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Evaluation of the Financial Market Infrastructure Act – FinMIA review

FDF report

Executive summary

The Financial Market Infrastructure Act (FinMIA) was introduced largely in response to the 2008 financial crisis. The Act governs the organisation and operation of financial market infrastructures (FMIs) and the conduct of financial market participants in securities and derivatives trading. The FinMIA, which entered into force in 2016, aims to ensure the proper functioning and transparency of securities and derivatives markets, the stability of the financial system, the protection of financial market participants and the equal treatment of investors.

This report fulfils a mandate of the Federal Council. When adopting the dispatch on the FinMIA, the Federal Council instructed the Federal Department of Finance (FDF) to report on the impact of the new financial market regulatory architecture (including the Financial Services Act [FinSA] and the Financial Institutions Act [FinIA]) five years after its entry into force. This report is a first step in completing this mandate.

The report takes into account the experience acquired since the Act entered into force, as well as external developments. Since the FinMIA entered into force, important developments have taken place at both national and international level. Of particular relevance for the provisions examined in this review are the advent of blockchain technology, the further development of international standards and important developments in the EU. Practical experience since the FinMIA entered into force also plays a key role for this report and for identifying areas for action.

This review shows that, overall, the FinMIA has proved itself well overall, but that individual adjustments are required. In fact, there are areas in all three sections of the FinMIA where action is needed. The focus is on simplification, extension, consolidation and, for the sections taken over from the Stock Exchange Act, modernisation.

As regards the financial market infrastructure, there is a particular need to:

- strengthen the stability of these infrastructures by introducing new specific requirements, e.g. gone-concern capital requirements and a "light" preventive resolution plan;
- introduce relevant simplifications aimed at reducing costs, e.g. a simplification of the recognition requirement for foreign trading venues;
- increase legal certainty, e.g. as regards the definition of organised trading facilities and a threshold for the authorisation of payment systems;
- further strengthen the good international reputation of Swiss regulations, e.g. for Swiss FMIs that are systemically important abroad or the active monitoring of multilateral efforts with regard to stablecoins.

In the area of derivatives trading, the following goals are being pursued:

- increasing the benefits of the reporting duty for derivatives transactions, with a view to improving market transparency, in particular by harmonising the reporting standard and taking account of international developments;
- regulatory simplifications for small non-financial counterparties, in particular by exempting them from the duty to report derivatives transactions;
- giving greater consideration to developments in Europe, in order to harmonise the regulations on compliance with the requirements of a foreign jurisdiction.

In the areas of disclosure law, takeover law and market abuse provisions, the aim is to:

- simplify disclosure law, in order to reduce costs;
- harmonise and expand the issuer obligations that are important for market integrity (ad hoc publicity, publication of management transactions and the keeping of insider lists), and transfer them into federal law in order to better prevent market abuse and strengthen the financial centre;
- modernise the trading supervision and reporting system, in order to better identify market abuse and strengthen the financial centre, in particular through the consolidation of existing offices into a central supervisory and reporting office.

Implementation of these recommendations requires a bill to be drafted to amend the FinMIA. Based on this report, the FDF will submit its conclusions and recommendations to the Federal Council.

Contents

1. Background

1.1. Context

The Financial Market Infrastructure Act (FinMIA, SR *958*), the Financial Market Infrastructure Ordinance (FinMIO, SR *958.11*) and the FINMA Financial Market Infrastructure Ordinance (FinMIO-FINMA, SR *958.111*) entered into force on 1 January 2016. The FinMIA governs the authorisation and duties of financial market infrastructures (FMIs), including supervision and oversight and the conduct of financial market participants in securities and derivatives trading. It aims to ensure the proper functioning and transparency of securities and derivatives markets, the stability of the financial system, the protection of financial market participants and the equal treatment of investors.

When adopting the dispatch on the FinMIA on 3 September 2014, the Federal Council instructed the Federal Department of Finance (FDF) to report on the impact of the new financial market legislation – comprising the FinMIA, the Financial Services Act (FinSA, SR *950.1*) and the Financial Institutions Act (FinIA, SR *954.1*) – five years after its entry into force.

The FinMIA review was performed by the State Secretariat for International Finance (SIF) in collaboration with the other authorities concerned (FINMA, the Swiss National Bank, the Swiss Takeover Board and the prosecution authorities). Private sector representatives were also involved in preparing the report, and an external study was commissioned for derivatives trading. This report reflects the views of the FDF. The bill on implementing the recommendations will be the subject of a public consultation, during which the interested parties will be able to comment.

This FDF report presents the review's findings and makes a series of recommendations based thereon. It identifies the main areas for action with regard to FMIs (section 2), the rules of conduct for derivatives trading (section 3), other areas of market conduct (section 4) and more generally (section 5). The report closes with a conclusion and describes the next steps (section 6). The appendix contains an overview table of the identified areas for action.

1.2. Key developments

Since the dispatch on the FinMIA was adopted in 2014 and the FinMIA entered into force on 1 January 2016, there have been some developments of relevance. In addition to technological developments (e.g. blockchain) and the digitalisation of business models (e.g. cloud, API and outsourcing), these include political (e.g. Brexit) and regulatory developments (especially in European legislation and international standards).

1.2.1. National developments

Digitalisation has advanced rapidly since the introduction of the FinMIA, with the advent of blockchain and its use on financial markets, for example. At national level, the Federal Act on the Adaptation of Federal Law to Developments in Distributed Ledger Technology (DLT), which was passed by Parliament on 25 September 2020 and entered into force in a two-phase process completed on 1 August 2021, amended a number of federal laws to enable Switzerland to develop further as an internationally recognised, innovative and responsible location for blockchain and DLT. Thus, the FinMIA introduced the concept of DLT securities and a new licence category for DLT trading facilities. Since then, the provisions on insider information and on price and market manipulation have also applied to securities (incl. DLT securities) admitted trading on a DLT trading facility.

Another important development is the advent of stablecoins and the associated questions this raises at FINMA. In 2019, for instance, one provider announced the launch of a global stablecoin from Switzerland. In 2021, the licence application to FINMA was suspended after the project was redefined. This project showed that the Swiss regulatory framework is also suitable for complex international infrastructures or payment systems, but could be refined to deal with the opportunities and risks of such projects.

A further technological development of relevance concerns consumers' use of payment methods. In autumn 2020, the Swiss National Bank (SNB) conducted its second survey on payment methods, the first having taken place in 2017. It revealed clear differences compared to 2017, with a shift from cash to cashless payment methods.

In the political arena, there is the measure to protect the Swiss stock exchange infrastructure, which the Federal Council put into force in November 2018 after the European Commission failed to extend Switzerland's stock market equivalence. In June 2022, the Federal Council adopted the dispatch on incorporating the measure into ordinary law (into the FinMIA).

In addition, on 14 September 2018, the Federal Council extended the transitional period for the reporting of derivatives transactions by small non-financial counterparties until 1 January 2024. This decision was motivated by a desire to wait until this review was available, as it might result in a revision of the FinMIA. The reporting obligation for small non-financial counterparties was postponed until after the review was complete, in order to reduce the administrative effort involved.

Finally, in December 2021, Parliament adopted a partial revision of the Banking Act (BankA, SR *952.0*), which included changes to banking insolvency law in particular. Most of the new provisions (especially on the resolution plan, approval thereof and capital measures) were already in FINMA's banking insolvency ordinance, but should be anchored in law for reasons of legal certainty. In 2019, provisions for a new licence category (person under Art. 1*b*) were introduced into the BankA to promote innovation. This new category has proved useful for numerous entities involved in payment transactions.

1.2.2. Development of international standards

At international level, the recommendations and regulations issued by international bodies have been refined since 2014, in particular the international standards on the harmonisation of reporting to trade repositories (TRs). In September 2014, the Financial Stability Board (FSB) recommended the introduction of a global Legal Entity Identifier (LEI), a Unique Transaction Identifier (UTI) and a Unique Product Identifier (UPI). Since then, technical standards on the definition, format and use of the main OTC derivatives transaction data to be reported to the TRs have been issued by the Committee on Payments and Market Infrastructures (CPMI) and the International Organization of Securities Commissions (IOSCO). This data encompasses UTIs, UPIs and around 100 critical data elements (CDEs) and has been included in the international ISO standard 20022. The Regulatory Oversight Committee (ROC)[1] has acted as the international governance body for LEIs, UTIs, UPIs and CDEs since October 2020.

Progress has also been achieved as regards the resilience and solvency of FMIs. Based on the Principles for Financial Market Infrastructures (PFMI), the most comprehensive international standard regulating FMIs, the CPMI and IOSCO drew up a specific standard, Recovery of Financial Market Infrastructures, which was first published in 2014 and revised in 2017. It has a particular focus on restructuring aspects. The FSB's Key Attributes of Effective Resolution Regimes for Financial Institutions describe 12 attributes that are essential for the

[1] The Regulatory Oversight Committee – ROC (leiroc.org)

successful resolution of financial institutions. A number of appendices were added in October 2014. The FSB has also issued guidance on the Key Attributes, aimed at simplifying application for central counterparties.

Also worthy of note is the work by the FSB on the regulation, supervision and oversight of global stablecoins (GSCs), an area in which Switzerland has been actively involved since its inception. This work is still ongoing. In 2020, it resulted in the FSB issuing 10 recommendations.

1.2.3. Regulatory developments in the European Union

Among the most important developments at European Union (EU) level are the Markets in Financial Instruments Regulation (MiFIR) and the Markets in Financial Instruments Directive (MiFID II[2]). EU member states were required to implement MiFID II by 3 January 2018. MiFID II and MiFIR were supplemented with the Investment Firm Review. During the COVID-19 pandemic, a packet of measures was implemented to deal with the crisis and help economic recovery. Moreover, in November 2021, the European Commission approved an amendment proposal as part of the MiFID II/MiFIR review. The EU is expected to take the final decision in 2022.

In February 2021, the Regulation on a framework for the recovery and resolution of central counterparties entered into force. Building on the existing recovery and resolution regime for banks, the regulation lays down rules and procedures relating to the recovery and resolution of central counterparties (CCPs) in accordance with the European Market Infrastructure Regulation (EMIR[3]). It also contains special provisions on relations with third countries.

With regard to derivatives transactions, the amendments to EMIR (EMIR Refit) that entered into force in June 2019 should also be mentioned. They refer to the definition of financial counterparties, the sphere of application and the calculation method for the clearing obligation, as well as to the fact that intragroup transactions no longer need to be reported to TRs.

Finally, the EU's Market Abuse Regulation (MAR) and Market Abuse Directive (MAD) entered into force in 2014. In the meantime, efforts are once again under way in the EU to review the MAR.

2. Financial market infrastructures

With the introduction of the FinMIA, stock exchange regulation was transposed out of the Federal Act on Stock Exchanges and Securities Trading (SESTA) and the very vague term "institution which is similar to a stock exchange", which is outdated by international standards, was replaced by the more precisely defined and more easily distinguishable terms of "multilateral trading facility" (MTF) and "organised trading facility" (OTF). Transparency requirements for multilateral and organised trading facilities also addressed the problem of dark pools, and the foundation was laid for regulating high-frequency trading and limiting it where necessary. In addition, in the area of post-trade infrastructures, a new licence requirement was introduced for central counterparties, central securities depositories, trade repositories and payment systems.

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[2] Directive 2014/65/EU of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EC

[3] Regulation (EU) No. 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories

The FinMIA review revealed that the provisions on FMIs have generally stood the test of time. However, a number of adjustments to and clarifications of the provisions would seem to be advisable. These duties are examined in greater detail below.

2.1. Systemic importance

2.1.1. Greater precision regarding systemic importance

Systemically important FMIs must meet special requirements (Art. 23 para. 1 of the FinMIA). The criteria for qualifying as a systemically important FMI are set out in Article 22 of the FinMIA. The main criteria concern the expected impact of the FMI's non-availability on financial markets and participants, or in the event of payment or delivery problems on the part of individual participants. The SNB designates FMIs as systemically important after consultation with FINMA (Art. 25 para. 2 of the FinMIA).

Various developments that have occurred since the FinMIA entered into force would justify a modification of the criteria for qualification as a systemically important FMI. For example, risks that have been created or exacerbated by digitalisation (e.g. cyberattacks or a loss of trust among market participants) could impair the functioning of an FMI to such an extent that this results in serious disruption on the financial markets. More consideration should be given to this aspect. Likewise, the increasing significance of the retail payment infrastructure for the real economy should be better taken into account.

Need for action: The criteria for qualification as a systemically important FMI should be revised to take account of the risks created or exacerbated by digitalisation (e.g. cyberattacks or a loss of trust among market participants) and the associated impact on the financial markets and real economy.

2.1.2. Swiss financial market infrastructures with systemic importance abroad

Swiss FMIs that are systemically important only in Switzerland can be designated as systemically important by the SNB. However, Swiss FMIs that are systemically important only abroad cannot be designated as systemically important by the SNB, meaning that they are not subject to the special requirements of Article 23 paragraph 1 of the FinMIA.

To date, no Swiss FMI has had systemic importance solely abroad. Yet technological developments could favour the creation of new FMIs, especially in the area of payment transactions. Nonetheless, it may be useful to also make these cases subject to the requirements for systemically important FMIs, in order to further reinforce the good reputation enjoyed by Swiss regulation internationally. This could be relevant for a Swiss FMI that issues global stablecoins, for example.

Need for action: Where appropriate, FINMA should be able to apply the special requirements for systemically important FMIs in Switzerland to Swiss FMIs that have been designated as systemically important by a foreign authority but are not designated as such in Switzerland. FINMA should be given the discretion to contact partner authorities in order to clarify systemic importance when dealing with licence applications.

2.1.3. Capital including loss-absorbing gone-concern capital for systemically important financial market infrastructures

Under existing legislation, systemically important FMIs must, among other things, hold capital to cover the costs of a voluntary cessation of business or restructuring ("orderly wind-down"); such capital must be sufficient to implement the resolution plan, but should in any case cover ongoing operating expenditure for six months (Art. 48 para. 3, Art. 56 para. 2 and Art. 69 of the FinMIO, and Art. 31 para. 2 of the National Bank Ordinance [NBO, SR *951.131*]). They must also have a plan showing how additional capital can be obtained if their existing capital no longer meets the requirements (Art. 48 para. 5 and Art. 56 para. 2 of the FinMIO, and Art. 31 para. 4 of the NBO). However, unlike in banking legislation, they do not have to hold gone-concern capital, i.e. where it can be assumed that the entity cannot continue to operate.

It would seem advisable to add two precisions to the existing regulations:

- The obtention of additional capital should be included as part of the stabilisation plan, so that this plan can be presented and checked in a standardised manner; incidentally, this corresponds to current regulatory best practice.
- The capital for a voluntary cessation of business should also take account of processes other than the systemically important business processes, where it is not possible for them to be hived off or wound down beforehand. This ensures that the capital requirements for the other processes do not impinge on the orderly wind-down of the systemically important business processes.

Moreover, in order to enable the orderly wind-down of systemically important FMIs, it would seem advisable to introduce pre-financed loss-absorbing capital for resolution ("gone-concern capital"), similar to that in banking legislation. Part of the regulatory authorities' work on the resolution strategy for existing systemically important FMIs is still ongoing[4]. Likewise, at international level, a technical working group is currently working on standards relating to resolution instruments for CCPs, including the associated capital requirements for CCPs[5]. The capital requirements will therefore need to be drawn up as part of the legislative process, with due regard for proportionality; here, both the different risks posed by systemically important FMI categories (CCP, central securities depository [CSD], payment system) and the individual risk situation of a given FMI (e.g. whether a CCP performs derivatives clearing) will need to be appropriately taken into account.

Need for action: Alongside minor precisions, existing rules should be amended to introduce loss-absorbing gone-concern capital for systemically important FMIs. The concrete design should take the principle of proportionality into account, including the specific risk posed by the relevant FMI.

2.2. Trading venues and organised trading facilities

2.2.1. Recognition of foreign trading venues

Under Article 41 of the FinMIA, trading venues domiciled abroad must obtain recognition from FINMA before they can grant access to their facilities for Swiss participants supervised by

[4] The current state of progress can be consulted here: https://finma.ch/en/enforcement/recovery-and-resolution/resolution-report/archive/resolution-report-2021/

[5] A first set of the working group's findings were published in March 2022: https://www.fsb.org/wp-content/uploads/P090322.pdf

FINMA. In particular, this provision is intended to ensure that Swiss financial institutions do not participate in a trading venue that is not subject to appropriate regulation and supervision (Art. 41 para. 2 lit. a of the FinMIA). It is also aimed at ensuring that the foreign supervisory authorities inform FINMA if they detect irregularities at Swiss participants, and provide FINMA with administrative assistance (Art. 41 para. 2 lit. b of the FinMIA).

Experience shows that the benefits of this duty to obtain recognition are limited in practice. Moreover, administrative assistance in IOSCO member jurisdictions is guaranteed under IOSCO's Multilateral Memorandum of Understanding (MMoU).

Need for action: The duty to obtain recognition should be simplified in order to reduce the associated costs, while still retaining the benefits to the extent possible. Concretely, the criteria for regulation and supervision in the relevant jurisdiction to be recognised as appropriate should be reduced. It might also make sense, from the perspective of reducing costs for all participants, for recognition to be revoked automatically in certain cases (e.g. when the trading venue no longer has any Swiss participants).

2.2.2. Organised trading facilities (OTFs)

2.2.2.1 Questions on the definition of OTFs

Organised trading facilities (Arts. 42–47 of the FinMIA) comprise trading facilities that do not qualify as stock exchanges or multilateral trading facilities. OTFs are subject to specific obligations; these relate primarily to the protection of investors.

Experience shows that the criteria for financial market participants to qualify as an OTF are not always clear, especially as regards trading facilities for contracts for difference (CFDs) and the foreign exchange (forex) market.

Need for action: In order to increase legal certainty, the qualification criteria for OTFs in the FinMIO should be clarified, in particular with respect to CFDs and forex trading venues.

2.2.2.2 List of OTFs

Since there is no separate authorisation requirement for organised trading facilities (see above), no list of OTFs has been drawn up to date. This leads to a lack of transparency in the market, for example as a result of a lack of information on operators and their area of activity.

Need for action: To strengthen transparency, FINMA should keep a list of organised trading facilities, but without a separate authorisation requirement being imposed, as hitherto.

2.2.3. Dark trading

Trading venues must publish the bid and offer prices for shares and other securities in real time, as well as the sizes of the trading positions at these prices (Art. 29 of the FinMIA). This provision should increase pre-trade transparency. The Federal Council has provided for exemptions from the duty of transparency (Art. 27 para. 4 of the FinMIO based on Art. 29 para. 3 lit. b of the FinMIA). Trading based on these exemptions is known colloquially as "dark trading".

To maintain healthy price formation in the future, it must first be ensured that the volume of dark trading in Switzerland remains within reasonable limits compared to the total trading volume in the context of exemptions from the pre-trade transparency requirement. Second, appropriate framework conditions are needed in Switzerland to limit the migration of dark trading from Switzerland to dark trading venues abroad. The UK's regulatory framework for dark trading appears to be particularly dynamic, especially post-Brexit. In the EU, unlike Switzerland, exchange-traded funds (ETFs) and exchange-traded products (ETPs) are subject to transparency requirements.

Need for action: As regards dark trading, there is currently no fundamental need for the regulatory framework to be adjusted. However, international developments – above all in the UK and EU – will have to be monitored. In this international context, the transparency requirement for ETFs and ETPs will need to be analysed in greater detail.

2.2.4. Definition of central securities depositories and custodians

Under Article 61 of the FinMIA, a central securities depository is the operator of a central custodian (an entity for the central custody of securities and other financial instruments based on uniform rules and procedures) or a securities settlement system (an entity for the clearing and settlement of transactions in securities and other financial instruments based on uniform rules and procedures). As a rule, both functions are linked and can be performed by the same central securities depository. Central securities depositories play an important role, given that investors now rarely hold their securities themselves.

Practical experience shows that it is sometimes difficult to differentiate between a central securities depository and a custodian within the meaning of the Intermediated Securities Act (FISA, SR *957.7*). Custodians, which can include banks and securities firms, maintain securities accounts in the name of persons of groups of persons (Art. 4 paras. 1 and 2 of the FISA), while taking account of the FinMIA's protection objectives. In particular, custodians whose failure or non-availability could threaten the stability of the financial system should remain under SNB oversight.

Need for action: The regulatory framework should be modified to clarify the situations in which a custodian in accordance with the FISA requires authorisation as a central securities depository in accordance with the FinMIA. In particular, cases in which the custodian performs clearing and settlement services for a trading venue or a DLT trading facility should be checked.

2.3. Payment transactions and payment systems

2.3.1. Thresholds for payment systems

A payment system requires authorisation from FINMA only if this is necessary for the proper functioning of the financial market or the protection of financial participants (Art. 4 para. 2 of the FinMIA) and if the payment system is not operated by a bank (Art. 4 para. 2 of the FinMIA), or operated by the SNB or on its behalf (Art. 4 para. 3 of the FinMIA). The last stipulation applies to the SIX Interbank Clearing (SIC) payment system. Thus, at present, no payment system has an authorisation in accordance with the FinMIA.

The provisions on payment systems were drawn up in the context of SIC and bank-operated payment systems. Digitalisation has meant that other players are increasingly entering the market. This raises the question of the point at which authorisation becomes necessary, especially since the FinMIA does not specify a quantitative threshold. In addition, there is a degree of legal uncertainty regarding the application of the FinMIA's general requirements (Arts. 4–21 of the FinMIA) to payment systems that do not require authorisation.

> ***Need for action:*** A quantitative threshold for the authorisation of payment systems should be introduced; below this threshold, payment systems would not be subject to the FinMIA. The threshold value should be set such that the corresponding protection objectives of the FinMIA can be ensured (see Art. 4 of the FinMIA).

2.3.2. Obligations of payment systems at legislative level

Payment systems subject to authorisation must comply with FINMA's general requirements for all FMIs (Arts. 4–21 of the FinMIA), as well as the special requirements for payment systems subject to authorisation (Art. 81 et seq. of the FinMIA, as set out in detail in Arts. 66–70 of the FinMIO). In addition, systemically important payment systems must meet special requirements (Art. 23 et seq. of the FinMIA).

Unlike the special requirements for other FMIs, the special requirements for payment systems are predominantly regulated at ordinance level. Moreover, banks that operate a payment system and authorised payment systems are not on an equivalent footing, as the banks are not subject to the requirements for payment systems. Finally, it would be advisable to introduce requirements for payment systems with respect to participant access, exclusion and default. At present, these apply only to systemically important payment systems and on the basis of Articles 24 and 24*a* of the NBO.

> ***Need for action:*** The question of which provisions should be dealt with at law or ordinance level should be examined. In addition, banks that operate a payment system should have to comply with the applicable requirements for payment systems without also being required to have separate authorisation as a payment system. Finally, requirements for payment systems with respect to participant access, exclusion and default should be incorporated into the FinMIA.

2.3.3. Stablecoins

Stablecoins are cryptocurrencies which aim to retain a stable value (e.g. through underlying assets such as fiat currencies or commodities). Unlike cryptocurrencies such as bitcoin, stablecoins are supposed to offer value added in payment transactions because it is assumed that their volatility is limited relative to the reference asset. In this area of regulation, Switzerland is seen as a trailblazer, in particular as a result of the guidelines issued by FINMA in September 2019[6].

At international level, a number of multilateral organisations such as the FSB are working on regulations for stablecoins. However, their work is still ongoing. It would therefore be premature to infer the potential repercussions for the regulatory framework in Switzerland.

> ***Need for action:*** As regards stablecoins, there is currently no need for the regulatory framework to be adjusted. Nonetheless, developments at multilateral level and in the relevant jurisdictions should be closely monitored and used as the basis for assessing any need for adjustments.

[6] See: https://www.finma.ch/en/news/2019/09/20190911-mm-stable-coins/

2.4. Preventive liquidation plan

The FinMIA requires that any FMI wishing to return its authorisation must present a liquidation plan to FINMA (Art. 86 para. 1 of the FinMIA). Systemically important FMIs must do so preventively, i.e. even if they do not intend to go into liquidation, they must draw up a plan showing how the systemically important business processes are to be wound down in the event of a voluntary cessation of business ("orderly wind-down plan"). This is currently provided for at ordinance level but not at legislative level (see Art. 72 of the FinMIO). The systemically important FMI must also back this plan with capital (see section 2.1.3). In addition, non-systemically important CCPs and CSDs must hold capital against a voluntary cessation of business, but do not need to have a specific plan (Art. 48 para. 3 and Art. 56 para. 2 of the FinMIO). The same applies for certain DLT trading facilities (Art. 58*j* para. 1 of the FinMIO).

As the preventive liquidation plan for systemically important FMIs is very important, regulation at legislative level is advisable for reasons of legal certainty and level-appropriateness. This could also clarify certain aspects, especially the question of whether FINMA authorisation in consultation with the SNB and regular (e.g. annual) updates are envisaged.

In order for non-systemically important CCPs, CSDs and certain DLT trading facilities to be able to determine the required capital for a voluntary cessation of business in the first place, they too already need to have a (de facto) rough plan, i.e. a "light" liquidation plan. For reasons of legal certainty, this existing requirement should be explicitly anchored in law. Since payment systems perform a similar key role in the financial system, it would also appear advisable to likewise require payment systems to have such a "light" liquidation plan, including corresponding capital against a voluntary cessation of business. For reasons of proportionality, this is appropriate only for payment systems that are subject to authorisation (see section 2.3.1 and Art. 4 para. 2 of the FinMIA).

Need for action: To increase legal certainty, the preventive liquidation plan must be anchored in law and the requirements must be made more precise. Likewise, a "light" liquidation plan for CCPs, CSDs and certain DLT trading facilities should also be anchored in law in the sense of a general concept. This requirement should also be extended to cover payment systems that are subject to authorisation.

2.5. Crises: recovery and resolution

Recovery refers to preventive stabilisation and resolution planning (see section 2.5.1), while resolution refers to restructuring and wind-down in accordance with the applicable insolvency legislation (see section 2.5.2).

2.5.1. Recovery and resolution planning

Systemically important financial market infrastructures must draw up a recovery plan that sets out the measures they will use to ensure their stability on a sustainable basis in the event of a crisis and be able to maintain their systemically important business processes (Art. 24 para. 1 of the FinMIA). FINMA draws up a resolution plan that describes how the restructuring or wind-down of a systemically important financial market infrastructure that it has ordered can be carried out (Art. 24 para. 2 of the FinMIA).

The recovery and resolution planning mechanisms envisaged in the FinMIA have largely stood the test of time. However, minor adjustments are needed, in order to increase legal certainty and take account of developments in international standards.

At present, Article 23 paragraph 2 of the FinMIA envisages that recognised international standards are explicitly taken into account only with regard to the special requirements. In regulatory practice, however, international standards are of key importance for the entire recovery and resolution planning process. This should therefore be explicitly anchored in law. Likewise, Article 24 paragraph 1 of the FinMIA should stipulate more precisely that recovery planning refers to business operations and *in particular* systemically importance business processes. This will better reflect current regulatory practice, in which the entire FMI generally needs to be restructured but any non-systemically important business processes can be offloaded. Finally, Article 21 of the FinMIO has proved to be of no significance in practice, and could be dispensed with in its current form.

To increase legal certainty, principles should be drawn up regarding the structure and minimum content of recovery planning. The FinMIO would probably be a suitable and level-appropriate instrument in this respect. As set out in the international standards, an explicit legal framework for regular (e.g. annual) tests or simulations of recovery planning should be created. Finally, FINMA, after consulting the SNB, should be able to order the implementation of the recovery plan if the criteria for measures under Article 25 of the BankA are met or if this is necessary for reasons of financial stability. In exceptional circumstances, FINMA, after consulting the SNB, should be able to prohibit the implementation of part or all of the recovery plan, where such implementation might pose a significant threat to financial stability. This constitutes a relatively minor additional intervention option for the regulator, but it makes a significant contribution to strengthening financial stability.

Need for action: The recovery and resolution planning mechanisms envisaged in the FinMIA have largely stood the test of time. However, minor adjustments concerning, in particular, requirements, tests and implementation would be appropriate, in order to increase legal certainty and financial stability and to take account of developments in international standards.

2.5.2. Insolvency law provisions

The FinMIA does not provide its own insolvency law provisions; instead, it refers to the corresponding provisions of the BankA. It also contains a few special provisions which form a lex specialis supplement to the general provisions of banking law (Art. 88 et seq. of the FinMIA).

Since the FinMIA entered into force, the international standards on insolvency law have been considerably expanded, especially as regards the resolution of CCPs, for which specific resolution instruments have been developed. Owing to its blanket reference to the BankA, the FinMIA does not currently contain such specific instruments. In order to allow the resolution authorities to respond in a targeted way, it would appear advisable to introduce specific instruments for FMIs, in addition to the instruments provided for in banking law. In particular, resolution cash calls to CCP participants and instruments aimed at restoring a more balanced clearing book for CCPs, namely the termination of contracts against cash settlement ("tear-up") and forced allocation of positions, could be introduced.

To allow other instruments, such as variation margin gains haircutting at a CCP, to be applied in a meaningful way, a departure from the creditor hierarchy envisaged in the revised BankA for the reduction of claims is necessary (see Art. 30*b* para. 7 of the revised BankA). It would also seem appropriate in principle to give priority to initial margin when reducing FMIs' claims. The creditor hierarchy as set out in the revised BankA should thus be made more precise for FMIs and, in particular, CCPs.

In this connection, the regulatory content in Article 92 of the FinMIA should be transferred to the Banking Act (e.g. as para. 6 of Art. 30*a* of the BankA) and made more detailed. This could also allow FINMA to take financial stability into account when delaying the liquidation of a bank's contracts.

Need for action: In line with the significant enhancements to international standards on insolvency law, FMI-specific resolution instruments, especially resolution cash calls and tear-ups for CCPs, should be anchored in Swiss law. Moreover, the creditor hierarchy for FMIs should be modified in places, to ensure that the entire set of resolution instruments can be used appropriately.

2.6. Further action needed

- **Outsourcing and supervisory instruments**: In order to enable an FMI's outsourced services to be subject to supervision by FINMA and oversight by the SNB, provisions similar to those in Article 47 of the IOA and Article 23^{bis} of the BankA should be included in financial market infrastructure law (duty to provide information, duty to report, auditing).
- **More precise definition of terms**: It should be examined whether the terms "changes of material significance" (Art. 7 para. 2 of the FinMIA) and "essential services" (Art. 11 para. 1 of the FinMIA) should be fleshed out with examples in order to increase legal certainty. Any precisions should take FINMA's existing practice into account.
- **Ancillary services**: In order for FMIs to perform certain ancillary services (Art. 10 of the FinMIA) that are similar to those performed by banks, the different regulatory treatment of banks and FMIs (esp. Art. 21 of the FinMIA) should be eliminated where it is not justified.
- **References to the Capital Adequacy Ordinance (CAO, SR *952.03*)**: Articles 29 and 127 of the FinMIO refer to the CAO. These references no longer appear relevant and could be removed. It could also be examined whether to add a reference to the International Monetary Fund to these articles.
- **Bankruptcy**: To increase legal certainty, some provisions on bankruptcy should be clarified, especially the relationship between Article 89 paragraph 2 of the FinMIA and Article 20 of the FISA.
- **Fair and open access to FMIs**: Article 18 of the FinMIA requires FMIs to grant fair and open access to their services. However, recent developments in Switzerland and abroad show that certain services offered by third parties, especially telecommunication services, could potentially jeopardise fair and open access to FMIs. The need for additional regulation in this area should be constantly monitored.
- **Algorithmic trading and high-frequency trading**: The terms "algorithmic trading" and "high-frequency trading" should be defined in the FinMIA or FinMIO, in order to increase legal certainty to the extent possible. In addition, the rules on the labelling obligation should be clarified in order to improve traceability by participants (obligation to label algorithms uniquely and permanently). As things currently stand, it would seem advisable to use the EU regulations as a basis.

3. Derivatives trading and position limits for commodity derivatives

In line with international requirements, the FinMIA imposes four key obligations on derivatives trading: settlement via a central counterparty, reporting to a TR, risk mitigation, and trading via a trading venue or other trading facility. Since the bulk of Swiss derivatives trading is cross-border and mainly with the EU, the derivatives trading obligations in the FinMIA are based on the rules applicable in the EU (EMIR).

In general, the provisions on derivatives trading have stood the test of time. The benefits of the reporting duty for derivatives transactions should be increased. Other minor adjustments would also appear appropriate, as described in more detail below.

3.1. Improvements regarding the reporting duty for derivatives transactions

3.1.1. Duty to report to a trade repository

The aim of the duty to report derivatives transactions to a TR, i.e. improving the transparency of the derivatives market, has yet to be satisfactorily achieved. This is largely due to insufficient data quality stemming from the lack of harmonisation regarding the data to be reported, but also to the fragmentation of the data reported to TRs authorised or recognised by FINMA and other TRs. As a result, there has been little systematic monitoring of the risks inherent in the derivatives transactions of Swiss counterparties on the basis of data reported to TRs. Yet the reporting duty creates substantial administrative costs for the reporting counterparties.

Despite the disproportionately high costs given the unsatisfactory use, a reporting duty and transparency on the derivatives market would still appear to be advisable, and are in line both with best practice in other financial centres and with international standards. Therefore, it does not appear appropriate to abolish the reporting duty. However, measures should be taken to ensure more targeted use of the collected data. This could also improve the use of the collected data for market oversight (esp. macroprudential) and in turn improve transparency in the derivatives market.

Need for action: The benefits of the duty to report derivatives transactions to TRs should be increased by improving: a) the quality of reports; and b) domestic and foreign authorities' reciprocal access to the collected data.

3.1.2. Harmonisation of reporting standards

Unlike in other jurisdictions (such as the EU or UK), the duty to report derivatives transactions under the FinMIA is unilateral, i.e. only one of the counterparties has to report the trade. A bilateral duty to report is more expensive, but has the advantage of allowing the correctness of the reporting fields to be verified. This is not possible with a unilateral reporting duty.

Despite being regulated in the FinMIO (Annex 2), reports differ depending on the reporting counterparty and the TR. This is mainly due to the different application of the reporting standard when completing important fields such as the identifiers of the involved parties (esp. non-reporting counterparties), product details and information on the underlying assets. This lack of harmonisation makes it more difficult for the competent authorities to aggregate and evaluate the data.

By making the existing reporting fields more precise, aggregation and evaluation could be automated without changing the number of fields, and the benefits of the reporting duty for the supervisory authorities could be significantly increased. For instance, the mandatory reporting of the LEI of a non-reporting counterparty (fields 2, 8 and 46 of Annex 2 to the FinMIO) would allow the parties involved in the transaction to be clearly identified and derivatives positions to be clearly allocated.

Since the FinMIA entered into force, technical standards on the definition, format and use of the main OTC derivatives data to be reported to the TRs have been issued by the CPMI and IOSCO. These standards cover UTIs, UPIs and around 100 critical data elements (CDEs), and have been incorporated into the international ISO standard 20022. Thus, the data to be reported to the TRs could be aligned with the existing technical standards drawn up at international level. The EU and USA have already adjusted their standards accordingly.

Despite some similarities, there are crucial differences between the reporting duties under the FinMIA and those under EMIR. For market participants that have to report their transactions in accordance with EMIR, full alignment of Swiss reporting standards with the European ones would therefore be advantageous. Over the long term, such an alignment and the associated consistency with EMIR would also bring an improvement in data quality. This fundamental adjustment would, however, involve considerable costs for the financial market participants, the TRs and the supervisory authorities. Overall, such an adjustment would appear disproportionate for the authorities and the Swiss financial centre.

Need for action: In order to improve report quality without causing disproportionate administrative costs for those involved, the report contents should be better aligned with international technical standards such as those on LEIs, UTIs, UPIs and other CDEs.

3.1.3. Access to trade repositories

Another aspect which could increase the usefulness of the collected data is domestic authorities' access to foreign TRs and vice versa. The requirements for access by foreign authorities to Swiss TRs are currently very high and narrowly defined (Art. 78 para. 2 of the FinMIA), which makes access practically impossible. The reason for the reservation in Article 78 paragraph 2 letter b of the FinMIA was that access to foreign authorities' data should not enable it to be used indirectly for tax purposes, and in turn for circumventing administrative assistance in tax matters. However, following the conclusion of work on the automatic exchange of information and the Foreign Account Tax Compliance Act (FATCA), the explicit reservation in Article 78 paragraph 2 letter b of the FinMIA is no longer needed to the same extent. By the same token, Swiss authorities' access to foreign TRs could be improved.

Need for action: Reciprocal access to TRs for domestic and foreign authorities should be improved, especially by means of an alignment with international standards and the adjustment of provisions on the exchange of data as part of administrative assistance.

3.2. Simplifications for small non-financial counterparties

3.2.1. Reporting duty

Under Article 104 of the FinMIA, in the case of transactions between a financial counterparty (FC) and a non-financial counterparty (NFC), the FC has a duty to report. In the case of transactions between NFCs, the duty to report lies with the NFC that is not deemed a small NFC in accordance with Article 98 of the FinMIA. A transaction between small NFCs does not have to be reported. The only case in which a small NFC must report is a transaction with a foreign counterparty that does not report to a TR under Swiss law.

At present, the reporting duty for derivatives transactions already applies for FCs (esp. banks and insurance companies) and some NFCs. For small NFCs in accordance with Article 98 of the FinMIA (e.g. industrial companies), the reporting duty was due to enter into force on 1 January 2019, but was postponed to 1 January 2024 by the Federal Council, i.e. until a new evaluation of costs and benefits became available in the form of this FinMIA review.

In a survey of small NFCs, the potential annual reporting costs per company were estimated at between a few tens of thousands of Swiss francs and several million (IT costs for the operation and maintenance of the databases, staff costs, costs for the TRs and other third-party services). These estimates are based partly on the experience of small NFCs in other jurisdictions where they are already subject to the reporting duty, particularly the EU.

As outlined above, the lack of harmonisation in the reports and the collected data makes it difficult to assess the benefits of the reporting duty as regards macroprudential oversight. The Federal Electricity Commission would welcome it if companies operating in the electricity market were to report their transactions, since they often fall into the category of small NFCs and are important participants in derivatives trading.

Yet even if the reporting system were improved (which is a goal in itself), the contribution of small NFCs' reports on their transactions with foreign counterparties would probably not be significant. Moreover, it can be assumed that the bulk of relevant transactions are already reported to a foreign TR by the other counterparty.

Need for action: The reporting duty for small NFCS should be abolished completely. To avoid the administrative costs of implementing the currently planned duty, and to guarantee legal certainty, the entry into force of Article 130 paragraph 1 letter c of the FinMIO should be postponed once again, to the beginning of 2028.

3.2.2. Monitoring of thresholds

Small NFCs benefit from exemptions (in particular, transactions between two small NFCs do not have to be reported), but they have to ascertain themselves whether they meet the exemption criteria, i.e. whether the 30-day rolling average of gross positions calculated for all outstanding OTC derivatives transactions is below the thresholds set in the FinMIA (Art. 99 et seq. of the FinMIA). The thresholds depend on the derivatives category. The calculations differ from those under the revised EMIR Refit. Moreover, the EU's regulatory simplifications of 2019 have not yet been adopted by Switzerland. In the private sector's opinion, the monitoring of thresholds involves complex calculations that carry significant costs, although the actual goal was to simplify matters.

Need for action: To relieve the burden on small NFCs as regards the monitoring of thresholds, the calculation method should be aligned with the regulatory simplifications under the EMIR Refit.

3.3. Cross-border transactions and categorisation of counterparties

As regards the duties relating to operational and counterparty risk mitigation (Art. 108 of the FinMIA), there is no specific article on cross-border transactions, unlike with other duties relating to derivatives trading, i.e. those on clearing (Art. 90 of the FinMIO), the exchange of collateral (Art. 106 of the FinMIO) and trading through a trading venue or organised trading facility (Art. 111 of the FinMIO). Concretely, this means that, despite FINMA having recognised EU law in accordance with Article 95 of the FinMIA, a Swiss bank with a European counterparty must carry out a categorisation in accordance with the FinMIA in order to determine whether the EMIR risk mitigation duties apply for the counterparty.

Article 95 of the FinMIA does achieve its purpose, i.e. the duties vis-à-vis market participants operating abroad are also deemed to have been fulfilled if they are regarded as having been fulfilled under foreign law recognised as being equivalent by FINMA and if the foreign FMI used to execute the transaction has been recognised by FINMA. Beforehand, however, market participants must determine whether a duty exists under the FinMIA and carry out the associated categorisation of its foreign counterparties in accordance with Article 93 et seq. of the FinMIA. The fact that counterparties subject to jurisdictions that FINMA has recognised as equivalent must first be categorised in accordance with the FinMIA causes unnecessary costs and constitutes a competitive disadvantage for Swiss counterparties.

Finally, it should be noted that the categorisation of counterparties in Switzerland does not fully correspond to that in European law. So if, for example, the European categories were adopted, this would require a corresponding alignment beforehand.

Need for action: The scope of application for compliance with obligations under foreign legislation in the case of cross-border transactions should be reviewed. As part of this, the compatibility with international standards should be examined in more detail.

3.4. Further action needed

- **Scope of application for financial and non-financial counterparties**: From a systematic perspective, a counterparty's declaration concerning its characteristics, which is currently regulated in Article 97 paragraph 3 of the FinMIA, should be transferred to Article 93 of the FinMIA (Scope).
- **Duty to report to a TR**: In Article 92 paragraph 2 of the FinMIO, the subordinate clause "that are traded via a trading venue or an organised trading facility" should be deleted, as this logic must also apply for centrally cleared derivatives traded outside a trading venue or organised trading facility (cleared OTC).
- **Valuation of outstanding transactions and risk mitigation**: The dispatch on the FinMIA makes clear that the legislator's intention was to exempt small counterparties from the duty to value outstanding transactions (Art. 109 para. 1 of the FinMIA). However, for large counterparties, the duty to value outstanding transactions as set out in Article 109 paragraph 1 of the FinMIA should apply irrespective of the categorisation of the other counterparty. Therefore, for reasons of legal certainty, Article 109 paragraph 2 of the FinMIA should be more precisely worded to ensure that large counterparties do not fall under this exemption.
- **Documentation and auditing**: It should be examined whether the auditing and documentation duties (Arts. 116–117 of the FinMIA) could be aligned with practice in other jurisdictions to take account of risks. For entities that are not subject to prudential oversight, this could take the form of an adjustment of the audit frequency or the adoption of thresholds for the audit obligation, for example. In the case of NFCs that do not intend to trade in derivatives, simplifications in the documentation duty (Art. 113 para. 2 of the FinMIO) should be considered.

4. Disclosure law, takeover law and market abuse provisions

In terms of substance, the provisions on the disclosure of shareholdings (disclosure law), on public takeover offers (takeover law) and on insider trading and price and market manipulation (market abuse) were taken over largely unchanged from the former Stock Exchange Act (SESTA) when the FinMIA was drafted.

The provisions in the area of disclosure law, takeover law and market abuse have generally stood the test of time, but they should be adjusted in certain areas. In particular, certain modifications in terms of disclosure law and a refinement of the current trading supervision system would seem to be advisable. The problems identified are described in more detail below and recommendations for action are provided.

4.1. Disclosure law

4.1.1. Reduction of complexity and avoidance of punishment for petty offences

Current disclosure law (Art. 120 et seq. of the FinMIA) requires the notification of a multitude of facts and in practice leads to a high number of disclosure notifications by international standards. These notifications generate a great deal of work not only for those obliged to disclose, but also for issuers and stock exchange disclosure offices. Moreover, because of the multitude of notifications, it is increasingly difficult for market participants to filter out the information of relevance to them from the large mass of disclosure notifications, and thus the creation of transparency intended by disclosure law is jeopardised. In addition, as disclosure law is highly complex, legal uncertainties and minor, negligent cases of notification duty breaches frequently arise in practice. However, all of these are punishable by law (see Art. 151 of the FinMIA) and they therefore have to be reported to FINMA by the disclosure offices, be reported by FINMA as offences and be assessed by the FDF. This criminal liability of petty offences and the associated burden for the disclosure offices, FINMA and the FDF appear inappropriate.

The deficiencies described in the current legal situation could be greatly reduced by doing away with the first reporting threshold of 3% of voting rights, which would mean that the first reporting threshold would be 5% of voting rights. This would be not only compatible with international standards, but also justifiable in terms of market transparency. Furthermore, existing legal uncertainties – especially in connection with the notification duty for shareholdings held by collective investment schemes (Art. 18 of the FinMIO-FINMA), in the case of capital increases and firm underwritings and for lock-up groups – should be eliminated and, if possible, criminal liability should be limited to material breaches of the disclosure obligation. The question of whether the notification duty triggered by changes in information (Art. 16 para. 2 of the FinMIO-FINMA) could be made less burdensome and whether there are other ways of simplifying disclosure law should also be examined in greater detail. Similarly, there is a need to clarify whether, in future, it should be those subject to the notification duty rather than the issuers who should enter the disclosure notifications on the platforms of the disclosure offices.

Need for action: In the area of disclosure law, the 3% reporting threshold should be abolished, existing legal uncertainties eliminated and criminal liability limited to material breaches of the notification duty. As work continues, consideration should additionally be given to how the notification duty triggered by changes in information could be made less burdensome and whether those subject to the notification duty should enter their disclosure notifications directly on the platforms of the disclosure offices in the future.

4.1.2. Greater efficiency in the supervisory architecture

Under the prevailing legislation, the supervisory architecture in the area of disclosure law provides for a division of tasks between FINMA and stock exchange disclosure offices (Art. 27 et seq. of the FinMIO-FINMA): the disclosure offices are responsible for monitoring the duty of notification and publication, and respond to requests for preliminary rulings, exemptions and the easing of requirements by issuing recommendations. If a breach of the notification duty is suspected, the disclosure office is obliged to inform FINMA (Art. 122 of the FinMIA). However, there is no duty to notify the prosecution authority.

FINMA is responsible for conducting enforcement proceedings in respect of notification duty breaches, although it does not currently have the instrument for restoring compliance with the law (Art. 31 of the FINMASA) and therefore the substitute performance instrument (Art. 32 para. 2 of the FINMASA) with regard to unsupervised parties. Consequently, it can neither order the submission of a correct disclosure notification nor enforce the correction of an incorrect notification by means of substitute performance, which, in practice, has led to individual incorrect or incomplete disclosure notifications not being corrected.

In reality, FINMA has to conduct enforcement proceedings only in isolated cases of disclosure obligation violations. Its activities are confined to urging those subject to the notification duty to correct a notification within the framework of informal administrative action – which is generally done without further ado – and reporting criminal offences to the FDF. Consequently, its role is often limited to that of intermediary between the disclosure offices and the FDF.

The supervisory architecture described in disclosure law is recognised in the market and has generally proved its worth. However, due to the importance of this regulation, it seems appropriate that the stock exchanges' obligation to have a disclosure office, as well as the tasks and powers of the disclosure office, should be anchored in the FinMIA instead of in the FinMIO-FINMA. In addition, in order to guarantee uniform application of the law, appropriate measures should be taken to ensure that the practices of the various disclosure offices are better harmonised.

Furthermore, it seems inefficient that, as described, FINMA acts almost exclusively as a mere intermediary, with this activity being financed by the supervision charges of supervised parties. In the event of a breach of the notification duty, the disclosure offices should thus be obliged to call directly on those responsible to correct the situation and also to report criminal offences directly to the FDF. For the performance of these tasks, it would be expedient for the disclosure offices to have a right to information vis-à-vis issuers and those obliged to disclose, in order to be able to determine whether the notification duty has been breached. In this way, FINMA would need to become involved only if an informal resolution of a disclosure irregularity cannot be achieved by the disclosure offices as described above or if there is a serious breach of the notification duty and enforcement proceedings therefore have to be conducted.

Moreover, FINMA should also be able to order the restoration of compliance with the law vis-à-vis unsupervised parties and to take the necessary action itself if those subject to the notification duty do not comply with this order.

Need for action: The stock exchanges' obligation to have a disclosure office as well as the tasks and powers of the disclosure office should be anchored in the FinMIA instead of in the FinMIO-FINMA, and appropriate measures should be taken to ensure that the practices of the various disclosure offices are better harmonised. Furthermore, the efficiency of the supervisory architecture should be improved by obliging the disclosure offices to call directly on those responsible to remedy the situation in the event of a breach of the notification duty and also to report criminal offences directly to the FDF.

4.1.3. Further action needed

- **Expansion of the scope of application**: The question of whether DLT trading facilities should also be able to list equity securities should be examined. If necessary, in order to create a level playing field and apply the principle of technology neutrality, disclosure law should be extended to companies' equity securities listed on a DLT trading facility.

- **Abolition of the possibility to send notifications and submissions by fax**: The possibility of faxing notifications, submissions and recommendations regarding the disclosure of shareholdings appears to be outdated and should therefore be abolished.
- **Review of company fines**: The maximum fine of CHF 10 million introduced as part of the 2013 revision of the Stock Exchange Act for the intentional breach of the notification duty still seems appropriate in view of the seriousness of the offence. However, the possibility of imposing a criminal fine on the company for organisational deficiencies beyond the narrow scope of Article 49 of the FINMASA (secondary imposition of a fine of up to CHF 50,000) should be examined.

4.2. Takeover law

4.2.1. Minor adjustment of the deficit guarantee

The current legal situation requires the Takeover Board to finance itself primarily by means of fees (Art. 126 para. 5 of the FinMIA). In years with few public takeover offers, the Takeover Board could have a deficit, which has to be borne by the stock exchanges (so-called deficit guarantee, Art. 126 para. 6 of the FinMIA). A stock exchange-driven review of this deficit guarantee borne by the stock exchanges showed that the current arrangement is fundamentally appropriate. It takes account of the fact that the scope of takeover law is linked to listing on a Swiss stock exchange and that ultimately the stock exchanges are the primary beneficiaries of the Takeover Board's activities. It would not be appropriate for all supervised or multilateral trading facilities to share the burden of the Takeover Board's deficit, as they do not perform listings and thus do not benefit in any particular way from the Takeover Board's activities. However, if takeover law were to be extended to companies whose equity securities are admitted to trading on a DLT trading facility, DLT trading facilities should also have to share the burden of any Takeover Board deficit in the future.

It should be added that the Takeover Board's operating loss has remained modest since it was established, and around 90% of the loss occurred in the last two years (pandemic). Disregarding the exceptional circumstances of these last two years, the Takeover Board is generally able to finance itself by means of fees, as envisaged by the legislator. Nevertheless, as work continues, consideration should be given to whether the existing fees for the activities of the Takeover Board (Art. 117 et seq. of the FinMIO) are still appropriate.

Need for action: The existing fees for the activities of the Takeover Board should be reviewed.

4.2.2. Further action needed

In the area of takeover law, the following adjustments or reviews additionally seem to be advisable:

- **Expansion of the scope of application**: The question of whether DLT trading facilities should also be able to list equity securities should be examined. If necessary, takeover law should be extended to companies whose equity securities are listed on a DLT trading facility (see similar proposal for disclosure law).
- **Harmonisation of the notification duty under disclosure and takeover law**: In order to boost transparency and avoid higher transaction costs, the disclosure notifications in accordance with Article 120 et seq. and Article 134 of the FinMIA should be accessible centrally in a single location in the future. In contrast, due to their different purposes, it

does not seem appropriate as things currently stand to harmonise the content of the notification duties under disclosure and takeover law. Nevertheless, it seems appropriate that, if the 3% reporting threshold is abolished in disclosure law, it should be abolished in takeover law too.

- **Introduction of an obligation to designate an address for service**: The question of whether foreign shareholders of target companies should be obliged to designate an address for service in Switzerland so that they can be more easily included as parties in proceedings should be examined.
- **Abolition of the possibility to send submissions by fax**: The possibility to submit legal documents by fax in correspondence with the Takeover Board appears to be outdated and should therefore be abolished.
- **Creation of a legal basis for the publication of appeal decisions**: In order to increase legal certainty, an explicit legal basis should be created in the FinMIA for the publication of FINMA's appeal decisions in takeover matters.
- **Review of company fines**: The maximum fine of CHF 10 million introduced as part of the 2013 revision of the Stock Exchange Act for the intentional breach of the duty to make an offer still seems appropriate in view of the seriousness of the offence, including from an international perspective. However, the possibility of imposing a criminal fine on a company that breaches the duty to make an offer beyond the narrow scope of Article 49 of the FINMASA (secondary imposition of a fine of up to CHF 50,000) should be examined.

4.3. Market abuse

4.3.1. Harmonisation, extension and statutory anchoring of issuer obligations that are important for market integrity

Under current legislation, although the bans on insider trading and market manipulation, and the corresponding criminal offences, are anchored in the FinMIA, the obligation to publish insider information (so-called ad hoc publicity) and transactions by managers in their own equity securities (management transactions) is regulated by stock exchanges in the listing rules (self-regulation). They are implicitly obliged to do so (see Art. 27 and Art. 35 of the FinMIA). As a result, stock exchanges are also responsible for enforcing these obligations. In the event of a breach of the aforementioned obligations, FINMA may conduct enforcement proceedings only against the supervised parties and solely in the case of serious breaches.

In Switzerland, neither state law nor the self-regulation of stock exchanges explicitly requires issuers to keep insider lists, i.e. lists that record the time at which insider information arose and indicate who became aware of it and when. The issue of whether stock exchanges may disclose issuer-related information to FINMA as part of market abuse investigations is not explicitly regulated by law either.

The legal situation described is in need of improvement in several respects. Firstly, the absence of an obligation for issuers to keep insider lists means that FINMA lacks key information for investigating market abuse, i.e. insider trading and market and price manipulation. It therefore seems appropriate that, in line with foreign legal systems, especially those of the EU, issuers in Switzerland should likewise be obliged at the FinMIA level to keep insider lists. Considering the great importance of insider lists for investigating market abuse, the effort involved in issuers keeping insider lists appears to be proportionate.

In addition, the obligations regarding ad hoc publicity and the publication of management transactions, which are currently regulated by stock exchanges in the listing rules, should also be regulated at state level in the future (i.e. in the FinMIA and FinMIO), as is the case in other jurisdictions with major financial centres. Although this would constitute a restriction of self-regulation in this area, which primarily has the advantage of market proximity, an argument in favour of regulation at legislative level is that the obligations regarding ad hoc publicity and the publication of management transactions are crucial for preventing insider trading and market and price manipulation and thus strengthen not only investor protection, but also the financial markets' ability to function properly and ultimately the competitiveness of the financial centre. Consequently, it seems outdated to leave these obligations exclusively to stock exchange self-regulation. For example, it would seem appropriate for the legislator to decide whether the names of the persons involved must be included when management transactions are published; this would be essential from a market transparency perspective. State regulation could lead to consistent and uniform regulation in line with the terminology of the FinMIA. This would provide more legal certainty than the current regulation in the market and facilitate the enforcement of the state's market abuse provisions. Finally, state regulation would have the particular advantage of better enforceability of issuer obligations and would be more widely accepted internationally.

Moreover, in order to increase legal certainty, it should be explicitly stated in the FinMIA that stock exchanges have to disclose issuer-related information to FINMA within the framework of market abuse investigations and that issuers and their agents have a duty to provide information to FINMA.

Need for action: Issuers should be obliged in the FinMIA to keep insider lists. In addition, the issuer obligations regarding ad hoc publicity and the publication of management transactions, which are currently regulated by stock exchanges in the listing rules, should also be regulated in the FinMIA and FinMIO. Finally, the FinMIA should explicitly state that stock exchanges have to disclose issuer-related information to FINMA within the framework of market abuse investigations and that issuers and their agents have a duty to provide information to FINMA.

4.3.2. Further development and centralisation of the existing reporting offices and trading supervisory bodies

The FinMIA and its implementing provisions (see in particular Art. 5 para. 4 of the FinMIO-FINMA) adopted the principle from the Stock Exchange Act that each stock exchange – and now also each multilateral trading facility – has to have its own trading supervisory body and reporting office. Trading supervision is limited to the monitoring of trading in securities admitted to trading at the corresponding trading venue and primarily to trades executed on the trading venue itself. It is based not only on an analysis of the trading data, but also on the participants' transaction reports. These reports have to be submitted to the trading venues' reporting offices, which are obliged to process them or prepare them for use in the context of trading supervision. They may charge those subject to the notification duty fees for performing tasks. Effective from 1 August 2021, DLT trading facilities are also required to have their own trading supervisory bodies and reporting offices.

FINMA's task is to enforce the bans on insider trading and market manipulation under supervisory law. Consequently, trading supervisory bodies are obliged to notify FINMA (and the prosecution authorities) of suspicious cases and to forward to it any anomalies detected and the relevant data for further investigation.

These existing provisions do not allow for a holistic view of data and are outdated. They prevent the systematic detection and prosecution of market abuse in Switzerland, which today is usually committed across trading venues as well as products. Therefore, a central trading supervisory body and a central reporting office should be created, as is the case in other jurisdictions with major financial centres. This would improve not only investor protection in terms of equal opportunities, but also the proper functioning of securities markets and the competitiveness of the Swiss financial centre. From the perspective of those subject to the notification duty, a central reporting office and thus the guarantee of a uniform reporting format would have the added advantage of less effort and lower reporting costs as things currently stand.

Other measures – especially reporting improvements to enable the automatic exchange of trading data between trading venues and the obligation for trading venues to include in ongoing trading supervision the trades outside the trading venue reported to them – cannot fully address the problem of the absence of a holistic view of data in trading supervision and have not been taken in practice to date.

Centralisation of the reporting offices and trading supervisory bodies would have to be implemented with the inclusion of the existing SIX and BX offices and bodies. The aim would be to intervene as little as possible in existing structures. For example, it would be conceivable that the centralised reporting office and trading supervisory body could be formed from parts of the trading venues' existing offices and bodies. It can be assumed that the trading supervision costs could be covered to a large extent by the fees levied for reports, although the financing would still have to be clarified in more detail. For the trading venues themselves, centralisation could be associated with a lower financial burden.

Aside from the centralisation of trading supervisory bodies and reporting offices, it is also necessary to address transaction reporting problems identified in practice, given that transaction reporting is crucial for the detection of market abuse. In particular, the enforcement of the notification duty should be improved and material rules that lead to inappropriate results should be modified. Based on the current situation, an exemption from the notification duty for all transactions in foreign securities and in derivatives with such securities as their underlying instruments that are executed on a foreign trading venue (extension of Art. 37 para. 4 lit. b of the FinMIO) would seem to be particularly advisable.

Furthermore, it seems appropriate to require all supervised parties to report suspected market abuse (especially by clients) to FINMA. Experience in other jurisdictions, especially in the EU, shows that such suspicious transaction and order reports (STORs) are an important source for detecting market abuse. Such a requirement could also minimise the legal risks for reporting institutions.

Finally, in a similar vein to the regulations in the EU and United States, participants in a trading venue or DLT trading facility in Switzerland should be required to record information on the client/principal when entering the trade in the order book (in the form of a short code). Without this information at the time of order entry, it is virtually impossible for the trading supervisory body to detect transaction-based market manipulation. Care should be taken during actual implementation to ensure that the burden for those subject to the notification duty is minimal.

Need for action: In collaboration with the existing trading venues, a central trading supervisory body and a central reporting office should be created in Switzerland. In addition, problems identified in practice in connection with the notification duty should be resolved, all supervised parties should be required to report suspected market abuse to FINMA, and participants in a trading venue or DLT trading facility should be required to record information on the client/principal already when entering the trade in the order book.

4.3.3. Further adjustment and review proposals

In the area of market abuse provisions, the following criminal law adjustments or reviews additionally seem to be advisable:

- **Inclusion of transaction-based market manipulation in the criminal law provisions**: In practice, around 90% of the market manipulation cases investigated by FINMA involve transaction-based market manipulation. This is not covered by the prohibition on price manipulation under criminal law, which seems inappropriate and should therefore be changed.

- **Abolition of offender categories for insider offences**: The criminal law provisions on insider offences distinguish between three offender categories (primary, secondary and tertiary insiders). The penalty scale depends on the insider's proximity to the company. This scale is contrary to the thinking behind the legally protected interest, is outdated in view of technological progress and leads to inappropriate results in practice. Therefore, there should be no distinction between offender categories in the future.
- **Review of the qualification hurdle**: In compliance with the FATF recommendations, the qualified criminal acts of insider trading and price manipulation, considered as felonies, were created in 2013. The qualifying element of the crime is the achievement of a financial gain of at least CHF 1 million. Based on practical experience, consideration should be given to whether another, more suitable qualifying criterion should be used instead of this threshold value.
- **Facilitation of the use of govware**: Nowadays, information is exchanged predominantly via digital channels and in encrypted format, which is why the Office of the Attorney General of Switzerland is dependent on the use of special IT programs for telecommunications surveillance (so-called govware) in order to punish market abuse. This needs to be done by amending the Swiss Criminal Procedure Code of 5 October 2007 (CrimPC, SR *312*).

5. Further findings

5.1. Legislative powers of FINMA

In its decree of 31 October 2018, the Federal Council instructed the FDF to examine the delegation norms in favour of FINMA in the financial market laws and associated ordinances within the framework of respective reform proposals, and to propose amendments if necessary. Any amendments are to be dealt with as part of ongoing or future reform projects and are to be submitted to the Federal Council or Parliament in due course. The final provisions of the Ordinance to the Financial Market Supervision Act (SR *956.11*), which entered into force on 1 February 2020, also stipulate in Article 16 that FINMA is to review its regulations within five years of the ordinance coming into force to determine their level-appropriateness and to make any necessary adjustments that fall within its remit. The corresponding review by the FDF in the area of the FinMIA has revealed that the legislative delegations contained in the FinMIA and FinMIO are generally appropriate and that the FinMIO-FINMA and FINMA circulars 2008/4 Securities journals, 2018/1 Organised trading facilities, 2018/2 Duty to report securities transactions and 2013/8 Market conduct rules are fundamentally consistent with the requirements in the FINMA Act and FINMA Ordinance. Only in isolated cases does it appear advisable to flesh out existing delegation norms (especially the abolition of blanket delegations) or to anchor regulations at a higher level, such as the duty of stock exchanges to establish a disclosure office, as well as its tasks and powers, and, insofar as possible, the content of the reports of participants in a trading venue (transaction reports).

5.2. Other

The following additional areas for action of a more general nature were also identified during the FinMIA review.

- **Equivalence**: Work in the EU (e.g. MiFID II/MiFIR review) should be monitored and any necessary amendments to the FinMIA proposed.
- **Fintech review**: The connections between the fintech review and the FinMIA review should be taken into account, especially with regard to payment transactions.
- **Benchmark regulation**: At the end of 2021, SARON replaced LIBOR as the new reference interest rate in Switzerland. A new regulation in this area generally does not appear necessary at present. However, further developments should be monitored.
- **Short selling**: The need for more stringent regulation to limit the risks associated with short selling should be examined.
- **Application of the law by supervisory authorities**: Depending on their importance and nature, legislative provisions are to be issued at law or ordinance level and in the procedure provided for this purpose. In contrast, authorities can generally create transparency about their application of the law in an informal manner. The circulars of the Federal Tax Administration and FINMA are particularly well known in this regard. It would also be within the powers of the SNB to document its application of the law in circulars or similar instruments.
- **Takeover law**: Finally, the National Council Economic Affairs and Taxation Committee is proposing an amendment to the FinMIA[7]. The amendment is based on the Vogt parliamentary initiative 18.489 and is intended to create a new criminal law provision concerning violations of the requirement to publish a true and complete prospectus or a true and complete announcement of an offer. This regulatory project is being carried out in parallel with the FinMIA review.

6. Conclusion and next steps

The review showed that the FinMIA has proved its worth. However, some simplifications, additions and consolidation, as well as modernisation of the parts adopted unchanged from the Stock Exchange Act would seem advisable. The need for action identified essentially concerns the following:

- ***Financial market infrastructures***: The stability of financial market infrastructures should be strengthened by introducing specific new requirements and simplifications to reduce costs and increase legal certainty.
- ***Derivatives trading***: The benefits of the notification duty for derivatives transactions should be strengthened and simplifications should be introduced for small non-financial counterparties; in particular, they should be exempted from the notification duty.
- ***Disclosure law, takeover law and market abuse provisions***: Disclosure law should be simplified, issuer obligations that are important for market integrity should be regulated at state level and the trading supervision and reporting system should be modernised.

Implementation of these recommendations requires a bill to be drafted to amend the FinMIA. Based on this report, the FDF will submit its conclusions and recommendations to the Federal Council.

[7] See press release of 16 May 2022

7. Appendix

7.1. Overview of identified areas for action

Topic		Need for action
FMIs		
1.	Payment systems (Art. 4 para. 2 of the FinMIA)	Introduce a quantitative threshold above which the payment system would require authorisation and below which the FinMIA requirements would not apply for the payment system
2.	Outsourcing and supervisory instruments (Art. 11 of the FinMIA)	Include provisions similar to those in Article 47 of the IOA and Article 23bis of the BankA in financial market infrastructure law (duty to provide information, duty to report, auditing).
3.	Concept of systemic importance (Art. 22 of the FinMIA)	Adjust the criteria for an FMI to qualify as a systemically important infrastructure
4.	Special requirements for systemically important FMIs (Art. 23 of the FinMIA)	Introduce loss-absorbing gone-concern capital for systemically important FMIs, similar to banking law and international standards (still being drawn up), while taking account of the risks stemming from this category (CCPs, CSDs, payment systems) and from the individual FMI (e.g. whether a CCP performs derivatives clearing)
5.		Grant FINMA the power to apply the requirements for systemically important Swiss FMIs in Switzerland to systemically important Swiss FMIs abroad
6.	Recovery and resolution plan (Art. 24 of the FinMIA)	Explicitly state that FINMA and the SNB shall take account of international standards in the entire recovery and resolution planning under Swiss legislation, as is already explicitly prescribed for special requirements (Art. 23 para. 2)
7.		Define more precisely the scope of recovery planning (Art. 24 para. 1 of the FinMIA), to state that it relates to the business activity and, in particular, to systemically important business processes
8.		Delete Article 21 of the FinMIO in its current form
9.		Include principles regarding the basic structure and minimum content of recovery planning in the FinMIO
10.		Provide an explicit legal framework for regular testing of recovery planning in line with international standards

Topic		Need for action
11.		Clearly state that systemically important FMIs must include the obtention of addition capital (see Art. 48 V of the FinMIO) as part of the recovery plan (this is the current practice)
12.	Dark trading (Art. 29 of the FinMIA)	Monitor international developments closely, especially those in the UK and EU
13.		Assess the expediency of introducing a duty of transparency for ETFs and ETPs
14.	Recognition of foreign trading venues (Art. 41 of the FinMIA)	Simplify the recognition duty for trading venues domiciled abroad
15.	OTFs (Arts. 42–43 of the FinMIA)	Define more precisely the criteria for CFDs and forex markets to qualify as organised trading facilities
16.		Draw up a list of organised trading facilities at FINMA level
17.	Definition of central securities depositories and custodians (Art. 61 of the FinMIA)	Adjust the regulatory framework to clarify the situations in which a custodian should be authorised as a central securities depository in accordance with the FinMIA
18.	Duties of payment systems (Art. 81 et seq. of the FinMIA)	Examine which provisions should be anchored at law or ordinance level
19.		Make banks that operate a payment system subject to the FinMIA requirements for payment systems
20.		Introduce new requirements on participant access, exclusion and default
21.		Monitor developments in stablecoins closely at both multilateral level and the level of the relevant jurisdictions
22.	Liquidation planning (Art. 86 of the FinMIA, Art. 72 of the FinMIO)	Anchor the provisions on preventive liquidation plans (orderly wind-down plans) in law
23.		Require non-systemically important CCPs and CSDs and payment systems subject to authorisation to have a "light" preventive liquidation plan (rough concept)
24.		Include principles regarding the basic structure and minimum content of the preventive liquidation plan in the FinMIO
25.		The authorisation of systemically important FMIs' preventive liquidation plans by FINMA and their regular updating should be explicitly anchored in law, including consultation with the SNB (this is the current practice)
26.		Clearly state that the capital backing for the liquidation plan at systemically important FMIs must be sufficient, i.e. non-systemically important processes should be taken into account provided they do not use up capital that is needed to wind down systemically important processes (this is the current practice)

Topic		Need for action
27.	Insolvency law provisions (Art. 88 et seq. of the FinMIA in conjunction with Art. 24 et seq. of the BankA)	Grant FINMA the power to do the following, after consulting the SNB - order the implementation of the recovery plan if the criteria for measures under Article 25 of the BankA are met or if this is necessary for reasons of financial stability; and - prohibit the implementation of part or all of the recovery plan where such implementation might pose a significant threat to financial stability
28.		Create specific instruments for winding down CCPs, especially resolution cash calls, tear-up and forced allocation
29.		Make various adjustments to the creditor hierarchy in order to address specific challenges in the resolution of FMIs and enable the appropriate use of existing resolution instruments (e.g. variation margin gains haircutting, possibility of exempting initial margin from claims reduction)
30.	Algorithmic trading and high-frequency trading	If possible, define the terms "algorithmic trading" and "high-frequency trading", and define more precisely the labelling obligation for participants (unique and permanent labelling of algorithms) (Art. 31 of the FinMIO)
Derivatives trading		
31.	Reporting duty (Art. 104 of the FinMIA)	Increase the benefits of the duty to report derivatives transactions to TRs by improving: a) the quality of reports (harmonisation of content descriptions and closer alignment with international technical standards such as those covering LEIs, UTIs, UPIs and other CDEs); and b) authorities' access to TR data (evaluation of how reciprocal access to TR data for domestic and foreign authorities can be improved)
32.	Simplifications for small non-financial counterparties	- Proposal to abolish the reporting duty completely for small NFCs - Revaluation of the calculation method used to define whether an NFC is small, in line with the simplifications in the EMIR Refit
33.	Cross-border transactions and categorisation of counterparties	Clarify and, where necessary, revise the provisions on compliance with obligations arising in connection with foreign law and cross-border transactions, especially as regards the categorisation of foreign counterparties
34.	Scope of application for financial and non-financial counterparties	Include a counterparty's declaration of its characteristics in Article 93 of the FinMIA (Scope)
35.	Duty to report to a TR	Delete the clause "that are traded via a trading venue or an organised trading facility" in Article 92 paragraph 2 of the FinMIO

Topic		Need for action
36.	Valuation of outstanding transactions and risk mitigation	Make the wording of Article 109 paragraph 2 of the FinMIA more precise so as to ensure that large counterparties are not subject to the exemption regarding outstanding transactions
37.	Documentation and auditing (Arts. 116–117 of the FinMIA)	Check whether - auditing and documentation duties can be aligned with the practice in other jurisdictions while taking account of risk - the documentation requirements can be simplified for NFCs that are not planning to trade in derivatives
Disclosure law		
38.	Notification duty	Assess whether to extend the scope of application to equity securities of companies listed on a DLT trading facility (Art. 120 para. 1 of the FinMIA)
39.		Abolish the 3% reporting threshold (Art. 120 para. 1 of the FinMIA)
40.		Transfer the disclosure offices' practice on capital increases with firm underwritings and lock-up groups to the FinMIO-FINMA
41.	Oversight architecture	Increase efficiency in the oversight architecture: require the stock exchange disclosure offices to call directly on those responsible to remedy the situation in the event of a breach of the notification duty, and to report criminal offences directly to the FDF. It would be expedient for the disclosure offices to have a right to information vis-à-vis those subject to the disclosure duty
42.		Anchor the stock exchanges' obligation to have a disclosure office, as well as the tasks and powers of the disclosure office, in the FinMIA instead of the FinMIO-FINMA
43.		Take measures to ensure that the practices of the various disclosure offices are better harmonised (e.g. make it easier to outsource the disclosure offices, regulation by analogy with Art. 72 para. 2 lit. c and Art. 5 of the FinSO, informal exchange)
44.	Publication of disclosures	Examine the option for those subject to the disclosure duty to record/publish their disclosures directly on the disclosure offices' platforms in future
45.	Correspondence	Abolish the option to send notifications and submissions by fax (Art. 8 of the FinMIO-FINMA)
46.	Supervisory instruments for unsupervised parties	Introduce the supervisory instrument to restore compliance with the law at unsupervised parties and thereby allow substitute performance (Art. 145 FinMIA)
47.	Criminal provision in the	Limit criminal liability for material breaches of the notification duty (Art. 151 of the FinMIA)

Topic		Need for action
48.	event of a breach of the notification duty	Examine the need and possibility to impose a criminal fine on a company beyond the narrow scope of Article 49 of the FINMASA (secondary imposition of a fine of up to CHF 50,000) for organisational deficiencies
Takeover law		
49.	Scope of application	Assess whether to extend the scope to cover companies whose equity securities are listed on a DLT trading facility (Art. 125 of the FinMIA)
50.	Address for service	Assess whether to require foreign shareholders of target companies to designate an address for service in Switzerland
51.	Costs of the Takeover Board	Assess the appropriateness of the current fees (Art. 116 et seq. of the FinMIO)
52.	Notification duty	In the future, it should be possible to access the disclosures under Article 120 et seq. and Article 134 of the FinMIA centrally at a single location
53.		Abolish the 3% reporting threshold (Art. 134 of the FinMIA)
54.	Publication of FINMA's appeal decisions	Create of a legal basis for publishing appeal decisions by FINMA in takeover matters (by analogy with Art. 138 para. 1 of the FinMIA)
55.	Correspondence	Abolish the option to submit legal documents by fax in correspondence with the Takeover Board (Art. 139 para. 5 of the FinMIA and Art. 8 of the FinMIO-FINMA)
56.	Breach of the duty to make an offer	Examine the need and possibility to impose a criminal fine beyond the narrow scope of Article 49 of the FINMASA (secondary imposition of a fine of up to CHF 50 000) for organisational deficiencies on a company that breaches the duty to make an offer (Art. 152 of the FinMIA)
Market abuse		
57.	Duties of issuers	Introduce a statutory duty for issuers to keep insider lists, and state regulation of the duties relating to ad hoc publicity and the publication of management transactions
58.		Clearly state in the FinMIA that stock exchanges must surrender issuer-related information to FINMA in the context of market abuse investigations
59.		Clearly state that issuers and their agents have a duty to provide information to FINMA
60.	Trade supervision and reporting	Centralise existing trading supervisory bodies and, hence, reporting offices. Subsequent work should examine how exactly such a centralisation of the reporting offices and trading supervisory bodies could be implemented. The aim would be to intervene as little as possible in existing structures

Topic		Need for action
61.		Improve implementation of the reporting duty (transaction reports; Art. 39 of the FinMIA/Art. 51 of the FinIA). Measures currently under discussion: - Raise awareness of proper reporting among those subject to the reporting duty, - Introduce criminal liability for negligent breaches of the reporting duty, - Greater inclusion of the topic in supervisory audits. - Removal of legal uncertainty and rules regarding the reporting duty which might lead to problems in practice. Measures currently under particular discussion: • Extension of the exemption from the reporting duty under Article 37 paragraph 4 letter b of the FinMIO to cover all foreign transactions in foreign securities and associated derivatives which are executed on a foreign trading venue, • Removal of the entitlement to report derivatives transactions that are not subject to the reporting duty (FINMA Circ. 2018/2, margin no. 17), • Adoption of self-regulating organisations' practice regarding special arrangements (community of heirs, condominium owners, etc.) in the FINMA Circ. 2018/2.
62.		Introduce the requirement for participants in a trading venue or DLT trading facility to record information on the client/principal when entering the trade in the order book
63.		Introduce the requirement for supervised parties to report suspected market abuse to FINMA
64.	Offences of insider trading and price manipulation	Abolish offender categories for insider offences (Art. 154 of the FinMIA)
65.		Include transaction-based market manipulation in the criminal law provisions (Art. 155 of the FinMIA)
66.		Review the qualification hurdle (Art. 154 para. 2 and Art. 155 para. 2 of the FinMIA)
Further action needed		
67.	Equivalence	Keep track of work in the EU (e.g. MiFID II/MiFIR review) and, depending on developments, make a proposal to adapt Switzerland's regulatory framework if necessary
68.	Fintech review	Take into consideration the connections between the fintech review and the FinMIA review, especially with regard to payment transactions
69.	Benchmark regulation	Monitor developments
70.	Short selling	Assess the need for stricter regulation to limit the risks associated with short selling

Topic		Need for action
71.	Application of the law by supervisory authorities	Clearly state that it would also be within the powers of the SNB to document its application of the law in circulars or similar instruments
Amendments to other legislation		
72.	BankA	Examine ways to make the notification duty triggered by changes in information less burdensome (Art. 16 para. 2 of the FinMIO-FINMA)
73.		Transfer the regulatory content of Article 92 of the FinMIA to the Banking Act
74.	CO	Flesh out the notification duty for shareholdings held by collective investment schemes (Art. 18 of the FinMIO-FINMA)
75.	CrimPC	Enable the use of special IT programs for telecommunications surveillance (Art. 286 para. 2 of the CrimPC)

7.2. List of abbreviations

Art.	Article
BankA	Federal Act on Banks and Savings Banks (SR *952*)
CAO	Ordinance on the Capital Adequacy and Risk Diversification of Banks and Securities Firms (SR *952.03*)
CCP	Central counterparty
CDE	Critical data elements
CFD	Contract for difference
CO	Federal Act on the Amendment of the Swiss Civil Code (Part Five: Code of Obligations) (SR *220*)
CPMI	Committee on Payments and Market Infrastructures
CrimPC	Criminal Procedure Code (SR *312*)
CSD	Central securities depository
DLT	Distributed ledger technology
EMIR	European Market Infrastructure Regulation
ETF	Exchange traded fund
ETP	Exchange traded product
EU	European Union
FATCA	Foreign Account Tax Compliance Act
FC	Financial counterparty
FDF	Federal Department of Finance
FinMIA	Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading (SR *958.1*)
FinMIO	Ordinance on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading (SR *958.11*)
FinIA	Financial Institutions Act (SR *954.1*)
FINMA	Swiss Financial Market Supervisory Authority
FINMASA	Federal Act on the Swiss Financial Market Supervisory Authority (SR *956.1*)
FINMASA-O	Ordinance to the Financial Market Supervision Act (SR *956.11*)
FinSA	Financial Services Act (SR *950.1*)
FISA	Federal Act on Intermediated Securities (SR *957.1*)
FMI	Financial market infrastructures

forex	Foreign exchange market
FSB	Financial Stability Board
IOSCO	International Organization of Securities Commissions
LEI	Legal entity identifier
MAD	Market Abuse Directive
MAR	Market Abuse Regulation
MiFID	Markets in Financial Instruments Directive
MiFIR	Markets in Financial Instruments Regulation
MTF	Multilateral trading facility
NBO	Ordinance to the Federal Act on the Swiss National Bank (SR *951.131*)
(small) NFC	(Small) non-financial counterparty
OTC	Over-the-counter
OTF	Organised trading facility
para.	Paragraph
PFMI	Principles for Financial Market Infrastructures
ROC	Regulatory Oversight Committee
SESTA	Federal Act on Stock Exchanges and Securities Trading (SR *954.1*)
SIC	SIX Interbank Clearing
SIF	State Secretariat for International Finance
SNB	Swiss National Bank
TR	Trade repository
UPI	Unique product identifier
UTI	Unique transaction identifier