



Media Release

Contact Tanja Kocher
Phone +41 31 323 08 57
Fax +41 31 322 69 26
E-mail tanja.kocher@ebk.admin.ch
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SFBC opting for modification of legislation on granting administrative assistance to foreign regulators of capital markets

Swiss legislation regulating international administrative assistance among regulators in matters of insider trading and other market abuses do not allow for adequate exchange of information between the Swiss Federal Banking Commission and its foreign counterparts. This calls for an amendment in the benefit of the Swiss financial market.

January 23, 2002 - A recent decision rendered on December 20, 2001 by the Swiss Federal Court in the case ABB/Elsag Bailey left the SFBC unable to grant administrative assistance to the Securities and Exchange Commission (SEC), one of the US supervisor of exchanges and financial markets. In view of Swiss laws currently in force, the SFBC estimates this verdict to be understandable. Most unfortunately, however, concerns expressed by the SFBC following the first decision rendered in this matter proved to be well-founded. Swiss legislation setting the conditions for the SFBC to cooperate with foreign supervisory authorities in matters of insider trading and stock market offences are inadequate for achieving its own objectives.

In a world of increasing internationalization of financial markets where national borders become irrelevant, there is a growing need for adequate cooperation among regulators. Foreign financial intermediaries (and their customers) are granted authorizations to engage in trans-border securities dealing provided that accountability to the competent regulator is given. In the event of investigations into transactions effected on their home markets, regulators expect such information to be made available to them expediently. Names of individuals having placed a particular order or having benefitted from such order are, of course, of key importance. The SFBC's needs are identical with regard to transactions effected on the Swiss markets. Any international financial market needs to be in a position to cooperate efficiently with its foreign counterparts. If legislation prevents it from doing so, amendment is called for.

Swiss law grants protection to customers at a level which is unique in the world: they are entitled to be heard, to be delivered formal notice and to appeal to the Federal Court before their identity is disclosed to the supervisory authority of the country where the transactions were made. This means that the Swiss rules not only prevent action from being taken expediently but in certain cases transmitting information is at all impossible. They even prevent foreign authorities from taking enforcement action regarding transactions made on their own territory. If, even in a case where there is strong presumption that one is dealing with a perfect insider, applicable laws prevent from ex-



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changing information among regulators, which was the case in the matter the Federal Supreme Court ruled on, such law needs to be amended in response to the international context securities dealers operate in today. An amendment would serve the interests of the Swiss financial market, promoting Switzerland's reputation and its access to international financial markets.

As a consequence, the SFBC will submit a proposal for an amendment to the Federal Department of Finance for the attention of the Federal Council and the Parliament. In the meantime, the SFBC suggests to the SEC to draw on legal assistance in criminal matters as before the enactment of the Securities Act; the SFBC will exhaust all possibilities existing under current law in the attempt to satisfy justified requests of foreign regulatory authorities.



Supplementary – technical - information to the press

1. Pursuant to Art. 38 of the Securities Act, the SFBC is allowed to transmit information to foreign securities regulators provided that the recipients are subject to professional secrecy (principle of confidentiality), use information for supervisory purposes exclusively (principle of speciality), and refrain from disclosing it to third parties without SFBC's prior approval (so-called principle of the long arm).

Swiss Federal Act on Exchanges and Securities Dealing (Sys.reg.no. 954.1) Art. 38 Administrative assistance¹

¹ The supervisory authority [*i.e., the SFBC; the translator*] may request foreign supervisors of exchanges and securities dealing to transmit information and the documentation necessary for enforcement purposes of the present Act.

² It is authorized to transmit pertaining information to foreign supervisory authorities of exchanges and securities dealing provided that such authorities:

- a. use this information for purposes of direct supervision of exchanges and securities dealing only;
- b. are subject to official or professional secrecy;
- c. will transmit the information to competent authorities and supervisory bodies instituted in the public interest only upon prior consent given by the Swiss supervisory authority or under a pertaining international treaty providing a generalized legal basis. In case legal assistance is not permitted, no information may be forwarded to authorities investigating penal matters. The supervisory body shall determine in accordance with the Federal Office of Justice².

³ The Federal Act on Administrative Procedure³ applies to the transmission of information by the supervisory body revealing a securities dealer's customer's identity. No information may be transmitted on individuals or entities who are not involved in a matter calling for investigative proceedings to be initiated.

2. In the case discussed, the SEC had requested information on the purchase of Elsag Bailey shares, listed with US stock exchanges, by the intermediary of a Swiss bank right before the public offering of Elsag Bailey shares submitted by Asea Brown Boveri in the fall of 1998. As soon as the bid was made public, the Elsag Bailey shares gained considerably. The customer who had benefitted from the transactions filed an appeal with the Federal Court against SFBC's decision to grant administrative assistance to the SEC. On May 1, 2000 (126 II 126), the Federal Court admitted the appeal and repealed SFBC's decision on the grounds that the SEC did not provide sufficient guarantees for the information to be used according to the requirements of Swiss legislation.

¹ Inofficial translation by the Secretariat of the SFBC

² Previously: the Federal Office of Police Matters

³ Sys.reg.no. 172.021



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3. The SFBC took the matter very seriously and initiated top level negotiations with the SEC in an attempt to obtain sufficient guarantees to satisfy the Federal Court decision. It even mandated an US attorney perfectly familiar with the matter in order to defend Switzerland's position in the negotiations over the new understanding. The SFBC determined anew, again in favor of the SEC, followed by another appeal filed against it with the Federal Court. The latter determined on December 20, 2001 (2A.349/2001) that the new guarantees offered by the SEC were still insufficient. It held that the principle of public hearings in US district courts, a US constitutional right, was incompatible with the requirements of the Swiss Act's rules on administrative assistance for as long as the SEC did not represent to use best efforts towards limiting the publicity in hearings. The same applied to the fact that the SEC publishes the name of the parties summoned in a "litigation release".

Note

- For further information please contact: Tanja Kocher, Head of Communication (+41 31 323 08 57)
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