CENTRE DE DROIT
BANCAIRE ET FINANCIER

Indirect naming and shaming

Federal Court confirms FINMA’s communication

Par Célian Hirsch le 4 October 2024

FINMA may publish a press release concerning the closure of *enforcement* proceedings against a named subject, in particular to show the public that it is not inactive in the face of violations of financial market law (2C_682/2023 intended for publication).

FINMA closes *enforcement* proceedings against a bank that has seriously violated money laundering regulations. A few weeks later, the regulator informs the bank of its intention to publish a press release on the proceedings six days later. The draft press release expressly names the bank and summarizes the*enforcement* decision. On the bank’s objection, FINMA formally confirms its decision. The Federal Administrative Court temporarily prohibits FINMA from publishing any information. It then dismissed the bank’s appeal, citing an overriding public interest over the private interest of the financial institution (B-4779/2023).

In its appeal to the Federal Supreme Court, the bank argues that if FINMA did not order publication in its decision to close the file (art. 34 FINMASA), it cannot subsequently order publication on the basis of art. 22 para. 2 FINMASA(public information). The Federal Supreme Court is therefore called upon, firstly, to clarify the relationship between these two provisions and, secondly, to examine the legality *in casu* of the disputed publication project.

Art. 34 FINMASA (publication of a supervisory decision) stipulates that in the event of a serious breach of supervisory law, FINMA may publish its final decision, including the personal data of the supervised persons concerned (para. 1). Publication must be ordered in the decision itself (para. 2). This “ *naming and shaming* ” is intended to provoke a special and general preventive effect among people in a particular profession, but not among the general public.

Art. 22 para. 2 let. c FINMASA (public information) stipulates that FINMA does not provide information on specific procedures, unless the provision of information is required by supervisory law, in particular if the purpose of the disclosure is to safeguard the reputation of the Swiss financial center.

The Federal Court emphasizes that these two provisions (art. 22 and art. 34 FINMASA) must not be confused. They are two distinct instruments, subject to their own conditions, applicable cumulatively and with different functions. In addition, the Federal Council is considering proposing a revision of art. 22 FINMASA with a view to obliging – and no longer merely authorizing – FINMA to inform the public in principle about all closed*enforcement* proceedings (cf. cdbf.ch/1343/). Finally, with one exception – namely the undersigned (cdbf.ch/1281) – the doctrine does not criticize FINMA’s practice of informing the public. Accordingly, FINMA may inform the public, within the meaning of art. 22 FINMASA, of the closure of an*enforcement* procedure by naming the person concerned, even if it has not ordered publication of the decision in accordance with art. 34 FINMASA.

This being the case, the Federal Court acknowledges that the effects of these two provisions may overlap, and in particular that art. 22 FINMASA may have an indirect *naming and shaming* effect. Accordingly, FINMA’s decision to disclose under art. 22 para. 2 FINMASA must be subject to effective judicial review (art. 29a Cst.). FINMA must inform the persons concerned in good time of its intention to communicate on the procedure, so that they can request a decision in accordance with art. 25a PA. In addition, FINMA’s formal decision to communicate must not be immediately enforceable, so that the persons concerned can have an appropriate period of time to refer the matter to the appeal authority.

Secondly, the Federal Supreme Court examines whether the publication of the disputed press release meets a need dictated by supervisory law and, in particular, whether it actually serves to safeguard the reputation of the Swiss financial center within the meaning of art. 22 para. 2 let. c FINMASA. Once again, the Federal Supreme Court points out that the Federal Council has emphasized the desirability of providing the public with more comprehensive information on FINMA procedures, in order to improve the image of the Swiss financial market. At present, however, Art. 22 para. 2 FINMASA imposes a restrictive approach, in view of parliamentary fears that too much information from FINMA could bring the Swiss financial centre into disrepute.

In the present case, the procedure concerned by the draft press release has been the subject of considerable media attention. The underlying events have kept the US authorities busy. The press release will thus serve to remind the public that FINMA did not remain passive in the face of the bank’s suspected misconduct, which in itself is likely to enhance the reputation of the Swiss financial center within the meaning of art. 22 para. 2 let. c FINMASA. The Federal Court also considers that the communication is proportionate. Indeed, it very briefly summarizes a 119-page decision and only names the bank. It was also apt to achieve its aim, namely to demonstrate that FINMA was not inactive. Finally, even if the communication risks attracting renewed media attention, it does not unduly infringe the bank’s personal rights. The Federal Court therefore dismisses the appeal.

This ruling, intended for publication, is welcome from a procedural point of view. It clarifies the safeguards that FINMA must respect before issuing a press release by name. The ruling is perhaps more questionable from the point of view of proportionality : is public information, naming the subject, really appropriate and necessary to enhance the reputation of the Swiss financial center ? It would be advisable for our authorities to examine precisely the proportionality of public information, before simply following the international trend (cf. cdbf.ch/1281).

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