CENTRE DE DROIT
BANCAIRE ET FINANCIER

Carrying out an activity without authorisation

The Federal Court upholds naming and shaming

Par Romain Dupuis le 1 December 2025

In a ruling dated 16 September 2025, the Federal Court confirmed that the publication for five years on the FINMA website of a decision prohibiting a person from carrying out an activity subject to authorisation under financial market law without the necessary authorisation is justified (2C_596/2024 of 16 September 2025) .

This ruling is based on the same facts as ruling 2C_597/2024 of 16 September 2025 (commented on in : Dupuis, cdbf.ch/1440/).

In summary, a company and its three main shareholders, described as 'reference shareholders', are accused of having acted as a group as an issuing house (Art. 3 para. 2 aOBVM) (now securities firm, Art. 44 para. 1 let. c LEFin) without the required authorisation.

Following a complaint, FINMA initiated enforcement proceedings against the company and the three reference shareholders. At the end of these proceedings, the authority ordered the dissolution and liquidation of the company. It also ordered the reference shareholders to refrain from carrying out any activity subject to authorisation without the necessary authorisation, under threat of criminal sanctions (Art. 48 FINMA Act).

FINMA decided to publish the prohibition on practising imposed on the three shareholders on its website for five years (Art. 34 FINMASA). This decision was upheld by the Federal Administrative Court and is therefore before the Federal Supreme Court.

In his appeal, one of the shareholders no longer disputes that, as a member of a group within the meaning of supervisory law, he carried out the activity of an issuing house without authorisation. However, he considers that FINMA should have refrained from publishing the prohibition on practising his profession that was served on him. In the alternative, he considers that the five-year period is disproportionate.

Article 34(1) of the FINMA Act stipulates that in the event of a serious breach of supervisory law, FINMA may publish its final decision, including the personal data of the parties concerned, in electronic or written form, once it has become final.

The publication of a prudential decision, known as '*naming and shaming*', is a repressive administrative sanction and a preventive measure to protect the public. According to case law, it aims to punish the persons concerned by damaging their reputation (ATF 151 II 197). However,

the Federal Court has already had occasion to clarify that this sanction does not constitute a criminal charge within the meaning of Art. 6 ECHR (ATF 147 I 57).

Such a sanction can only be imposed by FINMA in the event of a serious violation of supervisory law. A one-off, minor violation is not sufficient. According to established case law, the unauthorised exercise of an activity subject to authorisation constitutes in itself a serious violation of regulatory provisions.

In the present case, the Federal Supreme Court finds that the appellant actively participated in the unauthorised issuing house activity as the founder of the company and former chairman of its board of directors. The Federal Supreme Court therefore considers him to be one of the 'three main instigators' of the unauthorised activity.

In its analysis, the Federal Court dismisses the appellant's argument that he relied on a legal opinion prepared by a solicitor to consider that the company's financing model was lawful. In this regard, our High Court affirms that such a legal opinion cannot justify *a priori* the appellant's legitimate expectation that his activity was lawful.

In these circumstances, the Federal Court considers that the publication of the prohibition on practising is justified and proceeds to analyse the proportionality of the five-year period ordered by FINMA.

In this regard, the Federal Court points out that Art. 34 para. 1 FINMASA is a discretionary provision conferring broad discretion on FINMA. It considers that in the present case, the five-year period is proportionate insofar as it corresponds to that imposed in similar cases. A shorter period has certainly been accepted in cases where the person concerned had committed a minor individual offence, but this is not the case with the appellant, who played a key role in the unauthorised activity and derived considerable personal gain from it.

The FINMA decision is therefore upheld.

In practice, the most frequent application of Art. 34 FINMASA is the publication of a prohibition on a specific natural person from carrying out an activity subject to authorisation without the necessary authorisation. In fact, the 21 decisions currently published on the FINMA website all concern cases of this type. No decision concerning a legal entity is currently subject to such publication.

However, FINMA has another indirect '*naming and shaming*' instrument at its disposal, which it uses mainly against legal entities. This is Art. 22 para. 2 FINMASA, which allows the supervisory authority to inform the public about enforcement proceedings by expressly naming the person concerned, even if it has not previously ordered publication in accordance with Art. 34 FINMASA (see Hirsch, cdbf.ch/1374/).

Although FINMA has, to date, rightly shown a degree of restraint in its communications by naming the person concerned only relatively rarely, this practice appears to be changing. For several years now, the authority has been calling for greater scope for communication and seems to consider that, in future, it should be the absence of communication naming individuals that should be the exception. It is to be hoped, however, that the principle of proportionality will remain the basis for any decision to expressly name the person concerned, both from the

perspective of Art. 34 and Art. 22 para. 2 FINMASA.
