CENTRE DE DROIT
BANCAIRE ET FINANCIER

***Naming and shaming*.**

What public communication by FINMA ?

Par Célian Hirsch le 19 April 2023

In a (probably recent) undated decision, FINMA confirms the publication of a press release relating to the closure of enforcement proceedings against an expressly named subject. In particular, this decision allows FINMA to argue that such publication does not constitute a sanction (naming and shaming within the meaning of art. 34 FINMASA), but only information to the public within the meaning of art. 22 FINMASA.

At the end of an enforcement procedure, FINMA informs the subject of the procedure that it will publish a press release on the subject. It gives the supervised entity the opportunity to indicate whether there are any errors in the planned press release. The reporting entity does not take a position on the draft press release, but demands that FINMA dispense with it and issue a decision subject to appeal.

In its decision (partly redacted), FINMA begins by recalling the principle enshrined in art. 22 para. 2 FINMASA : “[t]he FINMA does not provide information on specific procedures”. After the rule comes the exception. Thus, FINMA may disclose information on a specific procedure if this is “necessary under supervisory law, in particular if the disclosure is intended to

to protect financial players or persons subject to supervision ;
rectify false or misleading information, or
to protect the reputation of the Swiss financial center.

FINMA sees in public disclosure a certain preventive effect in addition to the primary purpose of information. In particular, it emphasizes the distinction between, on the one hand, the information to the public provided for in art. 22 FINMASA and, on the other, the publication of a supervisory decision within the meaning of art. 34 FINMASA (naming and shaming). This second measure, adopted only at the end of a procedure, enables FINMA to “publish its final decision, including the personal data of the supervised persons concerned”. In addition to its preventive effect, this measure also has a repressive aspect. Although FINMA does not mention this in its decision, the Federal Court recently ruled that this measure does not constitute a criminal sanction within the meaning of art. 6 ECHR (ATF 147 I 57, commented in cdbf.ch/1111/).

As the text of the law indicates, the three aforementioned exceptions are not exhaustive. FINMA considers that it can communicate in the public interest, in the interest of those subject to its control, or in its own interest, in accordance with the aims of financial market supervision under art. 4 FINMASA. Moreover, such communication complies with the DPA, as it is founded on a legal basis in the formal sense. In any event, the communication must comply with the principle of proportionality (fitness, necessity and proportionality in the narrow sense).

In the present case, the taxable person maintains that he himself announced the procedure to FINMA, and that the press release would undermine the “supervisory dialogue”. Furthermore, it claims that a press release based on a non-final decision would be disproportionate, as it would cause irreparable damage to its reputation. Finally, in the absence of a particular supervisory need, publication should only have been made on the basis of art. 34 FINMASA.

Unfortunately, the five paragraphs of FINMA’s decision that respond to this argument have been redacted. Only the paragraph summarizing FINMA’s position is (partially) published. Thus, according to the authority, the press release is of such a nature as to safeguard the public interest in question (suitability criterion), which cannot be achieved by any other means (necessity criterion), and there is a reasonable relationship between the public interest FINMA is seeking to safeguard and the private interests of the taxable person (proportionality in the narrow sense).

This decision clarifies (somewhat) FINMA’s practice with regard to its communication on a specific procedure. That said, the distinction between communication in the public interest (art. 22 FINMASA) and communication as a sanction measure (art. 34 FINMASA) is not necessarily convincing in casu. The fact that the communication does not fall within one of the three exceptions mentioned in art. 22 para. 2 FINMASA, and that it was decided on at the close of the proceedings, rather favours its classification as naming and shaming. The redacted part may justify the opposite solution.

From a broader perspective, FINMA is said to have named the legal entity involved in the proceedings in press releases on only 64 occasions, despite having issued over 500 decisions. This practice differs from that of foreign authorities, which almost systematically publish the names of companies involved in their proceedings (cf. Gava Roy [2021], Challenging the regulators : Enforcement and appeals in financial regulation, Regulation & Governance). As far as individuals are concerned, FINMA has so far never named them directly, the only exception being a former bank CEO.

In our opinion, the fact that the identity of the person (natural or legal) involved in the proceedings is only disclosed in exceptional cases is in line not only with the legislator’s intention as expressed in art. 22 para. 2 FINMASA, but also with the Swiss view that publication of a sanction constitutes an additional sanction in its own right (cf. ATF 147 I 57 rec. 4.2). It seems to us that such restraint in FINMA’s communication is therefore justified. That said, the authority has recently asked to be allowed to communicate further. It remains to be seen whether the Credit Suisse debacle will convince Parliament to grant FINMA greater powers of communication.

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