

# Circular 2017/6

## Direct transmission

### Direct transmission of non-public information to foreign authorities and entities by supervised parties

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Adressees																												
BankA			ISA		FinIA				FMIA			CISA			AMLA		Other											
Banks	Financial groups and congl.	Other intermediaries	Insurers	Insurance groups and congl.	Intermediaries	Portfolio managers	Trustees	Managers of collective assets	Fund management companies	Investment firms (proprietary trading)	Investment firms (non propriat. trading)	Managers of the assets of occupational benefits schemes	Trading venues	Central counterparties	Central securities depositories	Trade repositories	Payment systems	Participants	SICAVs	Limited partnerships for CISs	SICAFs	Custodian banks	Representatives of foreign CISs	Other intermediaries	SRO	SRO-supervised institutions	Audit firms	Rating agencies
X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X			

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## **I. Subject matter**

To aid interpretation of Article 42c paras. 1–4 of the Financial Market Supervision Act of 22 June 2007 (FINMASA; SR 956.1), this Circular sets out in detail the conditions that must be met for supervised parties to transmit non-public information to foreign authorities and entities as well as the circumstances under which the intended transmission of information must be reported to FINMA beforehand. 1

## **II. Scope of application**

This Circular applies to all persons and entities supervised by FINMA in accordance with Article 3 FINMASA. 2

## **III. General information**

Article 42c FINMASA applies to all transmissions of information that is not publicly accessible ('information') by supervised parties. Transmissions under Article 42c FINMASA may be made spontaneously or in response to a request from a foreign authority or entity. 3

Article 42c FINMASA only applies when information is transmitted from Switzerland to another country, i.e. across national borders. Where representatives of the foreign authority or entity are in Switzerland, the transmission of information to these is not permitted under Article 42c FINMASA. Where information is to be shared with foreign authorities or entities inside Switzerland, the provisions of Article 43 FINMASA (on-site supervisory reviews) apply. 4

Where supervised parties transmit information 5

- to one of their subsidiaries or branches that is domiciled outside Switzerland or
- to a service provider working for them (within the meaning of Margin no. 2 of FINMA Circular 2008/7 'Outsourcing – banks') that is domiciled outside Switzerland,

and the information is subsequently forwarded to a foreign authority or entity outside Switzerland, the question of whether such forwarding is permissible is in principle a matter of foreign law. Article 42c FINMASA does not apply in such cases.

It does apply where the supervised party does transmit the information to its foreign outsourcing partner or group entity for the purpose of subsequently forwarding it outside Switzerland. 6

#### **IV. Article 42c para. 1 FINMASA – transmission of non-public information to competent foreign financial market supervisory authorities and other foreign entities responsible for supervision**

##### **A. Terms**

###### **a) Supervised parties**

Article 3 FINMASA defines supervised parties as a. ‘persons and entities that under the financial market law require to be licensed, recognised or registered by the Financial Market Supervisory Authority’ and b. ‘collective capital investments’ [sic]. 7

###### **b) Competent foreign financial market supervisory authorities**

Potential recipients of information transmitted under Article 42c para. 1 FINMASA include competent foreign financial market supervisory authorities. 8

An authority is a state-controlled or autonomous organisation that performs public administration functions and represents the State or the public administration externally within its assigned area of responsibility. 9

The foreign authority must have a legal mandate giving it financial market supervisory powers, but it does not need to have exactly the same powers as FINMA. The decisive factor is whether it performs any actual supervisory tasks, even if these are only secondary functions – as is the case, for example, with some central banks. If a financial market supervisory authority additionally has powers under criminal law, this does not exclude it from qualifying as a financial market supervisory authority for the purposes of this Circular. 10

The term ‘supervision’ here relates to enforcing financial market law (Art. 1 para. 1 FINMASA), in particular prudential requirements in terms of solvency and organisation, requirements for ensuring proper business conduct and all specific conduct requirements. This includes in particular the functions of authorisation, ongoing supervision and enforcement, measures in the event of a crisis and resolution. 11

Foreign authorities whose activities relate exclusively to criminal prosecution and taxation, among others, do not qualify as financial market supervisory authorities within the meaning of Article 42c para. 1 FINMASA. Accordingly, transmitting non-public information to such authorities is not permitted under Article 42c para. 1 FINMASA. Foreign financial market supervisory authorities or other entities responsible for supervision are not permitted to forward information to such authorities unless they do so for the sole purpose of enforcing financial market law (Art. 42c para. 1 let. a in conjunction with Art. 42 para. 2 let. a FINMASA, see Margin no. 19). 12

A foreign financial market supervisory authority qualifies as competent if the applicable foreign laws assign to it the specific supervisory task for which it is requesting information in a given case. 13

**c) Other foreign entities responsible for supervision**

In accordance with Article 42c para. 1 FINMASA, non-public information may also be transmitted to other foreign entities responsible for supervision. These are not authorities within the meaning of Margin no. 9 but perform supervisory functions on the basis of foreign legal norms or delegation by a competent foreign financial market supervisory authority. 14

It is not permissible, for example, to transmit information under Article 42c para. 1 FINMASA to entities that exclusively perform tasks not covered by financial market law, such as those under tax, criminal or competition law. 15

**d) Clients**

Clients are the natural persons and legal entities FINMASA and the financial market law are intended to protect, namely creditors, investors and insured persons (Art. 5 FINMASA). 16

**e) Third parties**

Third parties are to be understood as all other natural persons and legal entities that are mentioned in the information to be transmitted or can be identified from it, including employees of supervised parties, authorised representatives and beneficial owners. 17

**f) Transmission of information**

The term 'transmission of information' refers to the process whereby information is brought to the attention of another party, regardless of how this is done (on paper, electronically, face to face, by telephone, etc.) and whether it is done directly or through third parties. 18

**B. Conditions for transmitting non-public information to competent foreign financial market supervisory authorities and other entities responsible for supervision (Art. 42c para. 1 let. a in conjunction with Art. 42 para. 2 FINMASA)**

Transmitting non-public information to competent foreign financial market supervisory authorities and other entities responsible for supervision is only permitted if the conditions set out in Article 42 para. 2 FINMASA are met. 19

FINMA publishes a list of financial market supervisory authorities to which it has provided administrative assistance in the past. The courts have additionally ruled that specific authorities on the list meet the conditions regarding the principles of speciality and confidentiality or met them in a specific case at the time the decision was made. 20

If an authority appears on the list, supervised parties may assume that it meets the conditions regarding the principles of speciality and confidentiality.	21
Supervised parties must seek further clarification and take further precautions in particular when	22
• the financial market supervisory authority or entity requesting the information does not appear on the list mentioned in Margin no. 20;	23
• the financial market supervisory authority or entity requesting the information does not state the purpose for which the information is to be used or	24
• there is reason to suspect that the financial market supervisory authority or entity requesting the information will not keep it confidential in the case in question or will not use it solely for the purpose of enforcing financial market law or that it will not forward it to other authorities, courts or bodies exclusively for this purpose.	25
The principles of speciality and confidentiality may be clarified, for example, with confirmation from the foreign authority or entity, with a written opinion from a local lawyer specialising in financial market law or an international law firm, or in any other appropriate manner.	26
If, despite clarification, doubt remains whether the requirements regarding the principles of speciality and confidentiality are met, the supervised party must not transmit the information.	27
If a supervised party has reason to suspect that a specific financial market supervisory authority or entity to which information is to be transmitted does not meet the conditions regarding the principles of speciality and/or confidentiality, for example because confidential information has been published in the press, it must inform FINMA about this, even if it concerns an authority on the list mentioned in Margin no. 20.	28
Regardless of whether or not it can be assumed that the information transmitted will be handled subject to the conditions regarding the principles of speciality and confidentiality as mentioned in Margin no. 21, or whether or not further clarification and precautions are necessary (Margin nos. 22–25), supervised parties must inform the foreign authority or entity in writing or by e-mail or fax every time information is transmitted that the information transmitted must be kept confidential and used solely for the purpose of enforcing financial market law or forwarded to other authorities, courts or bodies for this purpose (Art. 42c para. 1 let. a in conjunction with Art. 42 para. 2 FINMASA).	29
<b>C. Preserving the rights of clients and third parties (Art. 42c para. 1 let. b FINMASA)</b>	
With regard to the rights of clients and third parties, supervised parties must inter alia preserve business and bank-client confidentiality, data protection and rights pertaining to employment relationships.	30

The precautions to be taken in each case depend on the applicable Swiss law, compliance with which is the responsibility of supervised parties. 31

## **V. Article 42c para. 2 FINMASA – transmission of non-public information related to the business activities of clients and supervised parties to foreign authorities and entities acting on their behalf**

### **A. Distinction relative to Article 42c para. 1 FINMASA**

The purpose of Article 42c para. 2 FINMASA is to ensure that supervised parties can themselves transmit directly to other countries information that must be supplied because of and in connection with the conducting of business activities of clients and supervised parties (e.g. to a transaction register or a foreign exchange's reporting office). 32

Article 42c para. 2 FINMASA goes beyond the scope of Article 42c para. 1 FINMASA, but it is also subsidiary to the latter. It is only permissible to transmit information under Article 42c para. 2 FINMASA if the conditions set out in Article 42c para. 2 FINMASA are met and transmission under Article 42c para. 1 FINMASA is not permitted because 33

- the information is not being transmitted to an authority within the meaning of para. 1 or
- the information to be transmitted is not to be used for the purpose of enforcing financial market law.

### **B. Terms**

#### **a) Foreign authorities**

The authorities (see Margin no. 9) to which information may be transmitted under Article 42c para. 2 FINMASA, provided the other conditions are met, are those to which the applicable law requires the information to be reported. 34

It is not permissible to transmit information to foreign criminal or tax authorities under Article 42c para. 2 FINMASA. The transmission of information to foreign financial market supervisory authorities or entities acting on their behalf is usually covered by Article 42c para. 1 FINMASA. 35

#### **b) Entities acting on behalf of foreign authorities**

Entities acting on behalf of foreign authorities are entities that are not authorities within the meaning of Margin no. 9 but receive reports either under foreign laws or through delegation by a competent authority. These may include in particular self-regulatory organisations, 36

exchanges, reporting offices, custodian banks, central counterparties, transaction registers and companies with equity securities listed on an exchange.

If there is reason to suspect that such an entity is acting on behalf of a foreign tax or criminal prosecution authority, transmitting information to it is not permitted under Article 42c para. 2 FINMASA. 37

**c) Clients, third parties, transmission of information**

Please refer to Margin nos. 7 and 16–18 for definitions of the terms ‘clients’, ‘third parties’ and ‘transmission of information’. 38

**C. Information that may be transmitted under Article 42c para. 2 FINMASA**

Supervised parties may only transmit information under Article 42c para. 2 FINMASA if it is related to the business activities of clients and supervised parties. These must be business activities that supervised parties usually conduct as part of their authorised business for clients, themselves or group entities abroad, for example securities transactions. 39

It must be necessary to transmit the information under Article 42c para. 2 FINMASA to conduct business activities in compliance with the applicable foreign law. 40

If the information to be transmitted goes beyond what is required to conduct the business activities in compliance with the applicable foreign law, transmission is not permitted under Article 42c para. 2 FINMASA. In this case, only transmission under Article 42c para. 1 FINMASA can be considered, provided the conditions for this are met. 41

**D. Preserving the rights of clients and third parties**

Please refer to Margin nos. 30 and 31 with regard to preserving the rights of clients and third parties. 42

**VI. Article 42c para. 3 FINMASA – compulsory reporting to FINMA beforehand**

**A. Definition of information under Article 42c para. 3 FINMASA**

The intended transmission of information under Article 42c FINMASA must be reported to FINMA beforehand if 43

- the information itself is of substantial importance within the meaning of Article 29 para. 2 FINMASA, such that it would be subject to a reporting obligation regardless of any transmission; or 44

- the transmission itself is of substantial importance; information can thus become substantially important as a result of the fact that it is intended for transmission abroad. 45
- Substantial importance is assessed at the time of the transmission. 46
- Examples of information for which transmission must always be reported to FINMA beforehand include in particular:
- information that is to be transmitted under Article 42c para. 1 FINMASA to financial market supervisory authorities that do not appear on the list of authorities to which FINMA has provided administrative assistance in the past (Margin no. 20); 47
  - information that is obviously not necessary for the purpose stated by the authority requesting it or that is obviously disproportionate in scope; 48
  - information destined for foreign preliminary investigations and proceedings that could lead to sanctions, which in turn could have a significant impact on the risks of a supervised party; 49
  - information relating to potential violations of Swiss law that could have a significant impact on the risks of a supervised party; 50
  - relevant supervisory and enforcement files in the context of supervision by FINMA and its agents, such as reports on FINMA supervisory reviews, information related to FINMA audits (Art. 24 FINMASA) and correspondence with FINMA or its agents regarding investigations and proceedings; 51
  - information on the balance sheet and income statement or risk that is not directly related to the business activities of the entity (e.g. foreign subsidiary) supervised by the competent foreign authority– this applies to both actual figures and forecasts; 52
  - reports on the current assessment of the internal control system (management) and the risk situation, e.g. reports by internal auditors and the statutory audit firm and own risk and solvency assessments (ORSAs); 53
  - reports on ongoing legal proceedings (conduct, legal, litigation); 54
  - information produced or collected in performance of the duties of the executive board and/or board of directors (including the corresponding meeting minutes); 55
  - information on capital planning, including the results of stress tests; 56
  - crisis information and information on crisis management, in particular on recovery and resolution plans. 57

Examples of information for which transmission does not have to be reported to FINMA beforehand include the following in particular:	58
<ul style="list-style-type: none"><li>• information (e.g. on the balance sheet and income statement or risk) related to a local entity, for example information on a subsidiary intended for the local financial market supervisory authority or entity that supervises it;</li></ul>	59
<ul style="list-style-type: none"><li>• internationally recognised capital and liquidity figures that must be published periodically (e.g. Common Equity Tier 1 (CET 1), leverage ratio, liquidity coverage ratio (LCR), net stable funding ratio (LCR) etc.);</li></ul>	60
<ul style="list-style-type: none"><li>• solvency certificates issued by a group's head office for a foreign branch;</li></ul>	61
<ul style="list-style-type: none"><li>• details of organisational structure (e.g. organisational regulations) and governance aspects (e.g. responsibilities of the committees attached to the board of directors and/or executive board);</li></ul>	62
<ul style="list-style-type: none"><li>• details of the current earnings situation of a business unit, the activities of which mostly fall under the responsibility of the financial market supervisory authority or entity requesting the information;</li></ul>	63
<ul style="list-style-type: none"><li>• management policy and guidelines that have a direct impact on the foreign entity;</li></ul>	64
<ul style="list-style-type: none"><li>• institution-specific and product-specific information covered by the usual obligations to report to foreign supervisory authorities and other foreign authorities as well as entities acting on their behalf with which the supervised party itself is directly registered or by which it is directly authorised or to which it must report on account of its activities in the jurisdiction in question, e.g. because shares belonging to its clients are held in custody abroad;</li></ul>	65
<ul style="list-style-type: none"><li>• general instructions, terms and conditions, anonymised forms and similar general documents intended for handing over at the point of sale;</li></ul>	66
<ul style="list-style-type: none"><li>• reports on finally disposed proceedings:</li></ul>	67
<ul style="list-style-type: none"><li>• certificates or confirmations held by the supervised party that relate to public information, for example confirmation of a member of the executive board on submitting the risk report as part of the annual reporting.</li></ul>	68
If a supervised party intends to transmit similar information that is subject to a reporting requirement to a foreign authority or entity repeatedly or on a regular basis, FINMA may waive the need for future transmissions to be reported to it beforehand either on its own initiative or on request.	69

## B. Procedure

The supervised party's report must include the information to be transmitted, and any documents to be transmitted must be attached. If the documents are very extensive, a summary of the information to be transmitted may be attached instead of the documents by agreement with FINMA. 70

Reports concerning the transmission of information of substantial importance in accordance with Article 42c para. 3 FINMASA must be addressed to the FINMA contacts responsible for the supervised parties concerned. On receiving a report, FINMA usually informs the supervised party within five working days as to whether it is reserving administrative assistance channels. This deadline may be extended in certain cases, for example due to their complexity. The supervised party is allowed to inform the foreign authority or entity about such extensions. In urgent cases, the supervised party must contact FINMA without delay. 71

No transmission of information subject to Article 42c para. 3 FINMASA may be carried out before FINMA has provided a response. 72

FINMA then informs the supervised party as to whether it is reserving administrative assistance channels in accordance with Article 42c para. 4 FINMASA or refraining from doing so. It may refrain subject to certain conditions, e.g. that the supervised party only directly transmits some of the requested information. It may also forbid the transmission of files in the context of supervision under Article 42c para. 5 FINMASA. 73

On receiving a report under Article 42c para. 3 FINMASA, FINMA does not verify whether the conditions for transmission under Article 42c paras. 1 and 2 FINMASA are met, in particular whether the rights of clients and third parties are preserved. The supervised party is responsible for checking that these conditions are met. 74

## **VII. Article 42c para. 4 FINMASA – reserving administrative assistance channels**

Direct transmissions of information are permitted under Art. 42c paras. 1 and 2 FINMASA, provided that FINMA does not reserve administrative assistance channels. 75

FINMA may also reserve administrative assistance channels at any time on a preventive basis, i.e. regardless of any specific intention to transmit information or submit reports under Article 42c para. 3 FINMASA. 76

FINMA informs the supervised party that it is reserving administrative assistance channels. Such reservation continues to apply until it is withdrawn. 77

FINMA informs the foreign supervisory authority that it is reserving administrative assistance channels. The supervised party may inform the foreign authority itself by agreement with FINMA. 78

Instead of reserving administrative assistance channels, FINMA may also demand that planned transmissions of information are reported to it beforehand by analogy with Article 42c para. 3 FINMASA. 79

### **VIII. Implementation**

Supervised parties must issue internal directives governing the processes required for compliance with Article 42c FINMASA. 80

Supervised parties for which the transmission of information under Article 42c FINMASA is of little or no relevance must record this fact in an appropriate manner. If they do so, the aforementioned processes and directives are not required. 81

### **IX. Auditing**

The appropriateness of the rules governing these processes and compliance with them are subject to auditing in accordance with FINMA Circular 2013/03 'Auditing'. 82

### **X. Transitional provision**

The processes and directives mentioned in Margin no. 80 must be implemented by 30 June 2017. 83