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Countdown at the Point of Sale – Final Version of Financial Services Ordinance Published

Reference: CapLaw-2019-52

On the way to the new Financial Services Act (FinSA), the final version of the Financial Services Ordinance (FinSO), which was published on 6 November 2019, started the final countdown towards the implementation of these new regulations in the light of their entry into force on 1 January 2020. As of that date, financial services providers must, in principle, comply with the new regulations (including the key adjustments made in the final version of the FinSO). However, various transitory provisions provide for (temporary) relief from the apparent time pressure.

By Sandro Abegglen / Luca Bianchi

1) Introduction

A **big showdown** is happening in the financial services and products industry in Switzerland: the **entry into force of the Financial Services Act (FinSA) and the Financial Services Ordinance (FinSO) on 1 January 2020**. This date marks the end of a legislative process which was triggered by the financial crisis of 2008. On 6 November 2019 the **final version of the FinSO** was approved by the Federal Council. It was made publicly available on the same date together with the final version of the Explanatory Report to the FinSO (the **Explanatory Report**). Based thereon, market participants who are within the scope of the new regulations are now finally in a position to complete their implementation design of the new point of sale duties.

Against this background, the authors do not aim to provide a summary of the regulatory point of sale duties set out in the FinSA and FinSO in general. Such overviews were provided over the last six years (see CapLaw-2018-58, 2017-3, 2016-3 and 2014-5). Instead, **this article zooms in on the key adjustments which are specifically relevant for the point of sale made in the final version of the FinSO of 6 November 2019** when compared with the Consultation Draft of the FinSO (Draft-FinSO) published on 24 October 2018.

2) Final Version of the Financial Services Ordinance: Key Adjustments at the Point of Sale vis-à-vis the Consultation Draft

The FinSO contains the following key adjustments in its final version of 6 November 2019 when compared with the Draft-FinSO:

- **Geographical scope of financial services:** Neither financial services rendered from a foreign financial services provider within an existing client relationship (which was requested by the explicit initiative of a client) nor individual financial services (which were requested by the explicit initiative of clients from a foreign financial

services provider) shall be considered as performed in Switzerland and, thus, do not fall in the geographical scope of the FinSO (article 2(2)(a-b) FinSO). This provision aims to provide clarity regarding the special cases in which financial services are rendered from abroad to clients with domicile in Switzerland (Explanatory Report, p. 18).

- **Financial services:** The term **financial services** conducted for clients according to article 3(c) FinSA shall contain any activity directed to specific clients which specifically targets the purchase or sale of financial instruments (article 3(2) FinSO). According to the Explanatory Report, p. 19, the distribution of collective investment schemes typically falls in the scope of this provision and, thus, qualifies as a financial service.

However, various exemptions of the term financial services in the meaning of article 3(c) FinSA have been inserted in the FinSO. In particular, **the following shall not be considered as financial services** (article 3(3)(a-d) FinSO):

- (a) advice on the structuring or raising of capital, mergers of companies and the acquisition or disposal of holdings, as well as the services connected with such advice (**corporate finance advisory exemption**);
- (b) placements of financial instruments with or without a fixed takeover obligation as well as related services (**capital markets placements exemption**);
- (c) financing within the framework of services pursuant to (a) and (b);
- (d) granting of loans for the execution of transactions with financial instruments within the meaning of article 3(c)(5) FinSA, if the financial services provider granting the loan is not involved in these transactions, unless he knows that the loan will be used for the execution of such transactions.

- **Financial instruments:** Article 3(1) FinSO now explicitly states that claims arising out of a bank account or custody agreement for payment or physical delivery (in particular, of foreign currencies, fixed-term deposits or precious metals) shall not qualify as financial instruments within the meaning of article 3(a) FinSA.
- **Reverse solicitation:** Article 3(6)(a) FinSO clarifies that the provision of information at the instigation or initiative of a client (**reverse solicitation**), which has not been preceded by advertising within the meaning of article 68 FinSA by the provider or one of its agents in relation to the specific financial instrument, does not constitute an offer in terms of article 3(g) FinSA (note: but, except in crossborder inbound situations (see above under “Geographical scope of financial services”), could still be

considered as a financial service if no exemptions apply (see above under “Financial services”).

- **Execution-only:** When a financial services provider is executing and transmitting client orders, a private client can agree in general manner that the KID be only made available after the transaction has been concluded (article 11(3) FinSO). However, this consent must be given separately from the agreement to the general terms and conditions in writing or in any other form which enables proof to be rendered by text (article 11(3) FinSO). A KID shall be regarded as **existing** in terms of article 8(4) FinSA and must, thus, in principle, be made available by the financial services provider in connection with execution-only transactions if it can be located with reasonable efforts (article 11(2) FinSO).
- **Information duties:** The obligation of financial services providers to notify clients in the event of changes with respect to their information duties under article 8 and 9 FinSA previously suggested in the Draft-FinSO has been deleted in the final FinSO (article 14 FinSO). This adjustment significantly reduces administrative efforts and costs for financial services providers which would otherwise have been expected. The Swiss Bankers Association (SBA) has published an update of the SBA-risk brochure with the title *Risks Involved in Trading Financial Instruments* (version of November 2019) on 23 October 2019, which may be used as a standardized document to fulfil the information duty regarding the general risks associated with financial instruments according to article 8(1)(d) FinSA.
- **Fee transparency:** The FinSO explicitly provides for the duty of financial services providers to **inform approximately or in ranges** about **costs which cannot or only with disproportionate effort be precisely determined in advance** (article 8(3) FinSO). If such information is not possible or only possible with disproportionate expenses this shall be disclosed (article 8(3) FinSO). In particular, the risk of additional fees, expenses or other costs must be pointed out (article 8(3) FinSO).
- **Suitability / appropriateness:** When performing a **suitability check** the financial services provider is now explicitly obliged to draw up a **risk profile** for each client based on the information obtained (article 17(3) FinSO). In the case of investment management mandates and permanent advisory relationships, the provider must agree on an investment strategy with the client on this basis (article 17(3) FinSO). Besides, financial services providers who **inform their clients about the non-performance of the appropriateness and suitability check** in terms of article 13(2) FinSA **only once** must expressly draw attention to this fact when providing the information (article 17(5) FinSO).
- **Organizational requirements:** The organizational requirements of financial services providers (which are related to the point of sale) set out in articles 23-30

FinSO were primarily subject to rather technical or formal amendments. However, the settlement of a price deviating from the actual closing price achieved in the execution of client orders (price fraud) is now explicitly stated as an inadmissible form of market behavior in article 27(d) FinSO.

- **Client advisers of foreign financial services providers:** Client advisers of foreign financial services providers which are subject to a prudential supervision are no longer required to register in the client adviser register as long as they conduct their (inbound) financial services **exclusively to professional or institutional clients** in Switzerland (article 31 FinSO). This adjustment represents a major liberalization for foreign client advisers of prudentially supervised financial services providers. However, financial services of foreign providers rendered to **private clients** in Switzerland require a registration of their client advisers in the Swiss client adviser register (notwithstanding whether the foreign financial services providers are prudentially supervised or not) (article 28(1-2) FinSA *e contrario*). The obligation to register was further clarified in the Explanatory Report by stating that this obligation can of course also be fulfilled by financial services providers for their client advisers (Explanatory Report, p. 33).

Besides, also all **foreign** financial services providers **will still need to comply with Swiss regulation** in terms of the **rules of conduct** of article 7 et seq. FinSA (to the extent applicable according to article 20 FinSA) and the **organizational requirements including conflict of interest rules** of article 21 et seq. FinSA.

- **Advertisements:** Article 95(3) Draft-FinSO on the regulation of advertisements for financial instruments that have not been approved or do not correspond to the customer profile was deleted (article 95 FinSO). However, FINMA-Circular 2013/9 “Distribution of Collective Investment Schemes” which includes similar requirements for collective investment schemes is expected to continue to apply according to the Explanatory Report, p. 65. It remains to be seen, however, if and to what extent FINMA-Circular 2013/9 will be adjusted by FINMA.

3) Final Countdown: Entry into Force and Transitory Periods

a) Adjustments in the Final FinSO

FinSA and FinSO will enter into force on 1 January 2020. Consequently, the new regulation is, in principle, applicable starting from this date. However, as an **exception from this rule**, the **transitory periods** set out in article 95 FinSA and articles 103 et seq. FinSO provide for a limited time period during which almost all of the new regulatory point of sale rules will not have to be observed (already on 1 January 2020). This article **focuses primarily on the point of sale regulation of the FinSA and FinSO** and does not contain references to transitory provisions in other areas.

The **transitory periods have been adjusted to two years (instead of one year)** for the following:

- **client segmentation of article 4 FinSA** (article 103(1) FinSO);
- **required knowhow of client advisers of article 6 FinSA** (article 104 FinSO);
- **conduct rules of articles 7-18 FinSA** (including – new – the best execution duty) (article 105(1) FinSO);
- **organizational requirements of articles 21-27 FinSA**, including the requirements for an appropriate organization (article 21 FinSA), the required skills, knowledge and experience of employees (article 22 FinSA), the involvement of third-parties (article 23 FinSA), the chain of providers (article 24 FinSA), conflicts of interests rules (article 25 et seq. FinSA), also, regarding payments such as inducements from third-parties (article 26 FinSA) and regulation of employee transactions (article 27 FinSA) (article 106(1) FinSO).

As a result, financial services providers benefit from longer time periods than previously expected to comply with the point of sale duties. However, the transitory period regarding conduct rules according to article 105(1) FinSO **does not include** the requirements for **securities lending** according to article 19 FinSA which are, therefore, applicable immediately with the entry into effect of the FinSA/FinSO (Explanatory Report, p. 69). Thus, article 19 FinSA represents the only rule of conduct which will be applicable immediately with the entry into force of the FinSA and FinSO.

b) Conduct Rules and Organizational Requirements during the Transitory Periods in Particular

Financial services providers which intend to fulfil the conduct rules of articles 7-18 FinSA and/or the organizational requirements of articles 21-27 FinSA before the end of the transitory period must irrevocably notify their audit firm in writing and indicate the date on which the new rules shall be complied with (articles 105(2) and 106(2) FinSO). Until that point in time, the following pertinent conduct and organizational rules of the old regime continue to apply as newly specified in articles 105(3)(a-f) and 106(3)(a-f) FinSO:

- (a) **code of conduct for securities dealers** according to article 11 Stock Exchange Act (SESTA);
- (b) **code of conduct for CISA-licensees** set out in article 20 Collective Investment Schemes Act (CISA);

- (c) **requirements for investments, securities transactions and the exercising of memberships and creditor's rights** of the CISA in accordance with articles 21-23 CISA;
- (d) **further conduct rules of the CISA** pursuant to article 24 CISA such as the duty to conclude distribution agreements and the protocol duty;
- (e) **requirement to appoint a representative and a paying agent** for the distribution of foreign collective investment schemes which are distributed **exclusively to qualified investors** (article 120(4) CISA);
- (f) **self-regulation recognized as a minimum standard for financial services and offers of collective investment schemes** by FINMA pursuant to article 7(1) and (3) Financial Market Supervision Act (FINMASA).

c) Time Table: Transitory Periods

Transitory Periods (Selection)			
Topic	2020	2021	2022
FinSA/FinSO	<i>Applicable as of 1 January 2020 (general rule which may be subject to the following exemptions, respectively, transitory provisions)</i>		
Client segmentation (article 4 FinSA; article 103(1) FinSO)	Transitory period		<i>Applicable as of 1 January 2022</i>
Required knowhow of client advisers (article 6 FinSA; article 104 FinSO)	Transitory period		<i>Applicable as of 1 January 2022</i>
Conduct rules (article 7-18 FinSA; article 105(1-2) FinSO)	Transitory period <i>alternatively, applicable earlier upon implementation/notification of audit firm</i>		<i>Applicable as of 1 January 2022 or,</i>
Organizational requirements (article 21-27 FinSA; article 106(1-2) FinSO)	Transitory period <i>alternatively, applicable earlier upon implementation/notification of audit firm</i>		<i>Applicable as of 1 January 2022 or,</i>
Registration of client advisers (article 95(2) FinSA; article 107 FinSO)	Transitory period	<i>Either applicable as of 1 July 2020 or,</i> <i>alternatively, applicable at a later point in time six months after approval/designation of a register</i>	
Ombudsman's office (article 95(3) FinSA; article 108 FinSO)	Transitory period	<i>Either applicable as of 1 July 2020 or,</i> <i>alternatively, applicable at a later point in time six months after recognition of a ombudsman's office</i>	

4) Conclusion

The final FinSO provides for some important and welcome adjustments of point of sale-related provisions when compared to the Consultation Draft. Especially, the concept of financial services has been adapted (in line with the diverging opinions of market participants in the consultation) in order to be **neither too broad nor too narrow** (Explanatory Report, p. 11). This Solomon-like compromise regarding whether distribution of financial instruments shall qualify as a financial service (which is, in principle, the case for the distribution of collective investment schemes but not for placements of capital markets transactions; article 3(2-3) FinSO) is well-intended but raises some questions which will have to be resolved in practice in the near future.

Also, the generous and broadly applicable transitory period of two years is very welcome and allows financial services providers to implement the new regulation diligently and without undue rush. In our view, this, combined with the general design of the new regulation, evidences the good and balanced judgment of the Swiss legislator.

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The Basic Information Sheet – No surprises in the final implementing ordinances, but some relevant amendments

Reference: CapLaw-2019-53

On 1 January 2020 the new Swiss Financial Services Act (FinSA) and its implementing ordinance, the Financial Services Ordinance (FinSO), will come into effect. The Swiss Federal Council announced its decision on the entering into force of the new financial services regulation and the final text of the implementing ordinances on 6 November 2019. There are no big surprises in the final ordinances regarding the newly introduced basic information sheet (*Basisinformationsblatt*). However, a number of amendments were made based on responses in the consultation process of the draft ordinances.

By Daniel Haeblerli

1) No surprises in respect of the content requirements

One of the key novelties introduced by the FinSA is the obligation to prepare and make available a short document setting out the key information, the so-called basic information sheet (*Basisinformationsblatt*; BIS), often referred to also as the “key information document” or “basic information document”.