fund management companies and the specific rules on outsourcing that apply to financial markets. On the other hand, FINMA specifically did not include them in the scope of the Revised Circular.

The Revised Circular defines outsourcing as mandating a service provider to carry out independently and permanently an essential function. The definition does not hinge on whether the service affects an essential function in whole or only in part. A function is deemed essential, if compliance with the objectives and regulations of the financial market legislation significantly depends on it (see FINMA-Circular 2018/3, N 3 f.). This definition is, thus, potentially fairly large.

Whereas FINMA-Circular 2008/7 specified this term with a positive and negative list and the draft of the Revised Circular contained an illustrative list of essential functions (such as processing of payments, IT, risk management in the case of banks and securities dealers as well as claims settlement, financial accounting and asset management in the case of insurance companies), the final version of the Revised Circular does not specify any further what is an essential function. Therefore financial institutions will need to determine on a case-by-case basis – potentially after seeking a ruling from FINMA – whether a given activity constitutes outsourcing under the Revised Circular. Although FINMA's consultation report clarifies that its practice does not change with respect to banks, the report does not provide much more guidance in this respect, but lists an important example: if an outsourcing provider gets access to mass client identifying data (CID) (and not only to a limited number of CID), the outsourcing is deemed essential (consultation report dated 21 September 2017, p. 15).

3) Restrictions on Outsourcing and Approval

Overall, the Revised Circular perpetuates the current liberal approach to outsourcing. The outsourcing of all essential functions remains permissible subject to limited exemptions. Only the core functions of the board of directors and executive management, as well as the decision to accept and terminate client relationships cannot be outsourced.

Further restrictions apply to banks, securities dealers and insurance companies of category 1 to 3, which must maintain their own risk control and compliance functions as an independent body, whereas other banks, securities dealers and insurance companies will only need to appoint one member of the executive management to oversee these areas (FINMA-Circular 2018/3, N 7 ff.).

This approach is also a significant relief for insurance companies, which until now could only outsource two of their three main functions, whereas insurance captives can even go a step further and delegate certain core competencies to specialized management companies or affiliates (FINMA-Circular 2018/3, N 10 ff.).

The Revised Circular perpetuates the current supervisory approach to outsourcing. Banks and securities dealers will continue to be able to outsource essential functions without seeking the approval of FINMA. By contrast, insurance companies will continue to need one, since the outsourcing of essential functions implies an amendment of the regulatory business plan which is subject to FINMA approval (see article 5 (2) in connection with 4 (2) (j) Insurance Supervisory Act).

4) Organizational Requirements

The Revised Circular sets out several organizational requirements relating to any outsourcing. First, the company has to keep an up-to-date inventory of the functions that have been outsourced, containing a description of the outsourced functions, the service provider (including subcontractors (if any)) and the recipient as well as the responsible unit within the outsourcing company (FINMA-Circular 2018/3, N 14).

Furthermore, the company must select the outsourcing provider based on its professional experience and ensure proper instruction and supervision of the outsourcing provider. The outsourcing company must also take into account a potential change of the service provider and consider the consequences of such a change when deciding about the outsourcing. To be considered as potential service provider for banks and insurance companies, the service provider must be able to properly perform the outsourced services. In addition, the outsourcing company must take adequate measures to ensure that the outsourced functions will be properly performed (FINMA-Circular 2018/3, N 16 ff.).

Finally, a written contract is required for outsourcing essential functions which provides the outsourcing company with the right to instruct and control the service provider, requires the approval of the outsourcing company before the service provider can involve subcontractors and ensures that outsourced functions can be audited at any time (FINMA-Circular 2018/3, N 32 ff.).

5) Intra-Group Outsourcing

Unlike the current FINMA-Circular 2008/7, the Revised Circular will no longer provide for blanket exemptions for intra-group outsourcing projects. At the same time, the Revised Circular does not go as far as the draft of the Revised Circular, which did not differentiate between intra-group outsourcing and outsourcing to external service providers. Instead, FINMA-Circular 2018/3, N 22 allows financial institutions to take into account their ties with affiliates when considering the requirements on selecting, instructing and controlling an outsourcing provider as well as the requirements that apply to the contractual documentation. In this way, the Revised Circular allows financial institutions to factor in the fact that some risks do not apply in an intra-group setting and that some regulatory requirements are not relevant in such a context or, at least, should be addressed differently (see consultation report dated 21 September 2017, p. 35 ff.).

This approach allows a more flexible approach to the regulation of intra-group outsourcing. At the same time, it also provides FINMA with more discretion to nevertheless apply the requirements applicable in external outsourcing to intra-group projects, if it considers that the circumstances of the specific instance require the financial institution to do so.

6) Cross-border Outsourcing

The outsourcing of essential functions to a foreign jurisdiction is permissible, if the financial institution can guarantee that it, its regulatory auditor and FINMA can exercise and enforce its rights of inspection and auditing (FINMA-Circular 2018/3, N 30). The Revised Circular no longer requires formal documentation that these requirements are satisfied through a legal opinion or otherwise (see FINMA-Circular 2008/7, N 50). In connection with cross-border outsourcing, the company must further ensure that outsourcing will not hinder a recovery or resolution in Switzerland and that consequently the access to data stored abroad for this purpose remains possible in Switzerland at all times (FINMA-Circular 2018/3, N 31).

Moreover, unlike the draft that was published in the consultation proceedings, the Revised Circular will not require banks and securities dealers to inform FINMA before they outsource functions involving a transfer of mass CID to foreign jurisdictions. However, banks will continue to be required to comply with the requirements set out in Annex 3 of FINMA-Circular 2008/21 *Operational Risks – Banks* when handling CID.

7) Responsibility and Auditing

The rules on the responsibility for outsourced functions and the auditing requirements remain unchanged in the Revised Circular with the exception of certain changes in the terminology.

Banks, securities dealers and insurance companies remain responsible in relation to FINMA for all functions that have been outsourced (FINMA-Circular 2018/3, N 23). Moreover, the outsourcing company must ensure that it, its regulatory auditor and FINMA will be able to monitor and assess compliance of the service provider with the regulatory requirements. More generally, the outsourcing must not hinder supervision by FINMA in particular in cases of cross-border outsourcing (FINMA-Circular 2018/3, N 26 ff.).

The outsourcing company, its regulatory auditor and FINMA must have a contractual right to inspect and audit all information relating to the outsourced function at any time without restriction. If the service provider is not supervised by FINMA, the company and the service provider must agree on a contractual obligation of the service provider to provide FINMA with all the information and documentation about the outsourced functions, which are necessary for FINMA's supervisory activities.

Auditing of outsourced functions may be delegated to the service provider's audit company if it is adequately qualified. In such case, the respective audit reports must be provided to FINMA on request (FINMA-Circular 2018/3, N 29).

8) Entry into Force and Phase-in

The Revised Circular entered into force on 1 April 2018. FINMA-Circular 2018/3, N 37 provides for a phasing-in period for existing outsourcing arrangements of banks and securities dealers which will be 'grandfathered' during a transition period of five years ending on 1 April 2023. Insurance companies will be subject to a different regime: new insurance companies will immediately be subject to the Revised Circular, whereas existing ones will need to comply with the new framework only if there is a change in their regulatory business plan regarding outsourcing (FINMA-Circular 2018/3, N 38).

9) Outlook

Overall, the Revised Circular changes significantly the regulatory requirements for outsourcing and calls for a review of existing outsourced services to determine whether they constitute outsourcing under the Revised Circular and consider how they intend to align them with the new rules during the phase-in phase.

The Revised Circular is also more focused on supervisory matters. By leaving banking secrecy and data protection out of the subject-matter of the Revised Circular, FINMA no longer needs to face the thorny questions these matters often raise in the context of outsourcing. This does not mean that they are no longer relevant. Quite to the contrary, the entry into force of the General Data Protection Regulation in the EU and the ongoing revision of the Data Protection Act are likely to impact significantly outsourced services. Among other things, the draft of the Data Protection Act foresees an obligation to keep a list of data processing activities (article 11 of the draft), a reporting obligation in the event of violations of data security (article 22 of the draft), modified requirements for the disclosure of data abroad (articles 13 ff. of the draft) and additional information obligations in connection with the processing of information (articles 17 ff. of the draft). In addition, a data protection impact assessment will need to be carried out in advance under certain conditions (article 20 of the draft). These requirements will create an additional compliance constraint for financial institutions, which will need to be addressed separately with the competent regulator.

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A Brief Overview of the LIBOR Reform

Reference: CapLaw-2018-17

The London Interbank Offered Rate (LIBOR) reform has been an ongoing project for the past several years, proceeding in fits and starts. It seems, however, that the global regulatory community has now finally begun in earnest to plan for a future without LIBOR. Reforming LIBOR is a complicated undertaking, since LIBOR acts as a reference rate to several hundred trillion dollars in both notional value of derivatives and in bonds, loans and securitizations and thus plays a very important role in the global financial market. LIBOR has attained such a unique role because it is calculated for five currencies (USD, GBP, EUR, CHF and JPY) which come in seven maturities (from overnight to 12 months).

By Thomas Werlen / Jascha Trubowitz

1) Background of reforming LIBOR

The LIBOR manipulation scandal revealed widespread problems with the reliability of LIBOR (See CapLaw-2014-14). The scandal involved several large banks, such as Deutsche Bank, UBS and Barclays, that manipulated LIBOR to benefit themselves. In the aftermath of this, the global regulatory community introduced reform efforts to rebuild the public's trust in the reliability and robustness of reference rates, including LIBOR. The reform was essentially launched in February 2013 when the G20 tasked the Financial Stability Board (FSB) with reviewing and reforming major reference rates. To take the work forward, the FSB commissioned an Official Sector Steering Group (OSSG) of regulators and central banks to monitor and oversee the efforts to implement the benchmark reforms. While the FSB has taken the lead in many of the global efforts to reform major interest rates, working groups have been established in several jurisdictions to have public and non-public market participants together study their respective financial markets and decide which alternative interest rates would be the most appropriate for the replacement of LIBOR.

In July 2014, the OSSG published a report on Reforming Major Interest Rate Benchmarks which laid out recommendations to reform major interest rate benchmarks. This report recommended initiatives to strengthen LIBOR but also focused on identifying alternative risk-free or nearly risk-free rates (here collectively referred to as RFR) that could replace LIBOR. Alternative RFRs are described as being risk-free or nearly risk-free because they are based on secured borrowing markets or on unsecured borrowing by sovereigns with little default risk, and therefore do not contain a credit risk premium. These rates would thus be credit risk-free or nearly so.

RFRs have been proposed because they could remedy significant shortcomings of LIBOR. The sustainability of LIBOR is in serious doubt, as LIBOR lacks active underlying markets. There is also a far greater risk of manipulation when rates are based on judgments rather than on actual quotes and transactions. Furthermore, alternative RFRs have also been deemed more appropriate benchmarks for products and transactions, since they can ignore the credit risk premium embedded in LIBOR.

2) LIBOR reform is given a boost

Absent any urgency to implement the LIBOR reform, reform efforts undertaken by regulators languished. Yet, in a speech delivered on 27 July 2017, Andrew Bailey, the Chief Executive of Britain's Financial Conduct Authority (FCA), delivered a boost to the reform efforts. He suggested that "[…] work on a LIBOR transition is unlikely to begin in earnest, if market participants continue to assume LIBOR will last indefinitely. […] In Switzerland, for instance, it has been clear for some time that the TOIS [Tom-Next Overnight Indexed Swap] reference would not survive". […] only once a date was agreed for [its] discontinuation did serious work on transition to the new reference rate, Swiss Average Rate Overnight (SARON), begin." It is therefore envisioned that all the current panel banks would voluntarily agree to sustaining LIBOR for a four to five year period, i.e. until end-2021. "[…] at the end of this period, it would no longer be necessary for the FCA to persuade, or compel, banks to submit to LIBOR" (Speech by Andrew Bailey, The Future of LIBOR, https://www.fca.org.uk/news/speeches/the-future-of-libor).

By providing a type of expiration date for LIBOR, Bailey effectively revitalized the LIBOR reform. Jurisdictions that had basically put their reform efforts on hold were now forced into action.

3) Implementation of the LIBOR reform

In the aftermath of the LIBOR manipulation scandals, the relevant jurisdictions covering LIBOR currencies set up working groups to study benchmark replacements for LIBOR. LIBOR will remain intact for now, but It appears that all of these jurisdictions will move towards implementing an alternative RFR.

a) United States

With the establishment of the Alternative Reference Rates Committee (ARRC) in November 2014 the foundation for benchmark reform was laid in the US. In June 2017, the ARRC chose the Secured Overnight Financing Rate (SOFR) as its preferred alternative to USD LIBOR. SOFR was selected because of its depth of the underlying market and usefulness to market participants.

b) Europe

The European Union regulatory bodies, the Financial Services Market Authority, European Securities and Markets Authority, the European Central Bank and the European

Commission, only recently, in September 2017, set up a working group to identify an alternative RFR to be used in financial instruments and contracts in the Euro area. The EURO overnight index average, a new repo benchmark and a new unsecured overnight rate, is considered to be in pole position to replace EURO LIBOR.

c) United Kingdom

In March 2015, the Working Group on Sterling Risk-Free Reference Rates (UK Group) was first convened. It selected the Sterling Overnight Index Average (SONIA) as the preferred alternative RFR in April 2017, because there is an existing market for SONIA-linked swaps and because SONIA is based on actual transactions. The first publication is slated for 23 April 2018. The UK Group is tasked with setting this broad based transition to SONIA into motion, so that SONIA may be established as the primary sterling interest rate benchmark by end-2021.

d) Switzerland

Switzerland's National Working Group on Swiss franc reference rates (NWG), established as the key forum for considering proposals to reform reference interest rates in Switzerland, sprang into action on 24 October 2017. That day, in its first meeting after Bailey's speech, NWG's members recommended SARON as the alternative for CHF LIBOR. The Swiss Average Rate Overnight (SARON) is a secured overnight interest rates average referencing the CHF interbank repo market. It was launched in 2009 by the Swiss National Bank in cooperation with SIX Swiss Exchange. The NWG selected SARON due to it being IOSCO-compliant and having a broad base of contributors. SARON is also based on actual transactions and tradable quotes and on data from the CHF repo market. In addition, SARON has a low probability of being manipulated and a low potential for conflicts of interest thanks to the high level of transparency (most CHF market activity is concentrated on the EUREX Repo platform). For the ongoing work, NWG members decided to form two sub-working groups, "Loan and deposit market" and "Derivatives and capital market" group, to examine CHF Libor-based product types and dependencies group.

e) Japan

In Japan, a number of steps have been taken by market participants toward identifying and establishing a Japanese alternative RFR. The "Study Group" was convened in April 2015 by the Bank of Japan to lead financial benchmark reform efforts in Japan. In December 2016, the Study Group selected the Tokyo Overnight Average Rate (TONA) as its preferred alternative RFR benchmark. The rationale for choosing TONA was the depth of the underlying market and the limited credit risk component thanks to TONA being an overnight average.

4) Transitioning to risk-free rates is not without risk

Among the challenges that RFRs face are the low trading volume for longer maturities (i.e. 3-month / 6-month) given that all the alternative RFRs are an overnight average rate, different risk premia of collateralized rates (repo) and uncollateralized rates (LIBOR), substantial transition cost when switching from LIBOR to the alternative RFR, hedging risks from trading legacy LIBOR positions against new alternative RFR hedges, economic risk of potential renegotiation of contracts and, lastly, significant legal risks.

Among the most challenging aspects of the transition away from LIBOR are the potential legal risks involved. Additional transition costs and operational risks will result from contract amendments. The same also holds true for legacy contracts that will convert to alternative RFRs. Legal disputes may also arise in connection with the transition to the alternative RFRs, because many contracts use LIBOR as an interest rate.

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IPO of Sensirion Holding AG on SIX Swiss Exchange

Reference: CapLaw-2018-18

On 12 March 2018, Sensirion Holding AG (Sensirion) announced the launch of its initial public offering (IPO) on SIX Swiss Exchange and the first trading day was March 22, 2018. The shares of Sensirion were priced at CHF 36 per share, at the top end of the price range, corresponding to a placement volume of CHF 276 million and a total market capitalization for Sensirion of CHF 504 million (before exercise of the over-allotment option). The bank syndicate placed 6,150,000 existing shares offered by the majority shareholder, Gottlieb Knoch, and 1,530,000 newly issued shares offered by Sensirion in the base offering. Sensirion raised gross proceeds from the IPO of CHF 55 million (before exercise of the over-allotment option).

Sensirion is a Swiss-based pure-play sensor specialist that combines a position at the forefront of sensor innovation with a strong track record of manufacturing sophisticated and cost-efficient environmental and flow sensors for the automotive, medical, industrial and consumer end markets.

IPO of Medartis Holding AG on SIX Swiss Exchange

Reference: CapLaw-2018-19

On 12 March 2018, Medartis Holding AG (Medartis) announced the launch of its initial public offering (IPO) on SIX Swiss Exchange and the first trading day was March 23, 2018. The shares of Medartis were priced at CHF 48 per share, corresponding to a placement volume of CHF 123.9 million (excluding the over-allotment option) and a total market capitalization for Medartis of CHF 563 million. The bank syndicate placed 2,604,166 new registered shares in the base offering. Medartis raised gross proceeds from the IPO of CHF 123.9 million (excluding the over-allotment option).

Medartis is one of the world's leading manufacturers and providers of medical devices for surgical fixation of bone fractures and osteotomies for the craniofacial region as well as for upper and lower extremities. Medartis employs over 480 individuals across its 11 locations, and Medartis products are sold in 44 countries globally.

Seminar: Company Law Conference XIV (Gesellschaftsrechtstagung XIV)

25 May 2018, SIX ConventionPoint Zürich

https://irp.unisg.ch/de/weiterbilden/veranstaltungen/2017/gesellschaftsrechtstagung-xiv

Seminar: News on Collective Investment Schemes (Aktuelles zum Kollektivanlagenrecht V)

31 May 2018, Lake Side, Zurich

http://www.eiz.uzh.ch/weiterbildung/seminare/

Seminar: Developments in Financial Market Law (Tagung zu Entwicklungen im Finanzmarktrecht)

5 June 2018, Lake Side, Zurich

http://www.eiz.uzh.ch/weiterbildung/seminare/

St. Gallen Banking Day 2018 (St.Galler Bankrechtstag 2018)

15 June 2018, SIX ConventionPoint, Zurich

https://irp.unisg.ch/de/weiterbilden/veranstaltungen/2017/bankrechtstag-2018