CENTRE DE DROIT
BANCAIRE ET FINANCIER

Carrying out an activity without authorisation

The consequence is compulsory liquidation

Par Romain Dupuis le 28 October 2025

In a recent judgment intended for publication (judgment 2C_597/2024 of 16 September 2025), the Federal Court confirmed the liquidation of a company that had carried out the activity of an issuing house (see Art. 3 para. 2 aOBVM) (now a securities house, see Art. 44 para. 1 let. c LEFin) without authorisation.

Company A, founded in 2015 by C, is active in the sale of subscriptions for recyclable goods. Shortly after the company was founded, C sold 80 % of the share capital, at a nominal value of CHF 0.01 per share, to D and E. These three persons, referred to as 'reference shareholders' in the judgment, successively held key positions on the company's board of directors, so that together they exercised a decisive influence on business decisions.

From 2017 onwards, the three reference shareholders sold a large number of the company's shares to third parties in a coordinated manner. In practice, the reference shareholders first sold their shares to company A (which thus bought back its own shares), which immediately resold them to third-party investors at a price up to 550 times higher than the nominal value.

Following a complaint, FINMA initiated enforcement proceedings against company A and the three major shareholders. It considered that they, acting as a group, had engaged in the business of a securities dealer or broker without authorisation. It therefore ordered the liquidation of company A, which was confirmed by the Federal Administrative Court.

Following an appeal under public law, the Federal Court examined the following questions in turn :

1. Consequences of a split during proceedings : during the proceedings before the Federal Court, company A was split (separation within the meaning of Art. 29(b) LFus). A company B, derived from company A, is therefore entered in the commercial register and takes over part of the assets and liabilities. However, company A continues to exist.

The Federal Court qualifies the split as a 'partial universal succession', i.e. a succession by operation of law limited in quantity to the assets and liabilities included in the split inventory.

The Federal Supreme Court notes in this case that FINMA's liquidation decision formally concerns only company A. However, it points out that, from a supervisory law perspective, it is not the liquidation itself that is decisive, but rather the cessation of the unlawful activity.

Consequently, the Federal Court held that, from a material point of view, the liquidation decision covers all the means used for the unlawful activity and therefore all the company's assets and liabilities. It follows that company B is directly affected by the liquidation decision and has automatically become a party to the appeal proceedings.

2. The concept of a 'group' in supervisory law : according to established case law, a uniform approach should be adopted when there are close economic, organisational and personal links between different persons and/or companies acting in a coordinated manner. This comprehensive approach aims to prevent the authorisation requirement from being circumvented by the fact that each member of the group, taken individually, does not meet the conditions for such a requirement to be imposed.

In this case, the Federal Court considers that the links are sufficiently close to conclude that a group consisting of company A and the three reference shareholders exists. In particular, it notes that the group established a coordinated sales strategy, according to which the company only acquired its own shares from the reference shareholders once they had already been resold to public shareholders, demonstrating joint action.

3. Classification as an issuing house (now securities firm) : according to Art. 3 para. 2 aOBVM, 'Traders who, on a professional basis, underwrite or commission securities issued by third parties and offer them to the public on the primary market are considered issuing houses.'

On this basis, the Federal Court examines whether the group carried out the activity of an issuing house (now securities house) without authorisation.

- *Securities issued by third parties* : the appellants argue that this is an issue of own securities, not subject to authorisation, insofar as company A is in fact selling its own shares. The Federal Court dismisses this argument, considering that at the time of the initial public offering, company A is a third party since it acts as an intermediary between the three reference shareholders and the public shareholders. The repurchase by company A of its own shares prior to their resale to public investors is described as a preparatory act with no real economic significance.
- *Offer on the primary market* : the appellants argue that the sale to public investors takes place on the secondary market since the prior transfers of shares between members of the group must be considered a transaction on the primary market. Here again, the Federal Court rejects the argument, considering that it is the first public offering that is decisive.
- *Professional nature* : the Federal Court considers that the group acted in a professional capacity insofar as it sold shares to more than 100 public investors between 2017 and 2022, generating revenues of more than CHF 12 million, three times higher than the revenues from the company's commercial activity for the same period.
- *Main activity in the financial sector* : Finally, the Federal Court found that C, one of the members of the group, carried out a main activity in the financial sector, as he earned much more income from the sale of shares than from his work for the company.

In conclusion, the group did indeed carry out the activity of a securities firm (now a securities house) without authorisation, which constitutes a serious violation of prudential provisions.

4. Liquidation : the appellants finally contest the proportionality of a total liquidation of company

A and consider that a partial liquidation would have been sufficient. However, the Federal Court considers that total liquidation is the consequence provided for by law for the absence of authorisation (Art. 36 aLBVM and Art. 66 para. 1 LEFin), leaving in principle no margin of discretion to the supervisory authority. Partial liquidation is only possible in special circumstances, for example when it is possible to distinguish between the assets and liabilities arising from the activity subject to authorisation and those arising from commercial activity. This is not the case here due to the company's 'chaotic' accounting, which shows that all revenues were mixed together regardless of their source (share issue or commercial activity). In these circumstances, only a total liquidation can be considered.

Two concluding remarks :

- FINMA and the courts regularly adopt a 'group' approach within the regulatory sense (see, for example, in another context, Raetzo, cdbf.ch/1366). This comprehensive approach serves as a tool against abuse of law and aims to prevent those who circumvent the requirements of financial market law from being treated better than those who comply with the law, with the laudable objective of protecting investors. Nevertheless, this is a variable concept, which depends largely on the discretion of the authority and can therefore be a source of legal uncertainty.
- The relatively large number of rulings relating to the unauthorised operation of a securities firm (now known as a securities house) shows that the relevant regulatory requirements remain largely unknown to players who are not normally active in the financial sector but who engage in activities in this area on the sidelines of their commercial activities. This highlights the importance of obtaining sound legal advice before embarking on this type of activity, especially as the consequences – in this case, total liquidation – can be particularly severe.
