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FINMA Enforcement Report 2014

Reference: CapLaw-2015-32

Over the past years, enforcement has become an increasingly important means for the Swiss Financial Market Supervisory Authority FINMA to achieve its supervisory goals. In line with its stipulation to make enforcement activities more visible, FINMA, in spring 2015, for the first time published a specific report summarising its enforcement activities in 2014. In the future, FINMA intends to publish an enforcement report once a year. This article provides an overview of the enforcement report.

By Philipp Candreia

1) FINMA's Increased Focus on Enforcement

Enforcing compliance with financial market legislation is one of the three core supervisory tasks of FINMA, besides the issuance of licences and the prudential supervision of market participants.

Over the past years, FINMA has become more proactive and has strengthened its enforcement department, shifting internal resources and increasing the amount of employees in the enforcement department by approximately 50%. In autumn 2014, FINMA also adopted a new enforcement policy, setting out the key principles of its approach to sanctioning violations of supervisory law (available under <https://www.finma.ch/en/enforcement/all-about-enforcement/>). The number of FINMA initiated investigations has tripled since 2009, and in 2014, FINMA issued 115 formal enforcement decisions, more than ever before.

2) Enforcement Report 2014

On February 24, 2015, FINMA for the first time published a specific report on its enforcement activities for the past year (<https://www.finma.ch/en/~media/finma/dokumente/dokumentcenter/myfinma/3durchsetzung/enforcementbericht-2014-20150224.pdf>). The enforcement report 2014 punctuates FINMA's increased focus on enforcement and its aim to use enforcement action as a visible means to achieve its supervisory activities. In the future, FINMA intends to publish an enforcement report once a year.

The enforcement report comprises four parts. After a summary of the main focus and trends of FINMA's enforcement activities 2014, the report contains 66 anonymised summaries of individual FINMA decisions that have been concluded in 2014. This is followed by a list of decisions of the Federal Administrative Court and the Federal Supreme Court on FINMA enforcement decisions that have been appealed against. Finally, the report contains detailed statistics about FINMA's enforcement activities in 2014.

The main focus and trends, as well as the individual case reports are divided into the following six topic categories in the enforcement report, reflecting FINMA's areas of competence:

- license holders (decisions against license holders, and their key individuals that are subject to proper business conduct requirements);
- market supervisions (decisions on market abuse, not limited to license holders);
- unauthorized financial services providers;
- insolvency decisions;
- takeovers and disclosure (all decisions by FINMA in its role as appeal body against decisions of the Swiss Takeover Board or relating to shareholder disclosure requirements under the Federal Act on Stock Exchanges and Securities Trading, SESTA; and
- international cooperation (cooperation with foreign supervisory authorities).

Below, FINMA's key activity and decisions in these topic categories are summarised in further detail. While the enforcement report only comprises anonymised information, in this article, the respective parties are mentioned by name where the relevant information had been published by FINMA at the time the cases were concluded.

As a preliminary remark, with respect to measures taken by FINMA, it is important to note that in contrast to other jurisdictions, FINMA may not issue fines. The measures available to FINMA range from a reprimand (declaratory ruling) to specific orders to restore compliance with the law (including request that certain individuals resign), as well as to prohibition against individuals from practising their profession and to revocation of licences (including liquidation). FINMA may also confiscate any illegal gains or avoided losses or order publication of a final and binding ruling.

a) License Holders

With respect to license holders, FINMA concluded 128 preliminary investigations during 2014 and issued 35 rulings. The main focus was on

- ***suspected embargo violations***, in particular, the BNP Paribas (Suisse) case, where FINMA concluded that the bank persistently and seriously violated its duty to identify, limit and monitor the inherent risks and ordered a reprimand as well as specific orders to restore compliance with law, additional capital requirement and mandated an independent third party auditor. The BNP Paribas (Suisse) case relates to the US proceedings against the BNP Paribas group concerning the circumvention

of US sanctions, where the bank pleaded guilty and paid a fine of total of USD 8.97 billion to the US authorities; and

- **cross border client business**, in particular several cases against banks and individuals regarding their cross-border U.S. business strategy after 2008.

The enforcement report also shows FINMA's increased efforts against **individuals** who have seriously violated supervisory law, besides action taken against the licensed institutions. In a speech held on 30 October 2014, FINMA's director Mark Branson explained FINMA's increasing focus on individuals, referring, in particular, to (i) the fact that individuals drive misconduct, not institutions, and (ii) the fact that deterrence by sanctioning institutions did not seem to have been having the desired effect, as FINMA has seen a massive inflation in financial penalties against financial institutions around the world without, however, seeing a corresponding improvement in conduct (<https://www.finma.ch/en/~media/finma/dokumente/dokumentencenter/myfinma/finma-publikationen/referate-und-artikel/rede-bnm-20141030-e.pdf?la=en>). In the relevant cases against individuals published in the enforcement report, FINMA ordered prohibitions against individuals from practising their profession for periods between two and five years.

In a number of decisions in 2014, FINMA also confiscated illegal gains, for example in a case where it ordered a bank to disgorge the profits generated from a politically exposed person (PEP) with whom the bank maintained a business relationship that it inadequately monitored.

b) Market Supervision

In 2014, FINMA conducted 109 preliminary investigations into suspected market manipulation and concluded six respective enforcement proceedings.

The most publicly prominent case was against Coop Bank. By decision of October 29, 2014, FINMA reprimanded Coop Bank for manipulating the market price of its own bearer shares. The bank bought its own securities in order to counteract a fall in price, in particular before and during the publication of business results as well as at months and year-end. During the proceedings, the bank itself had already largely implemented wide-ranging measures that FINMA regarded as appropriate for rectifying the organisational deficiencies identified.

Besides the bank itself, FINMA issued Coop Bank's then CEO with an order prohibiting him from acting in a management capacity at any supervised institution for a period of three years. FINMA imposed a similar ban on an individual in another case involving manipulation of a bank's own securities.

In another prominent and public case, FINMA carried out a large-scale investigation into foreign exchange trading against UBS, in close cooperation with foreign authorities. FINMA imposed a number of corrective measures on UBS, including a disgorgement of profits and avoided costs (CHF 134m), measures on variable compensation, automating foreign exchange trading, separation of client and proprietary trading and a strengthening and monitoring of compliance.

c) Unauthorized Financial Services Providers

FINMA is also responsible for acting against companies or individuals engaging in regulated activities without the requisite licence. In 2014, FINMA concluded a total of 22 unauthorized activity proceedings. Almost without exception, they involved the unauthorized acceptance of deposits from the public and unauthorized issuance activity.

FINMA specifically highlights bitcoin trading that is subject to the Anti-Money Laundering Act or even the Banking Act. However, FINMA has, pursuant to the enforcement report, not yet opened any enforcement proceedings for bitcoin trading. FINMA issued a factsheet on bitcoins on 25 June 2014 (<https://www.finma.ch/en/~media/finma/dokumente/dokumentencenter/4dokumentation/faktenblaetter/faktenblatt-bitcoins.pdf?la=en>). It also issued a similar factsheet on crowdfunding (<https://prod01.finma.ch/en/~media/finma/dokumente/dokumentencenter/4dokumentation/faktenblaetter/faktenblatt-crowdfunding.pdf?la=en>).

d) Insolvencies

FINMA is competent to impose protective measures or order resolution or bankruptcy of institutions and individuals that have a licence under financial market law or operate without a requisite license. In 2014, much of FINMA's insolvency activities involved bankruptcy proceedings, with a prominent case being the opening of bankruptcy proceedings in September 2014 against Banque Privée Espírito Santo SA, the Swiss bank subsidiary of the Espirito Santo group.

e) Takeover and Shareholding Disclosure

In takeover matters, FINMA decides on appeals against rulings issued by the Swiss Takeover Board. FINMA dealt with two respective appeal proceedings in 2014.

FINMA also investigates suspected violations of shareholder disclosure obligations under the SESTA (article 20 SESTA). In this respect, a total of 102 cases were concluded in 2014, of which 56 were discontinued without further action and 46 led to criminal complaints by FINMA to the competent Federal Department of Finance that is responsible for sanctioning criminal violations of disclosure obligations. FINMA itself conducts enforcement proceedings in disclosure matters only if a violation of disclosure obligations (i) has a lasting adverse impact on market transparency, (ii) there are aggravating

circumstances (such as secret stake building), or (iii) where prudentially supervised institutions are heavily involved. In 2014, none of the preliminary investigations led to respective enforcement proceedings by FINMA.

f) International Cooperation

With respect to international cooperation among financial market supervisory authorities, FINMA in 2014 received the third-largest number of requests for international assistance of any authority worldwide, many of them relating to market supervision (insider trading, price manipulation, violation of disclosure obligations, etc.). FINMA responded to a total of 479 requests in 2014.

g) Court Decisions

FINMA rulings can be appealed before the Federal Administrative Court, whose decisions, with certain exceptions, can be further appealed to the Federal Supreme Court. The enforcement report comprises a brief description of decisions of the Federal Administrative Court and the Federal Supreme Court during 2014 which fall into FINMA's remit.

In most cases, appeals against a decision of FINMA were not successful. In general, while having full cognition, the Federal Administrative Court tends to grant FINMA significant discretion.

A particularly notable exception was a case regarding FINMA's supervisory privilege (BVGer B-5579/2013 of 14 October 2014) where the Federal Administrative Court upheld the appeal of a bank against the order of FINMA providing that the FINMA administrative proceedings against the bank may only be disclosed to third parties with the approval of FINMA. The Federal Administrative Court held that such approval requirement lacked a sufficient formal legal basis under Swiss law. The decision has been appealed by FINMA. If the decision of the Federal Administrative Court is upheld by the Federal Supreme Court, this case has potential broad ranging implications for banks who may, for example, no longer reject disclosure of FINMA proceedings to foreign authorities on the basis of the argument that a disclosure would breach FINMA's supervisory privilege and be illegal under Swiss law, as FINMA prohibited the bank from disclosure without FINMA's consent.

h) Statistics

The enforcement report concludes with statistical information on FINMA's enforcement activity in 2014.

3) Conclusion and Outlook

The enforcement report 2014 reflects FINMA's aim to use enforcement action as a visible means to promote compliance with regulatory requirements. As FINMA believes deterrence by sanctioning institutions has not had the desired effect in the past, it has in particular stepped up its efforts against individuals and it will continue to do so. FINMA may in the future also be further enforcement tools with the enactment of a new Federal Financial Institutions Act (FINIG) (currently planned for 2017 at the earliest). Pursuant to the current draft bill, FINMA will, among other instruments, be granted the right to issue measures also against certain **lower** level employees, such as securities dealers and client advisors, in addition to measures against high level individuals currently subject to proper business conduct requirements. However, it is also for the future **not** foreseen that FINMA may issue fines against institutions or individuals.

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Revisions to the Draft Financial Services Act and Draft Financial Institutions Act by the Swiss Federal Council

Reference: CapLaw-2015-33

Following a review of the consultation results on the draft Financial Services Act (FinSA) and the draft Financial Institutions Act (FinIA), the Swiss Federal Council decided that certain elements needed to be revised and the dispatch for submission to the Swiss Parliament be postponed until the end of 2015.

By René Bösch/Benjamin Leisinger

On 25 June 2014, the Swiss Federal Council launched the consultation on the FinSA and the FinIA.

- The FinSA shall introduce for the first time a comprehensive framework for the issuance and sale of securities. The draft FinSA (see CapLaw-2014-5 for an overview) provides for a prospectus requirement for all securities (see CapLaw-2015-3 describing the prospectus regime originally proposed), the need for a Key Investor Information Document (KIID) for all complex financial products, stricter duties at the point of sale, client segmentation, licensing requirements for individual client advisors and the regulation of cross-border activities into Switzerland. Moreover, the draft FinSA includes provisions aimed at facilitating the enforcement of customers' claims against financial service providers (namely, group settlement proceedings and representative action).