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The new structure of Swiss financial legislation: a tree in need of pruning

On 27 June 2014, the Swiss Federal Council submitted for consultation two new draft acts on financial services (FSA) and financial institutions (FinIA). Under the guise of a conceptual restructuring, these drafts include many provisions prejudicial to the Swiss financial industry. Their texts need further pruning before they are submitted to Parliament in 2015. However, Parliament can first focus on passing the Financial Markets Infrastructure Act (FMIA), which is urgent.

The aim of the Financial Services Act (FSA) is to strengthen investor protection. In the opinion of the Association of Swiss Private Banks (ASPB), the FSA should be viewed as a way of facilitating cross-border access to markets in the European Union. This aim requires Swiss legislation to be judged equivalent to the rules laid out in the MiFID 2 directive and its measures for implementation in European countries. Although such equivalence would be enough to allow Swiss banks to offer their services to professional clients abroad, access to private clients depends on distinct bilateral issues, which must first be addressed. If necessary, the FSA could come into force first for professional clients and only later for private clients, after the issue of access to the main European markets has been satisfactorily resolved.

Some wonder whether adopting European-inspired rules for Swiss clients and clients domiciled outside the EU is justified. The ASPB believes it is, for the following reasons. First, there is no logical reason why Swiss or Asian clients, for example, should not enjoy the same level of protection as European clients. Second, only very few Swiss banks have no European clients at all, and it would be inefficient for them to follow different advisory procedures depending on the client's country of residence. Third, the European framework does not prevent from adopting flexible rules, which would allow clients to choose the level of protection they want, without imposing excessively formal regulations on experienced investors. On the latter point, the FSA could be improved if it assumed that investors are capable of informed choice.

When seeking equivalence, however, Switzerland must be careful not to overzealously adopt stricter rules than other countries. Though their intention is laudable, such measures, also known as the "Swiss finish", can have disastrous practical consequences. In particular, the FSA's provisions regarding claims under civil law would set an unwelcome precedent, paving the way for a wave of litigiousness such as can be observed in the US. Without a doubt, the financial sector is serving as a trial balloon for the Swiss economy as a whole.

The Financial Institutions Act (FinIA) basically combines the texts of the current Banking Act and Stock Exchanges Act, which will be repealed. This reorganisation of two existing laws, which were only recently amended, risks weakening a structure that has already proved its effectiveness, for gains that are merely cosmetic. Countless documents (contracts, general terms and conditions, directives, etc.) would need to be modified, at huge administrative expense. Such overhaul should not be pursued.

Furthermore, article 11 of the FinIA contains a foreign body: namely, additional requirements regarding fiscal due diligence, which were clearly rejected in consultation in the spring of 2013. Despite some small changes, these rules are not based on any existing international standard, and would be impossible to implement credibly. Financial institutions are not, and must not become, tax agents: they have neither the means nor the mandate to play this role.

The FinIA's only worthwhile innovation is to introduce prudential supervision of independent wealth managers. For the sake of consistency, and to avoid duplication, that responsibility should be entrusted to FINMA. Switzerland is one of the last countries in the world where private wealth managers are not regulated (other than for anti-money laundering purposes), and supervision, in a form appropriate for their size, would allow them to gain access to new markets.