

# Cross-Border Online-Banking and Online-Brokerage in Switzerland

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**A**mong the many legal questions which arise in connection with cross-border online-banking and -brokerage, the following two often are of particular interest. First, can such services be rendered in Switzerland without a licence? Secondly, can foreign banks and securities dealers which provide such services subject their agreements with Swiss resident users to their home laws and jurisdiction? In the absence of legislation specifically dealing with online-banking and -brokerage these questions are to be answered in the light of general Swiss statutory rules on banking and securities dealing as well as the general conflict-of-law-rules.

## Regulatory

Banking and securities dealing in Switzerland are subject to the supervision by the Swiss Federal Banking Commission (FBC). The respective legal framework can primarily be found in the Swiss Banking Statute and the Swiss Stock Exchange Statute and their implementing ordinances. Thereunder, as a rule, online-banking and -brokerage are permitted if the banks, respectively the securities dealers, doing business in Switzerland have obtained a licence from the FBC.

However, to the extent foreign domiciled banks only provide cross-border services into Switzerland they will be exempt from the Swiss licence requirement under the following conditions: a licence from the FBC will only be needed if they fail to meet the so-called "no physical presence in Switzerland test", i.e. if they employ persons in Switzerland who permanently and on a commercial basis in or from Switzerland (a) enter into transactions, maintain customer accounts or legally bind the branch ("branches"), or (b) are active in a manner other than set forth under point (a), in particular, in referring customer orders to the foreign bank or representing the foreign bank for advertising or for other purposes ("representative offices"). Under the Stock Exchange Statute the same exception applies *mutatis mutandis* to foreign securities dealers. In practice, however, the described test often cannot be applied in such a clear cut manner. For instance, the law does not specify the term "employment" so that contractual relationships with Swiss local representatives which do not qualify as employment contracts *stricto sensu* may nonetheless suffice to trigger the licence requirement. In case of doubt it is therefore recommended to apply for a negative clearance from the FBC which usually can be obtained within reasonable time.

Another regulatory issue relates to the recent Swiss Money Laundering Statute (MLS). Thereunder certain financial intermediaries doing business in Switzerland need to either join a recognised self-regulatory organisation or obtain a special license. In contrast to the above described legislation on banks and securities dealers, the MLS contains no express provisions as to its territorial applicability. However, a contextual interpretation of the MLA would indicate that the right approach is to apply *mutatis mutandis* the above mentioned "no physical presence in Switzerland" test which,

indeed, merely puts in more concrete terms the general principle of territoriality. This can be supported by the fact that the FBC is also competent for the supervision of banks and securities dealers in respect of the MLS and it seems quite unlikely that in respect of MLS matters the FBC wishes to expand its jurisdiction to banks and securities dealers which otherwise would not be regulated in Switzerland.

Finally, one should note that a different regime may apply to (and a licence respectively a no-action letter from the FBC may then be required for) online trading services which may qualify as foreign stock exchange respectively foreign systems similar to stock exchanges.

Conclusion: Foreign domiciled banks and securities dealers which render cross-border online services into Switzerland may be exempt from Swiss licence requirements. However, in order to benefit from such exemption the set-up must be carefully designed.

## Governing Law and Jurisdiction

The Swiss Statute on Private International Statute (PIL) allows the parties to choose a law to govern their contract. Such choice of law must be explicit or result unequivocally from the contract or the circumstances. Given that, usually, the clients of a foreign online bank or online securities dealer have to sign an application form to establish a customer relationship which provides a choice of law clause, Swiss courts would recognize such choice of foreign laws. In our view such choice would also be valid if the customer registered online, provided the contractual provisions are displayed on the screen in a way to allow the customer to read them easily in the course of performing the online registration.

However, in case of consumer contracts (which term is very likely to include online-banking and -brokerage contracts with private clients) a choice of foreign law may be held invalid and the bank/securities dealer – customer relationship would be subject to Swiss law if the consumer had his residence in Switzerland and further provided that (a) the offeror has received the order in Switzerland, or (b) the conclusion of the contract was preceded by an offer or advertisement in Switzerland and the consumer has carried out there the legal acts necessary for the conclusion of the contract, or (c) the offeror has caused the consumer to go to a foreign state and deliver his order there. As a rule, the offeror will not be deemed to have received the order in Switzerland if the application was merely handed over by the customer to the Swiss postal services or if acceptance was given by way of e-mail or over internet, in each case provided the offeror's address is abroad. By contrast, case (b) can easily be triggered if the offeror engages in marketing campaigns off-line through the traditional media, makes "cold calls", sends unsolicited e-mails to individuals in Switzerland or promotes its services over the internet, especially if such advertisement aims at Swiss customers (e.g. prices in Swiss currency).

As regards the choice of jurisdiction, similar principles apply. As a rule, according to the Lugano Convention (which is a parallel convention to the Brussels Convention) the choice of jurisdiction would be valid if a customer has signed an application form containing a choice of jurisdiction. If the foreign bank or securities dealer was not domiciled in an EU member State the PIL (instead of the Lugano Convention) would apply pursuant to which a choice of jurisdiction may be made in writing, but also by telex, telefax or any other form of communication allowing proof of the agreement by text.

Consequently, the choice of jurisdiction could be valid even if the customer registered online, provided that the text of the contract displayed on the screen during the registration procedure contains the clause and can be printed out. If, however, the contractual relationship qualifies as a consumer contract, similar reservations as above have to be made and notwithstanding any jurisdiction clause to the contrary, as a rule proceedings against the consumer may only be brought in the state where she or he is domiciled.

To be complete, one should note that additional limitations may result from mandatory Swiss rules or Swiss public policy which may even apply in case the choices of foreign law and/or foreign jurisdiction are valid.

Conclusion: Foreign banks and securities dealers rendering on-line services into Switzerland must be aware that their contractual relationship with Swiss customers may be subject to Swiss law and Swiss jurisdiction notwithstanding any contractual clauses to the contrary.

## Possible Future Developments

The Swiss government has issued a project for introduction of new statutory provisions dealing with electronic commerce, long-distance marketing and electronic signatures. This project has been distributed among interested parties for their comments and might be submitted to Swiss parliament in 2001 or 2002. One goal is to bring Swiss law in line with the electronic commerce, distance selling and electronic signature directives of the EC.

With respect to online-banking and -brokerage will be of particular interest the proposal regarding digital signatures. The draft bill provides that a digital signature would have the same effects as a handwritten signature if the digital signature contains an electronic certificate of an accredited provider of certification services. By contrast, the draft proposal for long-distance marketing will not cover online banking and online-securities dealing. It seems that the Swiss government intends to go the same path as the EC and to have the question of long-distance marketing of financial services dealt with separately. One may expect the Swiss government to provide a proposal in this field, once the EC has issued its directive on distance marketing of financial services. In addition, like in the EC questions of jurisdiction are not covered by the current proposal, as the Brussels and Lugano Conventions on jurisdiction and enforcement are under revision and shall be amended to address the specific electronic commerce related issues.

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