Switzerland: regime on inducements

The term “inducement” designates remunerations, fees, commissions, refunds, rebates and other monetary or non-monetary benefits offered to financial intermediaries in exchange for the promotion of specific products or flows of business. In the European Union, the revised Markets in Financial Instruments Directive II (MiFID II) and its accompanying Regulation (MiFIR), which went into application in early 2018, enhanced the standards pertaining to inducements that had been introduced under the 2007 MiFID I regime. By contrast, in Switzerland, although they have been practiced for numerous years, inducements do not form the object of specific legal norms up until now.

Over the last decade or so, the Federal Supreme Court (“Court”) has nonetheless identified a number of rules that now apply to these types of incentives. In a seminal decision of 2006, the judges affirmed the principle according to which financial intermediaries must pass inducements on to the client (ATF 132 III 460). In a 2012 ruling involving the Union Bank of Switzerland (UBS), the Court extended this obligation to other aspects of collective investment schemes, including in particular fund distribution activities (ATF 138 III 755). Moreover, in a series of further decisions, it has progressively set forth minimum requirements as regards the information the financial intermediary must provide to the client. Finally, in a ruling it handed down in 2017, the Court established a prescription period of 10 years, which starts on the date of payment, for claims pertaining to inducements (TF 4A_508/2016).

Today, the Swiss regime on inducements can be summarised as follows: (a) inducements are allowed in principle; (b) the recipient may keep such benefits, provided that the client (aa) has been informed beforehand in an adequate manner of their existence; and (bb) has given his or her express consent. In the event that these conditions are not satisfied, the financial intermediary must pass the inducements on to the client, which is in line with the rules applicable to the simple agency contract as set out in the Code of Obligations (CO). According to Article 400 CO, the agent is obliged at the principal’s request, which may be made at any time, (a) to give an account of his agency activities; and (b) to return anything received for whatever reason as a result of such activities.

Compared to the rules that are now in force in the European Union, the Swiss judges have opted for a more liberal approach, which is based upon the informed consent of the client. Specifically, they have given the parties the freedom to regulate their relationship, which comprises a potential conflict of interest, within the two limits imposed by the law: the agent’s duty of faithful performance (Article 398 CO) and his or her aforementioned duty to give account (Article 400 CO).

From a criminal law perspective, the Court rendered a noteworthy ruling in 2018 (ATF 144 IV 294). According to the judges, a wealth manager commits an act of criminal mismanagement within the meaning of Article 158 of the Criminal Code if he fails to inform his client of the inducements that he receives from the depository bank. The Court’s criminal division had to examine the case of X., the sole shareholder of Y. SA, a wealth management company. X. and Y. SA had received inducements totalling some CHF 400’000 in relation to services the company provided to several clients. X. neither revealed nor returned these benefits to them. Drawing on an earlier decision, the Court held that, taken on its own, the violation of the duty to pass benefits from a third party on to client does not constitute an act of criminal mismanagement (ATF 129 IV 124). However, the judges also considered that the two obligations set out in Article 400 of the CO reside on different levels within the legal regime governing the simple agency contract. In fact,

one duty (*i.e.*, to pass the benefits on to the client) requires the prior fulfilment of the other (*i.e.*, to give account of the inducements), which thus has a preventive function with respect to the interests of the principal. Moreover, the judges rejected X.'s argument according to which some of his clients had released him, by virtue of an explicit stipulation in the agency contracts, from both obligations. As the Court had noted before, a client may validly do so only if he or she had been informed in a truthful and complete manner about the advantages that the depositary bank confers on the manager (ATF 132 III 460).

Adopted last year by the two chambers of the Swiss parliament, the Financial Services Act (FinSA) is part of the new financial market architecture. The law, which probably will enter into effect in 2020, enshrines rules pertaining to inducements in Switzerland. Article 26 of the FinSA codifies the above-mentioned principles that the Court developed with regard to the civil law aspects. In addition, Article 89 of the FinSA strengthens the protection of the client by making the obligation to inform him or her a public order provision the violation of which can entail a criminal fine of up to CHF 100'000.