CENTRE DE DROIT
BANCAIRE ET FINANCIER

Collective investment schemes

A (welcome) clarification of the obligation to disclose shareholdings

Par Lukaz Samb le 6 October 2022

The Swiss Federal Supreme Court recently clarified the application of the rules on the disclosure of holdings in collective investment schemes (art. 120 ff. LIMF) in a ruling 2C_546/2020 of August 18, 2022, intended for publication. In particular, it held that the parent company of a group composed of collective investment schemes must disclose the latter's holdings on a consolidated basis.

At issue in this case were two foreign-based financial services companies. The first (the controlled company), based in the USA, is mainly active in asset management and the creation and distribution of collective investment schemes. The second (the controlling company), based in Canada, holds 94.65 % of the controlled company's voting rights. Thus, the controlled company and its subsidiaries constitute a sub-group controlled by the controlling company.

At the end of 2017, the two companies requested FINMA to clarify their legal situation with regard to their respective reporting obligations in Switzerland. At issue is which of the controlled or controlling company is subject to the reporting obligation, under Art. 120 LIMF, for holdings in collective investment schemes managed by the controlled company and its subsidiaries.

As a reminder, in the event of failure to comply with this obligation, the applicants are liable to a fine of up to CHF 10 million in the case of intentional breach, and up to CHF 100,000 in the case of negligence (art. 151 para. 1 let. a and 151 para. 2 LIMF).

The applicant companies argued before FINMA that only art. 120 para. 3 LIMF was applicable in this case as a basis for a reporting obligation. In their view, art. 120 para. 1 LIMF is not applicable, since collective investment schemes do not have any beneficial owners (BEs) within the meaning of art. 10 para. 1 OIMF-FINMA. Alternatively, Art. 18 MIFV-FINMA would not be applicable, in the absence of a valid legislative delegation. In this case, pursuant to art. 10 para. 2 OIMF-FINMA, the obligation to notify would fall on the person who can freely exercise the voting rights (art. 120 para. 3 LIMF).

On this latter basis, both the controlling company (in its capacity as parent company) and the controlled company (in its capacity as fund manager) would be empowered to disclose holdings. As a result, and this is the outcome sought by the appellants, the controlling company would not be obliged to disclose insofar as the controlled company already fulfilled this obligation.

FINMA rejected the applicants' conclusion. The Federal Administrative Court confirmed FINMA's decision in ruling B-5291/2018. The applicants appeal against the ruling to the Federal Supreme Court, which is called upon to rule on the application of the rules on disclosure of shareholdings.

The Federal Court begins by pointing out that Art. 120 LIMF establishes two separate disclosure requirements. These serve to ensure sufficient transparency in the chain of ownership of voting rights.

The first, based on art. 120 al. 1 LIMF, is incumbent on the person who actually controls the voting rights. Pursuant to Art. 10 para. 1 MIFV-FINMA, this includes the ADEs that control the voting rights and bear the economic risk associated with the shareholding.

The second, based on art. 120 para. 3 LIMF, also makes any person who freely exercises the voting rights attached to equity securities subject to the reporting obligation. According to art. 10 para. 2 OIMF-FINMA, this second obligation can be fulfilled directly by the person freely exercising the voting rights or, alternatively, by the person dominating them if there is a relationship of domination.

Contrary to the opinion of the appellants, the Swiss Federal Supreme Court finds an application of art. 120 para. 1 LIMF here. In its view, art. 10 para. 1 OIMF-FINMA establishes a rule of principle according to which the obligation to report is incumbent first and foremost on the ADEs. However, collective investment schemes do not have an ADE. In these structures, investors bear the economic risk, while management controls voting rights. Neither party therefore cumulatively fulfills the two conditions required to qualify as an ADE.

However, in the case of collective investment schemes, the management does not bear the economic risk, but retains ultimate control of the voting rights. In order to take this particularity into account, FINMA, by virtue of a valid legislative delegation (art. 123 para. 1 let. a LIMF), has introduced a specific provision applicable to collective investment schemes. In accordance with Art. 18 para. 1 OIMF-FINMA, the obligation to declare under Art. 120 para. 1 LIMF is incumbent on the holder of the authorization. Finally, in the case of foreign collective investment schemes that are not authorized but form part of a group, this obligation is fulfilled within the group (art. 18 para. 4 OIMF-FINMA). It is therefore up to the controlling company, in its capacity as parent company, to fulfill this obligation.

Accordingly, the Swiss Federal Supreme Court concludes that :

The reporting obligation under art. 120 para. 1 LIMF is incumbent on the controlling company. The reporting obligation under art. 120 para. 3 LIMF falls alternatively on the controlling or controlled company.

In this ruling, the Federal Court, rightly in our view, recognizes the broad scope of application of art. 120 para. 1 LIMF. Indeed, the purpose of this standard is to be able to take into account the greatest possible number of transactions with repercussions on voting rights. In this respect, the activities of collective investment schemes must be taken into account. FINMA therefore does not appear to be exceeding the scope of its delegation by providing for a specific standard to achieve this goal.