



Regulatory Innovations

FINMA Competence to Issue Administrative Fines

I. Introduction

On April 10, 2024, the Swiss Federal Council published its evaluation report on banking stability (the **Report**; see also our [Bulletin of April 11, 2024](#)). As part of the Report, the Federal Council announced that it will examine the introduction of certain measures to expand the supervisory powers of the Swiss Financial Market Supervisory Authority FINMA (**FINMA**). In particular, it will assess whether FINMA should be empowered to impose pecuniary administrative sanctions, such as administrative fines, on financial institutions. This would represent a change from the current supervisory regime, under which FINMA is only empowered to impose measures aimed at restoring compliance with the law.

This bulletin delves into the proposed administrative fines, places them in the context of the current Swiss regulatory framework and international standards, and outlines the main challenges that their introduction would pose.

II. Current Supervisory Instruments of FINMA

The Report defines a pecuniary administrative sanction as an official measure that imposes a financial burden on the party that is subject to an administrative proceeding. This financial burden is the authority's response to a past violation of an administrative regulation. Pecuniary administrative sanctions are therefore also described as having a penal character.

Under the current Swiss financial market regulations, FINMA cannot impose such pecuniary administrative sanctions on supervised legal or natural persons. However, articles 31 et seq. of the Financial Market Supervision Act (**FINMASA**) provide FINMA with various repressive instruments that can be directed at both supervised entities and the individuals acting on their behalf.

One of these instruments is the disgorgement of profits (article 37 FINMASA). This power enables FINMA to confiscate unlawfully acquired profits and thus ensure that market participants do not benefit (financially) from a violation of Swiss financial market regulations. However, there are no supervisory instruments in current Swiss financial market regulations that lead to financial sanctions and go beyond this disgorgement mechanism.

III. Proposed Administrative Fines

According to the Report, the Federal Council is examining whether the current regulatory framework should be amended to give FINMA the power to impose pecuniary administrative sanctions as an additional supervisory measure. In particular, the Federal Council proposes to introduce the right of FINMA to impose administrative fines.

These proposed additional pecuniary administrative sanctions must be distinguished from fines and other financial sanctions provided for under criminal law in Swiss financial market legislation. For example, pursuant to article 44 FINMASA, any person who engages in an activity for which a license or registration is required but does not have such a license or registration may be sanctioned in criminal proceedings with imprisonment of up to three years, a monetary penalty or a fine of up to CHF 250,000. If FINMA establishes that a criminal offence may have been committed, it will file a complaint with the competent criminal authorities. As a rule, criminal proceedings are instituted against natural persons, and only under certain circumstances against

companies. These criminal sanctions already exist and are not expected to be changed as a result of the Report.

In its Report, the Federal Council stated that FINMA should be able to impose financial sanctions on all supervised entities (and not only on systemically important banks). In contrast, the Federal Council confirmed that it does not intend to implement administrative fines against individuals, as FINMA already has instruments at its disposal that have drastic effects on individuals (e.g., industry ban, confiscation of unlawfully acquired profits, naming and shaming). In addition, fines against individuals require that the relevant violation of financial market regulations can be attributed to such individuals, which may be difficult in practice.

Apart from this clarification on the potential addressees, the Report does not provide any further details on the proposed administrative fines. In particular, it does not specify whether they will apply to all violations of Swiss financial market regulations or what the maximum amount of the fines will be. In this regard, the Report merely states that the fines must be designed in such a way that they are effective, but do not threaten the existence of the relevant supervised entities.

IV. Pecuniary Administrative Sanctions in Other Jurisdictions

From an international perspective, the introduction of administrative fines in Swiss financial market regulation will not be a novelty. As outlined in the Report, other jurisdictions already know the concept of fines as a sanction for violations of financial market regulations:

- In Germany, the supervisory authority BaFin can order both preventive and repressive measures. In particular, BaFin is empowered to impose fines for violations of the German Banking Act (KWG), the German Securities Trading Act (WpHG) and the German Insurance Supervision Act (VAG).
- In the United Kingdom, both the Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA) have the power to impose sanctions under financial market law. These regulatory measures include punitive financial sanctions such as the so-called "financial penalty". It should be noted, however, that, according to the Report, in the United Kingdom, the reputational damage resulting from the public announcement made at the end of the enforcement proceedings is estimated to be almost nine times greater than the damage resulting from financial sanctions.
- In the United States, the various financial market regulators (e.g., the Federal Reserve, the Commodity Futures Trading Commission or the Securities and Exchange Commission) may impose sanctions (civil and administrative) for violations of financial market regulations provisions. These sanctions include both financial sanctions of a non-punitive nature (disgorgement) and fines of a punitive nature (civil money penalties, civil fines). The regulators also have the option of entering into so-called deferred prosecution agreements with the companies and terminating the enforcement proceedings through a settlement.

Compared to these international standards, the current Swiss regulatory framework appears to lag behind. It is therefore not surprising that the Financial Action Task Force and the International Monetary Fund have already expressed their expectations that FINMA will be given the power to impose administrative fines.

V. Regulatory Challenges

The Federal Council's proposal to extend FINMA's powers to include pecuniary administrative sanctions does not come as a surprise. The Federal Council has previously been instructed by various parliamentary requests (see, for example, the request submitted by Prisca Birrer-Heimo, a member of the Swiss National Council, on December 17, 2021) to analyze the introduction of such sanctions.

Moreover, the idea of giving FINMA the power to impose administrative fines on supervised institutions has already been considered by the Federal Council in previous years. For example, the possibility of administrative fines as a FINMA sanction was already discussed in connection with the introduction of the FINMASA in 2004. However, the Federal Council ultimately decided not to include them in the draft FINMASA. Similarly, the Federal Council rejected the idea of administrative fines in 2013 and 2014.

In all of these assessments, the Federal Council feared that administrative fines could lead to FINMA's enforcement proceedings being qualified as a "criminal charge" within the meaning of article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such a qualification could allow the persons subject to the enforcement proceedings to refuse to cooperate with FINMA based on their right to remain silent ("nemo tenetur"), thus weakening the effectiveness of FINMA's supervision.

The Report does not yet contain a concrete solution as to how this dilemma can be resolved. However, it reiterates that it is crucial for the effectiveness of FINMA's supervision that the financial market participants are obliged to cooperate with FINMA in enforcement proceedings. Any power of FINMA to impose pecuniary sanctions must not significantly restrict the duty of cooperation of the supervised institutions.

In 2022, the Federal Council published a separate report on the possibility of combining pecuniary sanctions in administrative proceedings with the duty to cooperate by a person subject to such proceedings. The report came to the conclusion that pecuniary administrative sanctions can be embedded in administrative proceedings and that, in the case of such pecuniary administrative sanctions, there are generally three options to address the conflict between the duty to cooperate provided for under administrative law and the self-incrimination defense available under criminal law:

- Option 1: Maintain the status quo (i.e. no legislative clarification on how to resolve the conflict)
- Option 2: Introduce specific legislation establishing the primacy of the duty to cooperate where individuals are in a special supervisory relationship with the relevant government agency
- Option 3: Introduce specific legislation establishing a right of the relevant persons to refuse to cooperate or a prohibition to use the evidence provided by such persons based on their cooperation obligation

The Report emphasizes that option 2 would be applicable in the present case, as the institutions that could be subject to the proposed administrative fines are supervised by FINMA. It is therefore expected that the Federal Council will follow this approach and propose amendments to the Swiss financial market regulations that provide for the primacy of the supervised institutions'

duty to cooperate in enforcement proceedings, even if a conflict arises with their right to remain silent ("nemo tenetur").

VI. Other Relevant Considerations

In addition to the aforementioned effects on the procedural rights of the supervised entities, further aspects should be taken into account when assessing the introduction of administrative fines in financial market regulations. In our view, for example, the following points speak in favor of such fines:

- Unlike a disgorgement of profits, where market participants have – from a mere financial perspective – nothing or little to "lose", fines have a deterrent effect. Thus, fines may result in a general increase of compliance with financial market regulations.
- Fines would also provide FINMA with an additional supervisory instrument. In certain cases, this may allow FINMA to impose a more proportionate sanction on supervised institutions than under the existing legal framework (e.g. if a mere disgorgement of profits seems insufficient to appropriately sanction a market participant, but a withdrawal of its license would be disproportionate and, thus, not be permissible in the relevant case).

On the other hand, in particular, the following aspects speak against the introduction of administrative fines in financial market regulations:

- As long as the administrative fines can only be imposed on supervised entities (and not on individual representatives acting on their behalf), they do not directly sanction the persons responsible for a (potential) breach of financial market rules. Instead, the administrative fines must be paid by the supervised entities and are therefore ultimately borne by their shareholders. However, shareholders may only have a limited influence on ensuring that the supervised institution complies with financial market regulations.
- If FINMA is authorized to impose fines in the future, it will not only be an investigative authority but also a sanctioning authority. This combination of competencies may lead to a concentration of power and raise concerns with regard to FINMA's independency in enforcement proceedings. In general, it is to be expected that the combination of a regulatory and a criminal law element will lead to various new coordination issues for FINMA in enforcement proceedings.

VII. Outlook

Apart from these general considerations, we assume that the Federal Council's work in the coming months will focus primarily on the development of the necessary details for the administrative fines (e.g. their maximum amount or statute of limitations). While the Report remained vague on these details, it will be interesting to see what concrete proposals the Federal Council will come up with, in particular in relation to the amendments to the Swiss financial market legislation that are required to ensure the primacy of the supervised institutions' duty to cooperate in enforcement proceedings as well as other legislative changes that are necessary to implement administrative fines in FINMA's enforcement proceedings.