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Financial Market Infrastructure

Online forward foreign exchange transactions subject to the FinMIA

Par Marco Mazzilli le 12 November 2026

In a ruling dated July 1, 2026 (B-4080/2022), the Federal Administrative Court (FAC) held that the platform on which a bank enters into foreign exchange forward contracts with its clients constitutes a bilateral organized trading system (OTS) within the meaning of Art. 42(c) of the Financial Market Infrastructure Act (FinMIA). The exception for the primary market does not apply. By allowing clients to "close out" their positions at any time, the platform effectively functions as a secondary market.

A universal bank operates a web-based platform (370 users and CHF 94.9 billion in trading volume in 2020) on which its clients enter into spot and forward transactions in foreign currencies and precious metals with the bank. Only the foreign exchange forward transactions are at issue. These are over-the-counter (OTC) derivatives (Art. 2(c) FinMIA), known as *forwards*, whereby the parties agree to exchange two currencies on a future date at a predetermined exchange rate. To close out their position before maturity, the client therefore enters into an *forward* contract in the opposite direction for the same date. Both contracts remain in effect, but their economic effects cancel each other out. The platform displays real-time quotes, and the bank generally confirms quotes made on this basis immediately. It also offers several functions whose names are inspired by trading platforms, including "*Rollover*," "*Limit order*," and "*Close*." Accessible from the menu of each completed transaction, the "*Close*" function uses the data from the initial transaction to pre-fill the opposite order to close the position.

For these transactions alone, FINMA classifies the platform as a bilateral OTF, which subjects the bank to the obligations set forth in Articles 44 through 46 of the FinMIA and Articles 39 through 43 of the FinMIO. These provisions aim to prevent conflicts of interest, ensure orderly trading, and guarantee pre- and post-trade transparency. The bank has appealed to the Federal Administrative Court (FAC). In its view, the creation of bilateral OTC derivatives falls within the primary market, which FINMA Circular 2018/1 "*Organized Trading Systems*" unconditionally excludes from OTS (Commentary 25, 1st sentence). The provision regarding buyback prices—that is, the prices at which the seller repurchases the instruments—applies only to products tailored to a specific client (Commentary 25, 2nd sentence). The bank further disputes that it sets such prices. It also cites the FINMA report on the hearing regarding the draft circular, according to which the bilateral establishment of positions in derivatives is not subject to OTF regulations (section 3.9).

The Federal Administrative Court (FAC) first emphasizes that the definition of a bilateral OTF (Art. 42(c) FinMIA) is very broad and does not provide for any exceptions for the primary market. However, systematic, teleological, and historical interpretations exclude two situations. The first concerns primary market transactions in the narrow sense, such as issuances intended to raise capital (Art. 44(1)(c) of the Financial Market Act (LEFin)), which are already governed by the LEFin and the Financial Market Supervision Act (LSFin). The second concerns platforms where trading is only sporadic or of negligible volume, as the legislature did not intend to go beyond European law.

However, there is no justification for excluding bilateral OTC derivatives. From an economic perspective, the form of trading is irrelevant as long as the activity involves interests protected by the FinMIA. Foremost among these are, in particular, the proper functioning of the markets and the protection of their participants (Art. 1, para. 2 FinMIA). This applies to a platform that allows a *forward* contract to be offset at any time by an inverse contract, since it then fulfills the function of a secondary market. Finally, it is irrelevant that Art. 113(3)(b) FinMIA exempts these transactions from the requirement to trade on a trading platform or an SSO (Art. 112(1) FinMIA), as this exemption does not preclude a platform offering them from being an SSO.

The Federal Administrative Court (FAC) then notes that the circular, as an administrative ordinance, is not binding on the court. The court takes it into account only if it convincingly clarifies the law. This is the case here. The FAC therefore applies the circular but interprets the primary market exception restrictively and the concept of redemption price broadly. The decisive factor is the systematic guarantee of an exit option. The hearing report is even less binding on the court. Moreover, it extended the redemptions price reservation to OTC derivatives (section 3.8) and equated the reverse transaction that closes a position with a “redemption” (section 3.10).

The Federal Administrative Court (FAC) finds that the three cumulative criteria for a “systematic trading system” (SON) set forth in the circular (Paragraphs 5 and 7 through 15) are met, since (i) trading is governed by uniform and binding regulations established by a standard contract and takes place in a planned and repetitive manner, (ii) the contracts are concluded within the system, and (iii) the initiative for the trade may come from clients. Given its volume, the trading is also not sporadic. Thanks to continuous pricing and the “*Close*” function, any position can be closed out at any time, such that the bank effectively sets buyback prices. The appeal is therefore dismissed.

This ruling is convincing. By prioritizing economic reality, the Federal Administrative Court prevents a platform from evading the FinMIA solely on the grounds that positions on it are closed out through an offsetting contract rather than a resale. Its scope, however, extends beyond forward foreign exchange. Since no OTC derivative is resold, any platform that continuously quotes prices allowing for an offsetting transaction effectively sets buyback prices. For these instruments, the primary market exception thus loses most of its significance, and banks that had relied on section 3.9 of the hearing report should reexamine their platforms. The legal concept of “sporadic or negligible volume” trading—which exempts a platform from the FinMIA—remains vague. The Federal Administrative Court (FAC) leaves the interpretation of this to FINMA’s practice, which must draw on European law—a framework that the Swiss legislature did not intend to exceed. In practical terms, a platform that falls outside the scope of European regulation—either due to a lack of systematic trading or because it represents only an insignificant share of the market for the instrument in question—should not be considered a

Systemically Important Market (SON) either. However, this reference does not provide any specific numerical thresholds, since Switzerland has not adopted the European calculation thresholds and Directive (EU) 2024/790 has, in any case, eliminated the requirement for a “substantial volume” for the European equivalent of the bilateral SON. To ensure legal certainty, FINMA should clarify this concept in its circular, if necessary by providing indicative thresholds.

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