Schwanengasse 12
Postfach
CH-3001 Bern
Telefon +41 31 322 69 11
Telefax +41 31 322 69 26
info@ebk.admin.ch
www.ebk.admin.ch

Eidgenössische Bankenkommission
Commission fédérale des banques
Commissione federale delle banche
Swiss Federal Banking Commission

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Prof. Jean-Baptiste Zufferey
Vice-Chairman of the Swiss Federal Banking Commission

Pragmatism, consultation and differentiation: keeping over-regulation in check

1. Introduction

To follow on from Chairman Kurt Hauri's introductory words on regulation, I would like to mention here a few examples of how the Banking Commission takes into account the costs of regulation for professionals in the field, seeks the most balanced solution in each and every case and attempts to adapt such solutions to the situation on the ground.

The examples selected have been dictated by the events of 2004 and 2005 so far. The principles they illustrate, however, are those which underlie the activities of the Banking Commission as a whole, as it constantly seeks to weigh up all the interests involved, including the public interest in ensuring that the Swiss financial centre has an adequate level of regulation and supervision.

More generally, the examples chosen underscore the importance the Banking Commission attaches to self-regulation and to consulting and acting in a concerted manner with the representatives of the interested parties. What they also show, however, are the constraints under which the Banking Commission is forced to operate and the forces which give rise to and increase regulation.

2. Asset managers for institutional clients

This term is one which has recently been introduced into the Swiss regulatory system and refers to non-bank asset managers operating in or from Switzerland for the account of institutional investors, in particular investment funds (either Swiss or foreign investment funds).

At present, they are neither regulated nor supervised (except in connection with aspects pertaining to the prevention of money laundering).

For some months now, such asset managers have been subject to growing pressure from foreign authorities, as European investment fund legislation now requires that investment funds be exclusively managed by professionals which have been registered and are subject to prudential supervision. Swiss asset managers thus risk losing some of their mandates or not being able to acquire mandates in new funds. Moreover, certain countries within the European Union have signalled their intention to apply this ruling to all funds (other than UCITS III).

As a consequence of this, the Banking Commission has seen a first institutional asset manager in Switzerland (a company in the Capital International Group) request authorisation and supervision of its own accord. With regard to regulation, this illustrates, first, the dominant role of the international environment and, second, that professionals do not see any grounds for complaint when they have a vested commercial interest. These are insights regularly arrived at by the Banking Commission in the most diverse situations.

In order to satisfy the requirements of the applicant, the Banking Commission recently granted an appropriate licence to Capital International. Other institutional asset managers will no doubt submit similar applications in the months to come. In each individual case, the Banking Commission will seek to adopt a differentiated approach and aim to require conditions for authorisation as specific as the Stock Exchange Act will allow for. The status of securities dealer is ill-suited to individual asset managers or small management companies, however: stock exchange legislation sets out minimum conditions the Banking Commission is held to apply with, conditions which govern in particular capital, financial statements, internal organisation as well as internal and external audits.

The Swiss Bankers Association together with other professional bodies recently floated the idea of rendering official the status of institutional asset manager through the creation of an additional category of securities dealer in the Stock Exchange Ordinance. Thus, this is not a case of the Banking Commission seeking to put in place a general, abstract solution via new regulation, nor is it this category of professional which generates the biggest risks for investors and the market, which means that regulating them and forcing them all to be licenced is not necessarily in line with the objectives of the Stock Exchange Act.

This being the case, the Banking Commission is of the opinion that it is enough to monitor the development of the new practice and wait at least until the Federal Council pronounces on its position with regard to the third report from the Zimmerli commission of experts on the extension of prudential supervision. The recommendation from the commission is that action be taken on a step-by-step basis and solely in accordance with the requirements that become apparent. Imposing requirements spontaneously and on a case-by-case basis is sufficient to safeguard all the interests involved. This possibility could be featured in the legislation, for reasons of certainty of the law.

3. Swiss Federal Act on Collective Investment Schemes

In 2003, a commission of experts appointed by the Federal Department of Finance formulated a new draft act aimed at replacing the current law on investment funds. The objective here is to underpin the Swiss market, which now offers a vast range of new products, by equipping it with up-to-date regulation that is as flexible as possible and compatible with European standards in order to ensure that Swiss products are recognised. The preliminary draft was well received by all parties during the consultative stage and the Federal Council is currently working on its position.

The Banking Commission played a very active role in the legislative process, working constantly to ensure that the law remains moderate and accords considerable power to the authorities that implement it, that there is sufficient scope for self-regulation and that a distinction is made between the various categories of investors depending on their respective need for protection.

With regard to this last point in particular, the new law will undoubtedly confirm the already very liberal practice developed by the Banking Commission for funds reserved for institutional investors. A growing number of concessions has been secured for Swiss funds. As for foreign funds, they no longer even need to be licenced if they are not distributed to the public in accordance with the provisions of the current implementing ordinance. In the future, this more or less complete exemption could be extended to include funds for high net worth individuals in line with the international trend in matters of regulation.

It should be noted here that the Banking Commission's desire to preserve a minimum level of regulation has not always translated into a reality on the ground. During the consultative process, for example, several professional bodies demanded that the law classify the exemption for high net worth individuals and that it not be left to the discretion of the Federal Council and/or the Banking Commission. To cite another example, the Banking Commission proposed that the authorisation system for non-bank distributors of collective investment vehicles be abolished.

4. Further examples

In 2004 and this year so far, the Banking Commission has been given several opportunities to put in practice the principles to which it adheres and make its contribution to maintaining an adequate regulatory environment:

1. *Consultation* with professional bodies and promotion of *self-regulation*: the 2004 Annual Report sets out the periodic, high-level discussions between the SFBC and the Swiss Bankers Association, the Swiss Funds Association, the Swiss Institute of Certified Accountants and Tax Consultants and the SWX Swiss Exchange on matters concerning potential regulation and the compromises to be found, for example in respect of the new system of protection for savers contained in the law on banks and savings banks, fee and commission transparency in investment funds, supervision of structured products, and quality controls for auditors.

2. A desire to ensure a sense of *proportion* in all legislative matters: like the majority of professional bodies, the Banking Commission voiced serious reservations in connection with the draft submitted for consultation at the beginning of the year setting out the transposition to Switzerland of the FATF's new recommendations on the prevention of money laundering, even though there is no doubt that these recommendations represent the standard to be put in place. The Banking Commission is aware of the costs generated by any new regulation in this area, for a business sector that generally is a front-runner in such matters, and thus recommends that the draft be submitted to a group of experts where the various professionals will be represented.

3. Support for legislation creating a favourable *framework* for the development of Switzerland's financial centre. In addition to the future Act on Collective Investment Schemes (see point three), other elements here are the draft bills on book-entry securities and dormant accounts.

4. Promotion of the *competitiveness* of the Swiss financial centre wherever this is compatible with the objectives of the laws the Banking Commission is in charge of applying: for example, with regard to the obligation to provide information in connection with OTC transactions involving international bonds, the Banking Commission has recently decided to implement a more flexible solution equivalent to the ruling in force in London (monthly publication).

5. *Differentiation* (different rulings depending on the category of intermediary concerned): all the work connected with Basel II is based on this principle. I refer you here to the presentation given by Director Daniel Zuberbühler.