CENTRE DE DROIT
BANCAIRE ET FINANCIER

Suitability test

Quo vadis ?

Par Sébastien Pittet le 8 April 2025

There is debate about the extent to which the client's knowledge and experience should be gathered as part of the suitability test. The solution proposed by Art. 12 para. 2 FinSA is probably not satisfactory for the investment advisory service. For the management service, the interpretation of this provision proposed by FINMA in its Circular 2025/2 on the rules of conduct according to FinSA and FinSO has been fairly criticized and, according to some, deviates from the will of Parliament.

Art. 12 LSFin specifies the obligation to verify the suitability of the financial services provider who provides a portfolio management or investment advice service taking into account the entire portfolio.

Art. 12 ph. 2 LSFin specifies that "the client's knowledge and experience relates to the **financial service** and not to each individual transaction" (emphasis added). This clarification, which did not appear in the Federal Council's draft, was added following parliamentary debates. In Circ. FINMA-2025/2, FINMA specifies in Cm 14 that service providers must "inquire about the knowledge and experience of their clientele **for each category of investment** included in their financial service offering (…) taking into account the characteristics of the investment strategy **as well as the types of financial instruments used**" (emphasis added). The commentary to this circular states that "knowledge and experience do not have to be clarified for each transaction".

By introducing a control based on the "characteristics of the investment strategy" as well as on the "types of financial instruments used", FINMA establishes, in our opinion, an intermediate level between an assessment of knowledge and experience relating to the "financial service" and "each individual transaction". This approach – admittedly different from the letter of art. 12 ph. 2 LSFin – is quite close to the position of ESMA (p. 50, regarding the portfolio management service : "the client should at least understand the overall risks of the portfolio and possess a general understanding of the risks linked to each type of financial instrument that can be included in the portfolio").

In a letter dated January 15, 2025, the Association of Swiss Private Banks (ASPB) questioned the legality of this interpretation by FINMA (as had already been done by several stakeholders during the hearing procedure for the circular / see also the report on the results of the hearing). In its response of February 7, 2025, FINMA slightly modified its position for the management service, specifying that it "is more a question of looking at the types of products that **contribute**

significantly to the definition of the concrete investment strategy" to enable the client to assess the risks associated with the investment strategy (emphasis added). Regardless of the legality of FINMA's interpretation of Art. 12 LSFin, the legitimacy of the authority's process is questionable (legal provision interpreted/modified by a circular ; itself specified by a commentary ; then again by a letter to a professional association).

The analysis of the issue related to Art. 12 ph. 2 LSFin must be split according to the service provided.

In the **portfolio management service**, the client delegates the investment activity to his manager. Is it necessary for the manager to have a precise understanding of the nature and risks associated with all the different financial instruments that make up his portfolio ? It is precisely in order to delegate this task to his manager that he uses this service. The client's lack of understanding of a specific product (*e.g.*, *hedge fund* or structured product) should not prevent the manager from using this instrument if it is suitable for the investment strategy chosen by the client and does not *contribute significantly* to the investment strategy. Conversely, it is probably true that in order to accept a proposed strategy, the client should understand its content (at least the investment categories that contribute significantly to the strategy). The implementation of a strategy that complies, for example, with the requirements set out in the SBA Guidelines on Asset Management Mandates should not require the client to have more financial knowledge and experience (nor additional explanations / art. 14 para. 3 FinSA). However, this conclusion must be qualified when the strategy proposed to the client is highly complex or involves particularly significant risks.

It should be noted that the provision of an adequate service does not exempt the service provider from its duty to provide information (art. 8 LSFin). According to this provision, the service provider informs its client in particular about the general risks associated with financial instruments as well as the risks associated with the financial service (and the investment strategy / art. 7 para. 2 let. b OSFin).

In the **investment advisory service** taking into account the entire portfolio, limiting the verification of the client's knowledge and experience to the financial service is probably not justified. In an advisory relationship, it is the client who makes the investment decision. Contrary to the text of Art. 12 para. 2 FinSA, it should be necessary for them to understand not only the nature of the service, but also each individual recommended transaction (as is already the case for investment advice related to isolated transactions / Art. 11 FinSA). This element was also rightly specifically mentioned in the Message on FinSA (p. 8157).

The fact remains that the solution adopted by Art. 12 para. 2 FIDLEG currently applies in the context of supervisory law. FINMA does not have the necessary tools to remedy this legislative inconsistency (on this point, the position of the authority in its response to the ABPS differs from the FinSA). This point can only be corrected through an amendment to the FinSA. In the meantime, the service provider should bear in mind that the FinSA standards are not of a dual nature (*Doppelnorm*) and do not constitute a *safe harbor* under private law. Civil courts could therefore consider that limiting the verification of the client's knowledge and experience to the service is insufficient for all types of investment advice.