

Financial market supervision

Fewer rights in international cooperation ?

Par Yannick Caballero Cuevas le 23 October 2024

Cross-border financial market supervision and effective international cooperation are essential for the stability and integrity of the world's financial markets. To this end, the Federal Council has just launched a consultation on [amendments](#) to the Financial Market Supervisory Authority Act (LFINMA), the Audit Supervision Act (ASA) and the Swiss National Bank Act (NBA) to adapt the Swiss legal framework to the current conditions for international cooperation. This commentary focuses exclusively on the proposed amendments to LFINMA.

The [preliminary draft](#) seeks to tighten up the rules on the administrative assistance procedure (cf. art. 42a AP-LFINMA) and to clarify the cases in which a taxable person is authorised to transmit information directly to foreign authorities (cf. art. 42c AP-LFINMA). It also proposes to allow direct notification outside the country of origin (Art. 42d AP-LFINMA). Finally, FINMA would be able to conduct direct audits abroad or authorise direct audits in Switzerland in connection with the outsourcing of activities to or from Switzerland (cf. Art. 43 AP-LFINMA).

More specifically, Art. 42a AP-LFINMA would fully or partially repeal the right to be heard and the right of appeal in client assistance proceedings. The preliminary draft proposes two variants, either the total abolition of the right to be heard and the right of appeal (variant A), or the abolition of these rights in cases of market abuse (variant B). This would require a paradigm shift. Depending on the variant chosen, clients would no longer be able to exercise their right to be heard or to appeal in the context of the administrative assistance procedure, i.e. FINMA's decision on whether or not to transmit information to the foreign supervisory authority ([Art. 42 LFINMA](#)). These proposals are based on both international *soft law* and the US approach to mutual assistance between authorities. However, the rights to be heard and to appeal would remain in the procedure for producing documents. However, if a holder of information (typically a bank) refuses – exceptionally in practice – to provide FINMA with this information (art. 42a para. 1 AP-LFINMA), the administrative procedure would only concern the disclosure of the information, but would not confer party status with regard to its transmission to the foreign supervisory authority.

Article 42c of the Financial Market Supervision Act specifies the purposes of direct transmission of information by reporting entities (typically a bank) to foreign authorities. Such transmission would be authorised if it is carried out either for prudential purposes (art. 42c para. 1 AP-LFINMA) or for the cross-border execution of financial transactions (art. 42c para. 2 AP-LFINMA). If the information is transmitted to a foreign supervisory authority, the reporting entity must ensure that the conditions of art. 42 para. 2 LFINMA are met. If information concerning the

execution of financial transactions is transmitted to foreign authorities, the reporting firm must ensure in particular that this information is not used for supervisory purposes (Art. 42c para. 2 let. a AP-LFINMA), that it is necessary for the execution of transactions for clients or reporting firms (Art. 42c para. 2 let. b AP-LFINMA), and that it is not transmitted to a foreign tax or criminal authority (Art. 42c para. 2 let. c AP-LFINMA). In both cases, the rights of clients and third parties should be guaranteed. For example, taxable persons should in particular comply with data protection provisions.

In addition to the [European Convention of 24 November 1977 on the Service Abroad of Documents Relating to Administrative Matters](#), the new Art. 42d AP-LFINMA would allow FINMA to authorise the foreign supervisory authority – at its request – to serve documents directly in Switzerland for the purposes of financial market supervision. Two conditions would be required : the notification would be for supervisory purposes only ; and the state of the requesting foreign authority would grant reciprocity to Switzerland. FINMA would have discretionary powers and would have to weigh up the interests involved. However, such direct notification would be limited to the enforcement of financial market laws. Any direct notification for the purposes of tax or criminal investigations would therefore be excluded, even if the enforcement of financial market law were involved.

Under Art. 43 para. 1 AP-LFINMA, FINMA should be able to request audits of foreign companies that are not subject to FINMA. This would allow FINMA to conduct audits of companies that provide outsourced services. Art. 43 para. 2 let. c AP-LFINMA would also allow FINMA to authorise – under certain conditions – foreign supervisory authorities to conduct audits of non-taxable companies based in Switzerland. The audits referred to in Art. 43 para. 2 let. c AP-LFINMA should be limited to outsourced functions.

With this amendment, the Federal Council wishes to strengthen international cooperation in financial market supervision. This preliminary draft also forms part of the [proposed amendment to](#) the Financial Market Infrastructure Act. The various drafts show a desire to tighten the rules, particularly in the fight against market abuse, and to strengthen FINMA's cross-border supervision. The draft amendments to LFINMA will be put out to consultation until 3 January 2025.

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