FINANCIAL SERVICES M&A

Switzerland

LEXOLOGY
Getting The Deal Through

Consulting editor
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Financial Services M&A

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Quick reference guide enabling side-by-side comparison of local insights, including into the market and policy climate; key legislation; required regulatory consents and filings; ownership restrictions; directors and officers' issues; foreign investment restrictions; competition law and merger control issues; deal structures and strategic considerations; tax; ESG, public relations, political and policy risk management; shareholder activism; due diligence, including in relation to emerging technologies; pricing and financing; purchase price adjustments; deal terms (including reps and warranties, indemnities and closing conditions); dispute resolution; and current trends.

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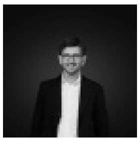

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MARKET AND POLICY CLIMATE

Market climate

How would you describe the current market climate for M&A activity in the financial services sector in your jurisdiction?

M&A activity in the financial services sector continues to be strong, although without particular high-profile transactions in 2021 and – to date – 2022. Besides banks, many transactions concern small and mid-sized asset management companies in the context of the ending transition period to obtain a compulsory Swiss Financial Market Supervisory Authority (FINMA) licence also for simple asset managers. In addition, we are seeing increasing consolidation pressure in the institutional asset management segment.

Law stated - 31 May 2022

Government policy

How would you describe the general government policy towards regulating M&A activity in the financial services sector? How has this policy been implemented in practice?

There is only limited government policy or political pressure towards regulating or otherwise influencing M&A activity in the financial services sector, except in extraordinary circumstances where the existence of a systemically important or otherwise significant bank or financial institution is concerned (with no such cases in recent years).

FINMA, besides having to approve most M&As, sometimes regulates M&A activity in enforcement decrees by imposing temporary M&A restrictions on institutions that breached supervisory law and must restore compliance with the law or remediate other irregularities (article 31 Financial Market Supervision Act).

On the other hand, FINMA may welcome or even request (under threat of licence withdrawal) mergers of deficient institutions into other companies.

Law stated - 31 May 2022

LEGAL AND REGULATORY FRAMEWORK

Legislation

What primary laws govern financial services M&A transactions in your jurisdiction?

The primary laws (all on federal levels) are:

- Code of Obligations (CO);
- Merger Act (MA);
- Cartel Act;
- Financial Market Infrastructure Act (FinMIA) (in particular, article 9, paragraph 5, and articles 17 and 125–141);
- Banking Act (BA) (in particular, article 3, paragraph 5, and article 3-ter);
- Financial Institutions Act (FinIA) (in particular, article 11, paragraph 5, and articles 15 and 43); and
- Insurance Supervision Act (ISA) (in particular, article 3, paragraph 2, article 5, paragraph 1, and articles 21 and 62).

Law stated - 31 May 2022

Regulatory consents and filings

What regulatory consents, notifications and filings are required for a financial services M&A transaction? Should the parties anticipate any typical financial, social or other concessions?

General M&A requirements

Banks (including Swiss subsidiaries or branches of foreign banks)

Persons must notify FINMA before acquiring or selling a qualified participation (10 per cent of the capital or voting rights or other means to exercise a controlling influence; the term has the same meaning below in the context of other financial institutions) or when their participation reaches, exceeds or falls below 20, 33 or 50 per cent (article 3 paragraph 5 BA). The bank must also notify FINMA of any persons subject to these requirements as soon as it becomes aware of them and at least once a year (article 3, paragraph 6 BA). De facto, the notification duty is an approval requirement, as FINMA may question the continuous fulfilment of the licence conditions if a person not deemed fit and proper takes a qualified participation. (This also applies to the notification duties concerning other financial institutions mentioned below.)

Banks that come under foreign control (foreign shareholders with participations of more than half of the voting rights or otherwise able to exercise a controlling influence) or whose foreign qualified shareholders change require an additional FINMA licence (articles 3-ter and 3-bisBA). The Federal Council may derogate from this requirement in international treaties for nationals of the treaty state generally or contingent on the granting of reciprocity (article 3-quaterBA). Banks that establish (including, in practice, acquire) a foreign subsidiary, branch, agency or representative office have to report this beforehand to FINMA (article 3, paragraph 7 BA).

Special rules apply for situations of impending insolvency, where FINMA may order a restructuring, in particular an asset deal to another bank or a bridge bank to ensure the continuation of banking services (article 30, paragraphs 2 and 3 BA). In future (likely from 2023), under the revision of 17 December 2021 (BBl 2021 3001), FINMA will also be able to order a merger (revised article 30, paragraph 2 lit. b and c BA).

Financial market infrastructures

This includes stock exchanges and other trading venues, central counterparties, central securities depositories, payment systems and trade repositories.

Persons must notify FINMA before acquiring or selling qualified participations in a financial market infrastructure or when their share reaches, exceeds or falls below 20, 33 or 50 per cent (article 9, paragraph 5 FinMIA). The financial market infrastructure must also notify FINMA of any persons subject to these requirements as soon as it becomes aware of them and at least once a year (article 9, paragraph 6 FinMIA).

A financial market infrastructure must notify FINMA before establishing, acquiring or closing a foreign subsidiary, branch or representative office, as well as before acquiring or surrendering a qualified participation in a foreign company (article 17 FinMIA).

Financial institutions under the Financial Institutions Act

Collective asset managers, securities firms

Persons must notify FINMA before acquiring or selling qualified participations in collective asset managers and securities firms or when their share reaches, exceeds or falls below 20, 33 or 50 per cent (article 11, paragraph 5 FinIA).

The target companies must also notify FINMA of any persons subject to these requirements as soon as they become aware of them (article 11, paragraph 6 FinIA).

For securities firms that are foreign-controlled, articles 3-ter– 3-quater BA requiring an additional FINMA licence (see above) apply by analogy (article 43 FinIA).

Collective and individual asset managers, trustees, fund management companies, securities firms

The acquisition or sale of a foreign subsidiary, branch or representative office or a qualified participation in a foreign company must be reported to FINMA (article 15 FinIA).

Insurance companies

Persons who wish to acquire a share in a Swiss insurance company reaching or exceeding 10, 20, 33 or 50 per cent of capital or voting rights have to report this to FINMA. The same applies to persons that wish to reduce their share below 10, 20, 33 or 50 per cent of capital or voting rights or otherwise change their share so that the company ceases to be a subsidiary.

A Swiss insurance company that wants to acquire a share in another company reaching or exceeding 10, 20, 33 or 50 per cent of capital or voting rights also has to report this to FINMA.

FINMA can prohibit the transaction or impose conditions if it could threaten the insurance company or the interests of the insured persons (article 21 ISA). In any case, it must be ensured that insurance contracts can be continued without change (article 4, paragraph 2 Insurance Supervision Ordinance [ISO]).

As mentioned above, article 3, paragraph 2 ISA also requires a FINMA licence for any merger (or split/ demerger or transformation of the legal form).

Mergers specifically (applies to all financial institutions)

Mergers in the form of a combination require a change of the articles of association of both companies, which must be approved in advance by FINMA. A new licence is generally not needed if the merging entities already each had the licence needed by the new company (which can, accordingly, usually 'inherit' it).

In the case of an absorption, the acquiring entity only needs to change its articles of association if its purpose or business area change. Such changes again have to be approved by FINMA. FINMA approval is also needed if the absorption leads to a 'significant change' of the circumstances underlying the licence. Otherwise, FINMA only needs to be notified. (The insurance sector is the exception – each merger [in corporate form] needs FINMA approval, see article 3, paragraph 2, and article 5, paragraph 1 ISA.) Finally, if the acquiring entity assumes an activity for which it has not been licensed so far, it needs an additional licence – it cannot simply 'inherit' the licence of the absorbed entity.

Share or asset deals may also lead to a change in the articles of association of the companies concerned or a 'significant change' of the circumstances underlying their licence, again requiring FINMA approval, and otherwise a FINMA notification.

Further (general) consent and filing requirements

Besides the above consent and filing requirements specifically for financial institutions under financial markets supervisory law, further consent and filing requirements under other laws must be considered, in particular merger filing requirements under the Cartel Act and public takeover rules under FinMIA.

Law stated - 31 May 2022

Ownership restrictions

Are there any restrictions on the types of entities and individuals that can wholly or partly own financial institutions in your jurisdiction?

Banks

Persons with a participation of 10 per cent or more of the capital or voting rights or other means to exercise a controlling influence (qualified participation; the term has the same meaning below for other financial institutions) must ensure that their influence is not detrimental to prudent and sound business activity (article 3, paragraph 2 lit c-bisBA). In this regard, FINMA may and does exercise some control over the types of entities and individuals holding qualified participations. FINMA is also generally reluctant to accept PE vehicles as holders of qualified participations and would only do so under additional requirements.

In addition, for foreign-controlled banks, FINMA makes the bank licence also conditional upon reciprocity by the home country of the holders of qualified participations, provided there are no contrary international obligations (article 3-bis, paragraph 1, and article 3-terBA).

Financial market infrastructures and financial institutions under the Financial Institutions Act

Persons with a qualified participation must enjoy a good reputation and ensure that their influence is not detrimental to prudent and sound business activity (article 9, paragraphs 3 and 4 FinMIA; article 11, paragraphs 3 and 4 FinIA). The standard of FINMA for the assessment is similar to that for banks (see above).

Insurance companies

In future, persons with a qualified participation will be required to enjoy a good reputation and ensure that their influence is not detrimental to prudent and sound business activity (article 14, paragraph 3 ISA under the revision of 18 March 2022, BBl 2022 704). Already today, FINMA may prohibit or impose conditions for an acquisition if it could threaten the insurance company or the interests of the insured persons (article 21 ISA), which can aim at the acquiring entities and individuals.

Law stated - 31 May 2022

Directors and officers – restrictions

Are there any restrictions on who can be a director or officer of a financial institution in your jurisdiction?

All financial institutions

While the wording of the provisions for the various financial institutions differs slightly, in essence they all require that the members of the board of directors and the executive board (and persons representing foreign insurance companies under a general power of attorney), enjoy a good reputation and guarantee irreproachable business conduct (ie, be fit and proper.) Additionally, these corporate bodies as a whole must have sufficient expertise and experience and be sufficiently independent (see, explicitly, article 14, paragraph 2 ISA, article 12, paragraph 1 and 2 ISO).

In the M&A context (or situations with dominant shareholders generally), FINMA will particularly strive to ensure that directors representing qualified shareholders do not enable such shareholders to exert undue influence on the institution's operations and procedures. In light of recent experience, this will particularly apply to foreign state-linked owners.

These requirements must be met for the granting of the original licence for the institution. Later director and officer changes in banks, securities firms and insurance companies must be approved by FINMA as well. For other financial institutions, (de facto) prior approval is generally sought to ensure that FINMA has no reservations regarding fitness and properness of incoming officers and directors.

In addition to the general fitness and properness requirement, the following specific requirements apply.

Banks

At least one-third of the board of directors must consist of independent members (FINMA Circular 2017/1 Corporate governance – banks), unless an exemption is granted. Further, in order to enable FINMA to effectively exercise its supervision, the bank must be managed from Switzerland (article 10 Banking Ordinance) (ie, key persons of the executive management must be available in Switzerland and the chairman or at least the vice-chairman of the BoD must have their domicile in Switzerland).

Financial market infrastructures

There is no explicit quorum for independent directors, but just as banks, financial market infrastructures must be managed from Switzerland (article 7, paragraph 1 Financial Market Infrastructure Ordinance (FinMIO)). The workplace of executive managers must also generally be in Switzerland, but they only need to ‘ reside in a place from which they can effectively exercise such management’ (article 7, paragraph 2 FinMIO), that is, not necessarily in Switzerland.

Financial institutions under the Financial Institutions Act

The requirement of FINMA Circular 2017/1 of at least one-third of independent board members also applies to securities firms.

The same quorum is required for fund management companies and managers of collective assets, but independence is more narrowly defined here as independence from persons with a qualified participation only (article 38, paragraph 3, article 52, paragraph 4 Financial Institutions Ordinance (FinIO]). Further independence and incompatibility requirements apply between directors and officers of fund management companies and their custodian banks (article 53, paragraphs 2–4 FinIO).

Financial institutions must again be managed from Switzerland (article 10 FinIA), but only one or two members (with individual or collective signatory powers) of the board of directors or the executive board must be domiciled there (article 23, paragraph 2, article 37, paragraph 2, article 66, paragraph 1 FinIO).

Insurance companies

One-third of the board of directors must be independent (FINMA Circular 2017/2 Corporate governance – insurers), unless an exemption is granted.

There is no requirement for the insurance company to be managed from Switzerland, and thus no attendant residence requirements, apart from the requirement for the person representing foreign insurance companies under a general power of attorney to reside in Switzerland (article 16, paragraph 1 ISO).

Law stated - 31 May 2022

Directors and officers – liabilities and legal duties

What are the primary liabilities, legal duties and responsibilities of directors and officers in the context of financial services M&A transactions?

There are no financial-institution-specific liabilities and legal duties of directors and officers in the context of financial services M&A transactions, except for certain notification or approval requirements.

Directors and officers must perform their duties with all due diligence and safeguard the interests of the company in good faith (article 717 CO).

The members of the board of directors and all persons engaged in the executive management are liable both to the company and the individual shareholders and creditors for any losses or damage arising from an intentional or negligent breach of their duties, in particular article 717 CO (article 754, paragraph 1 CO). Furthermore, violations of these civil law duties often translate into violations of supervisory law that can be sanctioned by a professional ban (article 33 Financial Market Supervision Act (FINMASA)). For example, FINMA imposed a professional ban for two years on a BoD member of a bank who failed to ensure that the entire BoD was informed about critical internal assessments of a planned acquisition and who did not recuse himself despite conflicts of interest (FINMA enforcement case 2021/10) .

Law stated - 31 May 2022

Foreign investment

What foreign investment restrictions and other domestic regulatory issues arise for acquirers based outside your jurisdiction?

There is no general foreign investment control regime in Switzerland yet, but in May 2022, the Federal Council published a draft Investment Screening Act for consultation. It is particularly aimed at investors with ties to foreign governments. The acquisition of Swiss companies in all sectors by foreign state-owned companies or investors with ties to foreign governments would therefore be subject to approval by the State Secretariat for Economic Affairs SECO. In addition, in critical areas acquisitions by any foreign investors – sometimes with a de minimis threshold – would need to be authorised. This includes systemically important financial infrastructures and systemically important banks; for them, the SECO approval would come on top of the existing FINMA approval requirements. The law is likely to be submitted to and debated in parliament in 2023.

Today, while there are no general foreign investment controls, the background and nationality of a person acquiring a qualified participation are already considered by FINMA to the extent relevant for its notification or approval process or its ongoing supervision of the licensing requirements. For example, FINMA investigated Venezuelan (potential) qualified shareholders of Banca Credinvest and reviewed whether they had a negative influence on the bank's strategy and operations, especially in the AML area (see the decision of the Federal Administrative Court B-5445/2019 of 15 September 2020).

Also, banks and securities firms coming under foreign control or whose foreign qualified shareholders change require an additional FINMA licence (see above).

Law stated - 31 May 2022

Competition law and merger control

What competition law and merger control issues arise in financial services M&A transactions in your jurisdiction?

A concentration of undertakings must be notified to the Competition Commission if, in the financial year preceding the concentration, (1) the combined turnover was at least 2 billion Swiss francs or the combined turnover in Switzerland of all undertakings concerned together was at least 500 million Swiss francs, and (2) at least two of the undertakings concerned each have a turnover in Switzerland of at least 100 million Swiss francs, or (3) an undertaking concerned has been held to be dominant in a market in Switzerland, and if the concentration concerns either that market or an adjacent market, or a market upstream or downstream thereof.

If FINMA deems a concentration of banks necessary to protect creditors, their interests may be given priority (article 10, paragraph 3 CA) (ie, the Competition Commission may approve it even though it would not do so under 'pure' competition law reasons).

The turnover triggering the duty to notify the Competition Commission of a planned concentration of undertakings is calculated under a special rule for certain financial companies (article 9, paragraph 3 CA). Under these rules, in the case of banks and other financial intermediaries subject to the accounting regulations set out in the BA, 'turnover' is replaced by 'gross income', and gross income is considered generated in Switzerland if the client relationship is booked with the entity or branch in Switzerland.

For insurance companies, 'turnover' is replaced by 'annual gross insurance premium income'.

Law stated - 31 May 2022

DEAL STRUCTURES AND STRATEGIC CONSIDERATIONS

Common structures

What structures are commonly used for financial services M&A transactions in your jurisdiction?

Financial services M&A transactions are commonly (1) share deals (ie, acquisition of a stake in a licensed entity, (2) asset deals (acquisition of all or part of the assets, either as partial universal succession pursuant to article 69ff Merger Act (MA), or singular succession, or in the case of insurance companies, portfolio transfers under the Insurance Supervision Act (ISA)), or (3) referral agreements for the transfer of certain customer portfolios. Share deals may be followed by a group-internal merger post closing. Merger transactions (by absorption) are possible, but have been less common in recent years, except for intra-group transactions.

Share deals are often used in transactions where the purchaser – often a non-Swiss person or entity – does not yet hold a respective Swiss Financial Market Supervisory Authority (FINMA) licence and wishes to establish a banking or other regulated operation including acquiring respective infrastructure, etc. Asset deals, on the other hand, are often used by purchasers who already have a FINMA licence in Switzerland, to expand their business. Asset deals, in particular, allow 'cherry picking' (ie, a selective transfer of client relationships). Asset deals are also often used if a target has significant legacy risks or ongoing proceedings that would not be part of the transfer (creation of a 'bad bank' that will later be liquidated). Finally, mere referral agreements are an option where only a portfolio of selected client relationships (eg, clients from selected countries) are transferred. With referral agreements, a buyer only pays for the clients that actually specifically agree to the transfer and enter into a new client relationship.

For the past decade, most financial services M&A transactions, in particular regarding banks, have been asset deals.

Law stated - 31 May 2022

Time frame

What is the typical time frame for financial services M&A transactions? What factors tend to affect the timing?

The key timing element in financial services M&A transactions is the time required for notifying and obtaining approval from FINMA between signing and closing.

Typically, we would allow for two to four months in the case of notification requirements (share deal without requirement for an additional licence and asset deals), and three to six months if an additional or new licence is required, and in the case of insurance transactions where the business plan must be adjusted.

The timing may be extended in the case approvals are required also in foreign jurisdictions, and in particular if FINMA has to coordinate on consolidated supervision with foreign regulators.

Law stated - 31 May 2022

Tax

What tax issues arise in financial services M&A transactions in your jurisdiction? To what extent do these typically drive structuring considerations?

The same tax considerations apply to financial services M&A transactions that apply to transactions in other sectors.

For Swiss domiciled sellers who are individuals, a share deal tends to be more attractive than an asset deal, as capital gains resulting from the sale of shares held in their private wealth, are generally tax free in Switzerland.

Law stated - 31 May 2022

ESG and public relations

How do the parties address the wider public relations issues in financial services M&A transactions ? Is environmental, social and governance (ESG) a significant factor?

The parties to a transaction are generally free how they include and specifically address ESG factors in their M&A activity.

ESG matters have become a significant focus of FINMA in recent years. In its strategic goals 2021–2024, FINMA committed to contributing to the sustainable development of the Swiss financial centre. For example, FINMA requests the identification, measurement and management of climate-related risks (at least from financial institutions of a certain size), has taken measures to prevent greenwashing, and generally has integrated climate-related risks into its supervisory practice.

Law stated - 31 May 2022

Political and policy risks

How do the parties address political and policy risks in financial services M&A transactions?

It is advisable to pre-sound with FINMA early in the process if the parties are uncertain whether FINMA would approve an incoming shareholder, director or officer.

The risk distribution between the seller and the buyer, including regarding political and policy risks, should be carefully negotiated, in particular in connection with representations and warranties on compliance with law. Besides changes in law and policy, a change in the interpretation of laws and policies should be addressed. In practice, risks, including political and policy risks, in connection with legacy matters or particular clients are often excluded from a transaction by choosing an asset deal, specifically excluding legacy risks.

Law stated - 31 May 2022

Shareholder activism

How prevalent is shareholder activism in financial services M&A transactions in your jurisdiction?

Deals driven directly by activist investors only represent a small share of the overall M&A activity in Switzerland, and the financial services sector is no exception to this.

Law stated - 31 May 2022

Third-party consents and notifications

What third-party consents and notifications are required for a financial services M&A transaction in your jurisdiction?

Besides the regulatory notification and approval requirements and possible contractual consent and notification requirements with third parties (eg, under finance documents or other contractual agreements), a key question in financial services M&A transactions is if and in what form clients of the bank or FINMA-licensed financial services entity need to consent to a transfer, in particular to safeguard the secrecy requirements for banks (article 47 Banking Act (BA)), financial infrastructures (article 147 Financial Market Infrastructure Act (FinMIA)) and financial institutions (article 69 Financial Institutions Act (FinIA)).

Generally, in the case of a share deal, no consent or notification to clients is required, as all client data remain with the target (and after completion of the deal, article 4-quinquies BA allows foreign parent companies to access Swiss secrecy-protected data as far as necessary for their consolidated supervision).

In the case of an asset deal by singular succession, the transfer of any contractual relations in principle requires the consent of the counterparty. An exception applies to transfers of dormant accounts (article 37l BA) and transfers ordered by FINMA in the case of an insolvency (article 30 BA). Furthermore, if an asset deal is structured as a partial universal succession pursuant to article 69ff MA (asset transfer of a business), it is the prevailing view in practice that contracts transfer automatically, unless this has been contractually excluded. Nonetheless, even under article 69ff MA client consent is generally required in view of the banking secrecy and analogous secrecies for other financial institutions .

There are no clear general rules for the required form of such consent. In practice, clients are generally informed by letter (sent by the target) about the transfer, and the question is whether positive consent is required, or whether deemed consent is sufficient, with the clients being given ample time to oppose a transfer. In practice, deemed consent is sometimes viewed to be sufficient where the buyer is a financial institution already headquartered in Switzerland (ie, when there is no transfer abroad and Swiss banking secrecy, etc, continues to apply) and a large number of client relationships are to be transferred. The requirements can be further relaxed in the case of an asset transfer among Swiss entities of the same group – although the secrecies in principle also apply group-internally, deemed consent can more easily be assumed, and the Federal Supreme Court recently appeared to see no banking secrecy issue at all in such a situation (decision 2C_958/2021 of 8 December 2021, consid. 3.2 – concerning an asset transfer pursuant to article 69ff MA within UBS).

Additional notification requirements apply, for example, regarding information of employees in the case of an asset deal, or information of creditors in the case of a merger under the MA.

Regarding insurance, in the case of a portfolio transfer pursuant to the rules of article 62 ISA, affected insured persons have a statutory right to terminate the insurance contract following the transfer.

Law stated - 31 May 2022

DUE DILIGENCE

Legal due diligence

What legal due diligence is required for financial services M&A transactions? What specialists are typically involved?

In addition to general legal due diligence topics (corporate, tax, employment, pension, real estate, claims or litigation), regulatory and compliance due diligence plays an eminent role in financial services M&A transactions. In addition to law firms, regulatory audit firms are often consulted for this work. This regulatory or compliance due diligence commonly involves the review of the licences, annual regulatory audit reports (long form reports) provided to Swiss Financial Market Supervisory Authority (FINMA), risk reports, sample account documentation, AML documentation, review of communication with regulators, as well as regulatory proceedings.

When conducting due diligence on financial services firms, particular attention must be paid to the secrecy requirements for banks (article 47 Banking Act (BA)), financial infrastructures (article 147 Financial Market Infrastructure Act (FinMIA)) and financial institutions (article 69 Financial Institutions Act (FinIA)). As no client-identifying information can be provided in the due diligence, the buyer cannot directly review the client portfolio, credit book, etc, in the course of its due diligence. It is, however, possible that the target financial institution mandates a third party (often an audit firm) to conduct a due diligence, and that this mandated firm reports the findings (in anonymised form) to the potential buyer. Also, the seller or target frequently produces a vendor due diligence report setting out key aspects of the client business in anonymised form.

Law stated - 31 May 2022

Other due diligence

What other material due diligence is required or advised for financial services M&A transactions?

Besides the legal due diligence, a tax due diligence, financial due diligence and particular compliance due diligence are advisable. Due to the increased requirements and expectations for ESG issues, an ESG due diligence is also advisable.

Furthermore, FINMA expects financial institutions to have appropriate procedures or processes in place to govern M&A transactions (ie, to not proceed only on an ad hoc basis.)

Law stated - 31 May 2022

Emerging technologies

Are there specific emerging technologies or practices that require additional diligence?

Yes. In the case the target financial services firm is active in, or has any exposure to, emerging technologies or practices, in particular if they entail an increased compliance risk (eg, regarding AML or sanctions or uncertainty about supervisory treatment/status and need for licence), these should be covered by the due diligence.

Law stated - 31 May 2022

PRICING AND FINANCING

Pricing

How are targets priced in financial services M&A transactions? What factors typically affect valuation?

In particular for banks, the common purchase price formula comprises the net asset value, plus goodwill on the assets under management (AuM).

Law stated - 31 May 2022

Purchase price adjustments

What purchase price adjustments are typical in financial services M&A transactions?

Sometimes, purchase price adjustments after closing are agreed, based on the development of the AuM or net new money in that period (eg, 12 or 18 months). If a purchase price adjustment is agreed, it is important to clearly define and contractually ring-fence the basis of the calculation of the AuM for the price adjustment (eg, to avoid variations of the AuM due to reorganisation or tactical considerations of the buyer post-closing).

For insurance companies, price adjustments post-closing may be agreed in particular based on developments of clients or insured persons, or premium volumes, or both.

Law stated - 31 May 2022

Financing

How are acquisitions typically financed? Are there any notable regulatory issues affecting the choice of financing arrangements?

No, as long as regulatory capital requirements are safeguarded.

Law stated - 31 May 2022

DEAL TERMS

Representations and warranties

What representations and warranties are typically made by the target in financial services M&A transactions? Are any areas usually covered in greater detail than in general M&A transactions?

In financial services M&A transactions, representations and warranties on compliance with law and default risks of the credit business are particularly relevant.

Compliance with law representations may typically include:

- Swiss banking regulatory provisions in a broad sense (Swiss Financial Market Supervisory Authority (FINMA) requirements; outsourcing requirements; conduct rules);
- anti-money laundering provisions and KYC requirements (including CDB);

- compliance with sanction and embargo laws;
- compliance with the unfair competition act; and
- compliance regarding retrocessions: Third-party payments received in connection with asset management and advisory services must be forwarded to clients, unless they were duly informed of and waived their right, pursuant to and in line with the requirements set forth by case law to article 400 CO and article 26 Financial Services Act. A particular focus must be laid on waivers pre-2014/2015, which sometimes do not meet these requirements. Waivers are also often missing or deficient for execution-only relationships; while in the opinion of two cantonal courts and of us, the duty to forward retrocessions in the absence of a waiver does not apply to this type of relationship, the Zurich Commercial Court and a minority in learned writing take the opposite view.

In addition to these elements of compliance with Swiss law, compliance with foreign law is relevant, as breaches of foreign laws may also constitute breaches of Swiss proper business conduct and risk management requirements, and foreign law may directly apply to Swiss financial institutions, even if they provide services only cross-border, without a presence outside Switzerland (eg, compliance with the sanction, embargo and corruption law, Foreign Account Tax Compliance Act and cross-border provision of services laws).

Besides legal compliance, potential default risks in the credit business should be addressed (eg, by representations and warranties regarding no breaches or defaults under credit agreements), the recoverability of collateral and adequate provisions for risks.

Law stated - 31 May 2022

Indemnities

What indemnities are typical for financial services M&A transactions? What are typical terms for indemnities?

Specific indemnities in financial services M&A transactions significantly depend on what are the relevant issues at a specific target. Commonly, specific indemnities are requested for regulatory or criminal investigations based on identified issues (eg, legacy risks for tax-related issues, breaches of sanctions, embargo or corruption laws, identified AML matters, Madoff risks, retrocession cases or specific credit claims).

Indemnities are generally agreed either in the form of an abstract guarantee pursuant to article 111 CO, or as specific covenants not subject to a de minimis, without application of the general cap (but potentially subject to a specific cap), without application of the shortened statutes of limitations under the contract, and with no exclusion of liability for known or disclosed information.

Law stated - 31 May 2022

Closing conditions

What closing conditions are common in financial services M&A transactions?

Common closing conditions include all supervisory approvals and notifications, merger control approvals, and further standard closing conditions (no hindrances for closing, no material adverse changes, compliance with contractual obligations, or representations and warranties).

Law stated - 31 May 2022

Interim operating covenants

What sector-specific interim operating covenants and other covenants are usually included to cover the period between signing and closing of a financial services M&A transaction?

While it used to be common in financial services M&A transactions to allow for an observer delegated by the buyer to participate in board and management meetings of the target prior to closing, FINMA generally no longer accepts this, for fear of gun-jumping prior to FINMA approval.

FINMA, however, allows access to information and interaction to the extent required for integration planning purposes.

The contractual documentation also commonly includes usual conduct of business covenants for the period between signing and closing.

Law stated - 31 May 2022

DISPUTES

Common claims and remedies

What issues commonly give rise to disputes in the course of financial services M&A transactions? What claims and remedies are available?

The predominant issues in our experience are (1) compliance matters and regulatory or criminal investigations against a bank, in particular for cross-border or foreign tax (evasion), know your customer or AML matters, and (2) the calculation and development of the assets under management, in particular in connection with a post-closing price adjustment mechanism.

Law stated - 31 May 2022

Dispute resolution

How are disputes commonly resolved in financial services M&A transactions? Which courts are used to resolve these disputes and what procedural issues should be borne in mind? Is alternative dispute resolution (ADR) commonly used?

For transactions with Swiss applicable law and Swiss jurisdiction with venue Zurich, the specialised Zurich Commercial Court is often agreed as the forum for dispute resolution. Arbitration with a seat in Switzerland is also regularly used.

Law stated - 31 May 2022

UPDATE AND TRENDS

Trends, recent developments and outlook

What are the most noteworthy current trends and recent developments in financial services M&A in your jurisdiction? What developments are expected in the coming year?

The Federal Council's draft Investment Screening Act is likely to be submitted to and debated in parliament in 2023.

Under the revision of the Banking Act of 17 December 2021 (likely to enter into force in 2023), the Swiss Financial Market Supervisory Authority will obtain the right to order a merger in the case of an impending insolvency.

Law stated - 31 May 2022

Jurisdictions

Egypt	Soliman, Hashish & Partners
France	Bredin Prat
India	Khaitan & Co
Indonesia	ABNR
Japan	Mori Hamada & Matsumoto
Mexico	Creel García-Cuéllar Aiza y Enriquez SC
Netherlands	De Brauw Blackstone Westbroek
South Korea	Bae, Kim & Lee LLC
Spain	Cuatrecasas
Switzerland	Niederer Kraft Frey
USA	Cravath, Swaine & Moore LLP