New legislation on financial services: the beginning of the legislative process

SWITZERLAND

Frédérique Bensahel

FBT Attorneys-at-law, Geneva

fbensahel@fbt.ch

Pierre-Olivier Etique

FBT Attorneys-at-law, Geneva

poetique@fbt.ch

In Switzerland, various financial services, financial actors and financial products are subject to different rules with no real objective justifications. Based on that observation, on 18 February 2013, the Federal Department of Finance, under a mandate by the Swiss Government (the 'Federal Council'), published a report on the draft Financial Services Act (Loi sur les services financiers (LSFin)) (the 'FDF Report').

This document sets the basis of a future legislation that will apply to all actors on the market and to all financial services and products, with a view to a better protection of investors and to the alignment of the Swiss financial market's legislation with European standards, in particular the Markets in Financial Instruments Directive currently being revised (the 'draft MiFID II').

The independent asset manager's profession is certainly the most affected by this legislative project. These financial actors manage between 10 and 15 per cent of the assets under management in Switzerland, depending on the estimates, and represent approximately 2,000 companies with an average of three employees per company. Currently, they can offer asset management services with no requirement of licence or supervision by the regulator provided they comply with the Anti-Money Laundering Act (AMLA) and, when placing investment funds in managed clients' portfolios, with the rules of conduct of the self-regulatory organisations they are affiliated to. This situation, which constitutes a 'Swiss exception', is doomed to disappear.

One of the main axes of the future Financial Services Act project will be to subject the independent asset managers to a supervision, which could be carried out either by the Swiss Federal Financial Market Supervisory Authority (FINMA) or a self-regulatory body, to which asset managers must currently be affiliated for anti-money laundering purposes.

Although the requirements for licensing independent asset managers have not been presented in detail yet, the FDF Report mentions that the conditions to obtain a licence will include adequate financial resources, as well as a proper organisation. Usual requirements such as the management of the independent asset managers by competent bodies, which provide a guarantee of proper business conduct and by qualified personnel, which will be subject to training and development duties, are also mentioned.

The FDF Report does not specify the financial and organisational requirements regarding independent asset managers. It is anticipated that they could mirror the requirements applying to asset managers of collective investment schemes, under the Collective Investment Scheme Act, that is, a share capital of at least Fr 200,000 and sufficient own funds proportional to their fixed costs.

From the organisational point of view, the FINMA may focus on the corporate governance system within independent asset managers' companies (check and balances), as well as on the compliance and risk management functions. In its developed practice, the supervisory authority has set high standards with respect to asset managers of collective investment schemes, which shall probably be one of the main challenges independent asset managers may face, in order to obtain licences.

Another main axe of the future regulation on financial services consists of the implementation of rules of conduct for all providers of financial services. To date, only financial intermediaries subject to the FINMA's supervision and independent asset managers offering investment funds to their clients under asset management agreements, are subject to the rules of conduct of the professional organisations they are affiliated to.

The FDF Report proposes to expand existing information duties of financial services providers regarding the characteristics, costs and risks of the financial products offered. These suggested additional requirements are in line with the suitability

and appropriateness tests under MiFID, but constitute a big step forward as far as most Swiss financial services providers are concerned.

The future LSFin shall also deal with the sensitive issue of inducements. Clients may waive their rights to receive the inducements and accept that they be allocated to the financial services provider as part of its remuneration, provided clients are informed of the amount and the method of calculation of the inducements. The FDF Report takes into account recent case law developments, which have already been embodied in the recently amended FINMA's Guidelines on asset management applicable: (i) to financial intermediaries subject to the FINMA supervision; and (ii) to independent asset managers placing investment funds in their clients' managed portfolios. Nonetheless, the FDF Report provides that inducements should be admitted only if they serve the interests of clients and contribute to improving the quality of the services offered. The FDF Report even considers a mere prohibition of inducements.

Finally, several measures are proposed in view of improving the enforcement of clients' civil claims. Disputes between clients and their asset managers could thus be brought before mediation authorities, which could issue recommendations or even make decisions. The FDF Report goes as far as proposing the possibility for clients of receiving non-refundable advancements on the proceedings costs from the financial services provider, in case of a favourable opinion by the mediation authority on the outcome of the dispute. This proposal is already debated bitterly among the professional organisations representing banks and independent asset managers. The formal consultation process of the draft legislation will be opened shortly and the LSFin is expected to enter into force within two or three years.

The Swiss market anticipates a drastic reduction of the number of actors in the independent asset managers sector. Due to increased regulation, the number of Swiss banks has been divided by two over the last ten years. The independent asset managers' industry will undoubtedly follow the same trend. Its actors will indeed have to join forces in order to share the increasing costs triggered by the increased regulation. These changes could represent an opportunity for financial services providers oriented towards a European clientele, if they enable them to have access to the European financial services market. However, this is not the case under the current draft MiFID II, which requires non-EU financial intermediaries to set up a branch in the EU, in order to be able to carry out their activities in the European Union. In any case, the increased protection of investors and the general supervision of financial services providers may very well constitute the first step towards an alignment with MiFID II, with a possible positive outcome for the Swiss financial industry as regards the perspective of accessing the European market.

TURKEY

Şafak Herdem
Herdem & Co, Istanbul
safak.herdem@herdem.av.tr

What is new for private equity in Basel III: the Turkish experience

Basel III is a key regulation that is aiming to build on the existing Basel II regulation by a series of amendments. The regulation is considered to be one of the most critical for global financial stability, considering the destabilising role the banking sector played during the latest global economic meltdown. Private equity, like the rest of the actors in global markets, will benefit from the strengthening of the banking sector and the reining in of its destabilising capabilities by Basel III.

The new regulation will bring stringent rules for the banks to follow. The core solvency ratio for the banks will be retained