CENTRE DE DROIT
BANCAIRE ET FINANCIER

The L-QIF is coming!

The revised CISA and CISO come into force on 1 March 2024

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At its meeting on 31 January 2024, the Federal Council adopted the amendments to the CISO and decided that the amendments to the CISA relating to the limited qualified investor fund (L-QIF), adopted on 17 December 2021, would enter into force. As a reminder, the L-QIF is a collective investment reserved for qualified investors within the meaning of the CISA that is not subject to approval or authorisation by FINMA (art. 118a CISA). It may take the form of a contractual fund, an externally managed SICAV (i.e. a SICAV whose administration and management are carried out by a fund management company) or a limited partnership for collective investments (SCmPC), which must then delegate its management to a collective asset manager, unless the partners with unlimited liability are banks, insurance companies subject to the LSA, securities firms or collective asset managers (art. 118c CISA, art. 118g and 118h CISA). In this way, the legislation requires that L-QIFs be administered by supervised institutions.

As part of the revision of the CISO, the Federal Council specified the regulatory framework applicable to L-QIFs. On the whole, the regulatory framework will be comparable to that applicable to supervised collective investments, in particular because of a reference to the technical standards adopted by FINMA in the OPC-FINMA and the self-regulation standards recognised by FINMA (art. 126b OPCC). Firstly, despite the objections voiced during the consultation, it stipulated that L-QIFs in the form of SICAVs or contractual funds should be subject to the same requirements regarding investment techniques and restrictions as other alternative investment funds (see art. 126p CISO), which may be offered to non-qualified investors. However, it has allowed L-QIFs to use a value-at-risk (VaR) model to assess the risks of an L-QIF, provided this is stipulated in the documentation, under the same conditions as those laid down for collective investments subject to FINMA supervision, but without prior FINMA approval (art. 126p para. 4 CISO ; cf. art. 33 para. 2 OPC-FINMA).

Given the absence of FINMA supervision, transactions with related parties of real estate funds will be subject to less stringent requirements : subject to an appropriate provision in the documentation of the collective investment scheme, compliance with a valuation by an independent expert and the approval of at least the majority of investors, it will be permissible to carry out transactions with related parties (art. 126x para. 1 CISO). In this case, ex-post control will be ensured by the obligation to prepare a report on the subject, to have compliance with the duty of loyalty verified by the audit company and a mention in the L-QIF’s annual report (art. 126x par. 2 to 4 OPCC).

L-QIFs will have to provide the FDF with the same statistical information as the supervised collective investment schemes (see art. 126g para. 2 and 6 CISO) and FINMA will also be able to obtain statistical information on L-QIFs, even if they are not subject to its supervision, through the duty to provide information imposed on those subject to supervision. The accounting standards, valuation principles and publication requirements applicable to supervised collective investment schemes will apply by analogy to L-QIFs (art. 126zquater and art. 126zquinquies CISO). The latter will also be subject to an audit regime, which will be adjusted to take account of the absence of supervision by FINMA : an additional audit will play the same role as the prudential audit and will follow by analogy the principles applicable to the latter, while also looking at compliance with the requirements specific to L-QIFs (see art. 126zduodecies CISO). However, the audit company will not have to submit its report to FINMA. Only if fundamental shortcomings are identified will the audit company be required to notify the supervisory authority by mentioning an irregularity in its prudential audit report concerning the institution responsible for administering the L-QIF (art. 126ztredecies CISO).

Contrary to what had been envisaged in the draft submitted for consultation, the OPCC no longer provides that family links between the administration and the investors call into question their independence and therefore compliance with the condition of management by a third party. Similarly, it no longer requires that appropriate processes be put in place to ensure that collective investment schemes maintain their characteristics, more specifically that, subject to the exception in art. 7 para. 3 CISA, they have a plurality of investors. It will therefore be up to the institutions administering a collective investment scheme to ensure that the collective investment schemes retain their legal characteristics over the long term (art. 5 para. 6 CISO) and to intervene if necessary, it being specified that the audit company will have to note any violation of this principle in its supplementary report and, in the form of an irregularity, in the prudential audit report of the supervised institution.

In addition to these changes, the CISO contains other new provisions with a broader scope : in particular, it extends the scope of application of the CISA conduct of business rules to the administration of foreign collective investment schemes (see art. 31 to 34 CISO) and requires compliance with the best execution obligation in the context of services provided to collective investment schemes (see art. 31a CISO), whereas the corresponding provision of the LSFin did not apply in this case by virtue of art. 20 LSFin. In addition, the CISO codifies the possibility of creating side pockets with the approval of FINMA in exceptional circumstances in order to segregate assets that have become illiquid from an open-ended collective investment scheme (art. 110a CISO). Similarly, the CISO improves legal certainty by providing a framework for ETFs : in line with FINMA practice, Swiss and foreign ETFs will have to be listed in Switzerland in order to be offered to non-qualified investors. However, the CISO breaks new ground by providing for the possibility of issuing listed and unlisted unit classes within the same collective investment scheme (see art. 107 CISO). Finally, the CISO also introduces a regulatory framework for managing the liquidity risk of open-ended collective investment schemes, inspired by international efforts in this area (see art. 108a CISO).

Overall, the arrival of the L-QIF is good news for the Swiss financial centre. However, it is a less flexible and innovative project than might have been hoped : first and foremost, it allows collective investments to be created for sophisticated or wealthy investors without approval or authorisation, but the regulatory framework ultimately remains close to that applicable to authorised funds, which, given the target audience for these vehicles, is questionable in terms of desirability. It remains to be seen whether this instrument will find its place in the Swiss

ecosystem, in particular in order to offer Swiss investors a vehicle subject to Swiss law, and whether, over time, the Federal Council will dare to show greater flexibility with regard to this new form of collective investment.
