

Client segmentation and the duties of conduct

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The Financial Services Act distinguishes between three categories of clients: retail clients, professional clients and institutional clients. Retail clients receive the highest level of protection. Professional clients, among them banks, insurers, pension funds, large companies and certain high-net-worth individuals who opt out of retail protection, receive less protection. Institutional clients, a subset of professional clients that includes financial intermediaries and central banks, receive the least. Clients can opt in or opt out of their category under certain conditions. Private investment structures established for wealthy individuals can declare themselves professional clients.¹

The duties of conduct of financial service providers depend on the category of the client and on the type of service. Providers must inform their clients about their services, their costs, the risks of the financial instruments and their conflicts of interest. Before providing investment advice or portfolio management, they must assess the suitability of the service for the client, taking into account the client's knowledge, experience, financial situation and investment objectives. For execution-only transactions, no such assessment is required, but the provider must inform the client that it has not been made. Providers must document their services, render accounts to their clients, execute orders on the best possible terms and organise themselves to avoid or disclose conflicts of interest.²

The duties of conduct codify, in large part, duties that Swiss courts had derived from the law of mandate in the Code of Obligations. The Federal Supreme Court had developed a substantial case law on the duties of banks and asset managers towards their clients, distinguishing between portfolio management mandates, advisory relationships and execution-only relationships. The Financial Services Act transformed these private-law duties into public-law duties enforced by FINMA and the supervisory

organisations, although it left the private-law liability of providers to the Code of Obligations.

The relationship between the public-law duties of the Financial Services Act and the private-law duties of the law of mandate has raised difficult questions. Since the Act does not expressly provide that a breach of its duties gives rise to civil liability, the courts must decide to what extent the public-law duties shape the content of the private-law obligations. For a lawyer who advises clients or financial institutions in disputes about investment losses, this question is central, although the case law is still developing.

1 Notes

1. On the client segmentation of the FinSA (retail, professional and institutional clients, Art. 4 FinSA) and the possibilities of opting in and opting out (Art. 5 FinSA), see the standard commentaries. To be verified. ↩
2. On the duties of conduct under the FinSA (information, Art. 8 f.; appropriateness and suitability, Art. 10 ff.; documentation and accountability, Art. 15 f.; transparency and due diligence in client orders, Art. 17 ff.; conflicts of interest, Art. 25 ff.), see SR 950.1. To be verified. ↩

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