CENTRE DE DROIT
BANCAIRE ET FINANCIER

Rules of conduct under FinSA

FINMA launches consultation on new circular

Par Rashid Bahar le 24 May 2024

FINMA has published a draft of a new circular entitled “Rules of Conduct under the Investment Services Financing Act and the Investment Services Financing Ordinance”. The aim of the draft is to enhance legal certainty two years after the end of the transitional period following the entry into force of these standards and the first prudential audit cycle on this subject. Overall, it is a relatively modest project. Rather than extending the scope or providing a general commentary, it is intended to clarify the scope on specific issues. However, on certain issues, there is a risk of a side-effect.

On the question of the demarcation between corporate finance and financial services (art. 3 para. 3 let. a OSFin), the draft proposes to qualify services according to the purpose pursued by the client : if the client uses services primarily for industrial, strategic or entrepreneurial purposes, these are corporate finance services. On the other hand, if the service is provided for investment or hedging purposes, it is a financial service (paragraph 3). However, the Explanatory Report casts doubt on this point, suggesting instead that we should consider whether the client is a private individual or a company and, in the latter case, distinguish between the motives that prompt the client to act. In my view, these clarifications pose more problems than they solve : firstly, they ignore the fact that individuals can also be driven by entrepreneurial objectives and, for example, seek to acquire a business in order to develop it. It seems wrong to us to consider that, in a business succession scenario, the LSFin applies to the advisers of the seller, who is seeking to realise his investment and finance his retirement. Even more absurdly, according to FINMA’s reasoning, services rendered to private equity firms could be classified as financial services, since these players are by definition funds that aim to invest in private markets. In our view, it is preferable to determine whether the service relates to corporate finance, as opposed to investment services.

With regard to the duty to provide information (art. 8 LSFin), the draft circular requires investment advisers to specify whether they are offering portfolio advice or purely transactional advice and to document this (Cm 4). In addition, it sets out specific expectations regarding the risks associated with contracts for difference (CFDs), requiring them not only to inform clients of the risks associated with leverage, the operation of margin or counterparty risk, market risk and slippage, but also to disclose the proportion of clients who lose money and have to reinvest funds (Cm 5 to 8). Taking its inspiration from European law, the draft law thus introduces special regulation for this type of financial instrument, which had not been foreseen or envisaged when the LSFin was adopted. On the contrary, the LSFin was intended to create harmonised framework conditions for all financial instruments.

Furthermore, the draft intends to strengthen the information relating to concentration risk in the context of investment advice on the portfolio or asset management, when indications of unusual concentration arise, whether due to exposure to a specific product (10 % threshold) or to an issuer (20 % threshold) (Cm 9 to 11). For good reason, the draft does not apply to collective investment schemes (Cm 12).

In the context of verifying the suitability or appropriateness (Articles 11 and 12 of the Financial Services Act) of investment advice or asset management, the draft circular stipulates that the asset manager must ensure that the client has the knowledge and experience required for each investment category, specifying that the information must be adapted to the complexity and risk profile of the investments likely to be used (paragraph 14). In this respect, FINMA goes further than the LSFin, which specified that the information must relate to the financial service (art. 12 LSFin).

In the area of conflicts of interest (Art. 25 LSFin), the draft circular also seeks to clarify the rules applicable to the consideration of the financial instruments of the financial service provider as part of its offer. It accepts that the financial service provider may consider only its own instruments, but requires that the client be informed of the related risk (paragraph 24). When the service provider envisages a broader investment universe, the circular points out that measures must be taken to avoid conflicts of interest, in particular by means of a selection process based on objective criteria customary in the industry (Cm 25), without specifying whether FINMA considers these measures to be sufficient to exclude the risk or whether information is still required.

Finally, FINMA will also intervene in the controversial context of retrocessions (Art. 26 LSFin) : the draft stipulates that if the amount of retrocessions (and other third-party remuneration) is not known before the financial service is provided or the contract concluded, the service provider must disclose a range of remuneration taking into account different investment categories (Cm 28) and, secondly, in the context of asset management or portfolio investment advice, according to the value of the portfolio (Cm 29). In so doing, FINMA goes beyond the requirements of the FINMA Act and adopts the case law developed by the civil courts in application of Art. 400 CO after the adoption of the FINMA Act (see TF 4A_355/2019 of 13 May 2020, or again for example : TF 4A_496/2023 of 27 February 2024, summary in : Fischer, cdbf.ch/1338/).

Because of the limits of FINMA’s jurisdiction, this draft circular is intended to apply only to entities subject to supervision by FINMA or an SO and not to other financial service providers, in particular those engaged exclusively in the sale of financial products or in investment advice, or to financial service providers that limit themselves to cross-border activity and do not carry out an activity subject to authorisation (see Art. 58 para. 1 FINMA and Art. 2 para. 1 OBE-FINMA). It is to be expected, however, that the criminal authorities, who alone are competent to ensure that these players comply with their duties, will draw inspiration from this.
