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Investment advice and asset management

The SBA clarifies certain obligations with regard to sustainable finance

Par Yannick Caballero Cuevas le 4 July 2022

On June 28, 2022, the Swiss Bankers Association (SBA) published two self-regulatory guidelines on sustainable finance for its members. The first guideline concerns the integration of ESG preferences and risks by financial service providers (providers) in their investment advisory and asset management activities. The second directive is aimed at mortgage providers, who are required to address the issue of energy efficiency and the preservation of the long-term value of buildings when granting financing. The present commentary is limited to presenting the obligations set out in the first directive mentioned above. It does not deal with the implementation of this directive, nor with the various definitions contained therein.

With this directive, the SBA aims, on the one hand, to set a uniform minimum standard for the integration of ESG preferences and ESG risks in investment advice and asset management, and on the other hand, to prevent greenwashing in the context of these activities. Accordingly, the directive applies only to the financial services of investment advice and asset management, to the exclusion of other financial services (cf. art. 3 let. c LSFin).

In addition to the rules contained in the LSFin on the obligation to inform (cf. art. 8 ff LSFin), the directive specifies these rules when ESG investment solutions are offered. In particular, providers must provide general information on the various ESG investment solutions available, to enable customers – who have expressed ESG preferences – to understand the ESG characteristics of these investments. Providers may also specify the ESG approaches followed in the different ESG investment solutions. In addition, as soon as customers choose an ESG investment solution, they should be informed about how this solution integrates their ESG preferences. In this context, service providers must refrain from providing false or misleading information to customers to avoid any accusations of greenwashing, which in our opinion could possibly be analyzed under the angle of fraud (art. 146 StGB) or unfair management (art. 158 StGB).

The directive is also intended to supplement art. 10 ff LSFin. Firstly, when verifying appropriateness (cf. art. 11 LSFin) or suitability (cf. art. 12 LSFin), providers must include customers' ESG preferences. To do so, they must collect the relevant information from their customers. One way of doing this is to determine what the customer understands by sustainable, taking into account the carbon footprint of companies according to the various scopes of the GHG Protocol corporate standard, and thus excluding or including certain types of investment. This data collection must be homogeneous within the framework of asset

management activities or investment advice based on the entire portfolio. It is worth noting that these ESG preferences do not override the client's investment objectives. Furthermore, if the client does not express any ESG preferences, the service provider is under no obligation to take ESG criteria into account, unless he deems it appropriate in the context of carrying out his mandate. Furthermore, the Directive stipulates that if the client has been asked about his ESG preferences, but does not respond, the service provider may assume that the client is ESG neutral. In this case, ESG criteria need not be taken into account. We can therefore deduce from art. 11 par. 7 of the directive an obligation on providers to find out about their customers' ESG preferences.

In addition, the directive specifies that certain information must be appropriately documented by providers in accordance with art. 15 LSFin. For example, it must be documented whether clients have an ESG preference and what it is, or whether they are neutral, or whether the ESG characteristics of an investment solution or financial instrument correspond to the client's ESG preferences. Providers may also be required to report to customers on whether or not these preferences match the investment solutions or financial instruments offered (cf. art. 16 LSFin).

Finally, according to the directive, providers must ensure that the ESG characteristics of the investment solution or financial instrument are in line with the ESG preferences of clients, both in the context of investment advice based on individual transactions and on the portfolio or asset management as a whole. They must also clearly indicate investment solutions or financial instruments that deviate from the client's ESG preferences, and communicate this to the client as part of the recommendation. In this way, the transaction cannot be executed by the service provider without first informing the client. However, the execution of such a transaction does not imply a global modification of the client's profile.

In our opinion, this directive is to be welcomed, as it clarifies, on the one hand, the various obligations for financial service providers in the field of investment advice and asset management, when customers express ESG preferences. On the other hand, it obliges providers to classify customers according to their ESG interests and preferences, so that they can be proactive in collecting this information from their customers. It should be noted that this directive will come into force on January 1, 2023, and provides for transitional periods.

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