

## **FAIS clearly unclear!**

*Vague about which “intermediary services” require licensing*

Gary Moore

A norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable the citizen to regulate his conduct. —European Court of Human Rights

The Financial Advisory and Intermediary Services Act (“Fais”) is unclear about which intermediary services require licensing. It violates the Rule of Law principle that laws must indicate with reasonable clarity what is.

Fais requires a person to hold a licence to give “advice” to clients about buying financial products (company shares and debentures, insurance, pension-fund and medical-scheme benefits, etc).

It also requires a licence for rendering “intermediary services” (acts which result or may result in clients entering into transactions, or anything done with the aim of managing or administering financial products).

A person who provides advice or intermediary services without being licensed could be fined up to R10 million or imprisoned for up to ten years, or both.

Some advice is expressly excluded from advice requiring a licence (providing mere factual information about how to enter a transaction regarding a financial product, objective product information, and reports about a financial product without recommending any transaction as appropriate).

However, no service is expressly excluded from an “intermediary service” which requires a Fais licence.

Though no intermediary service is excluded, the Supreme Court of Appeal ruled in 2013 that the provision of some intermediary services does not require a Fais licence:

The case (*TriStar v Chemical Industries Provident Fund*) concerned investment company TriStar which held a Fais licence to provide advice but not intermediary services. TriStar contracted to provide advice and other services for the Provident Fund. The Fund later argued that it was not bound by the arrangement. It alleged the contract was void in requiring TriStar to render intermediary services, which it was not licensed to do.

Many services TriStar had contracted to provide constituted advice, for which it held a licence: It undertook (after ascertaining the Fund’s financial aims) to recommend for the Fund’s approval investment strategies to meet its financial aims. (An independent asset manager would make investments approved by the Fund.)

Other services TriStar would provide were not advice. At issue was whether these were “intermediary services” for which it should have been licensed. TriStar would draft a mandate for the asset manager, implement the mandate and the investment strategy, monitor performance of the investments and asset manager, and take corrective action.

The court held that Fais’s first licensable category of intermediary services (acts resulting in a client’s entering a transaction regarding a financial product with a supplier) contemplates acts “directly” resulting in this consequence, and to construe it as including acts “indirectly” having that result would “lead to absurdities”.

The ordinary meaning of “intermediary” is a “go-between” standing between client and product supplier to effect transactions. The court found the asset manager had that role.

The court held that the services TriStar contracted to provide were not such intermediary services. It was not obliged to bring about transactions (the asset manager did that). TriStar merely had to compile and convey the mandate and instructions to the asset manager, and take steps to ensure the asset manager complied.

The court found that Fais’s second licensable type of intermediary services (managing or administering financial products purchased) contemplates someone managing or administering the products. The court stated that TriStar had not contracted to manage or administer financial products: it merely had to manage or administer the mandate of the asset manager.

This judgment, seemingly a welcome narrowing of Fais’s ostensibly broad application, highlights the vagueness of Fais. If the Provident Fund had given TriStar discretion to determine what products should be bought, and TriStar had instructed the asset manager what products to buy, then arguably TriStar’s acts would directly result in the transaction, not the asset manager’s carrying out of the instruction.)

This uncertainty about which intermediary services require licensing under Fais violates the Rule of Law principle that laws should indicate with reasonable clarity what is required.

*Gary Moore is a senior legal researcher at the Free Market Foundation*