PANORAMIC

FINANCIAL SERVICES M&A

Switzerland

LEXOLOGY

Financial Services M&A

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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 slowed down in 2023 compared to previous years. The most prominent transaction in 2023 was clearly the US$3.5 billion merger of Credit Suisse Group into UBS. This Swiss Federal Council-brokered transaction between two systemically important banks was announced on 19 March 2023, following significant turbulences at Credit Suisse. The merger was legally effected on 12 June 2023.

Since the announcement of the merger, there have been numerous shifts of teams and employees from former Credit Suisse to other financial institutions, which might have contributed to reduced M&A activity.

The asset management sector continues to account for the majority of financial services M&A, but without a consolidation on the scope initially expected with the FINMA licensing requirement applicable since 2023. It is followed by the insurance sector.

Law stated - 25 Mai 2024

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. Such an exceptional case materialised in March 2023, when the Federal Council, the Swiss National Bank and the Swiss Financial Market Supervisory Authority (FINMA) encouraged or pressured UBS to take over the ailing Credit Suisse. This was preferred to a resolution in order not to threaten the stability of the international financial system and limit the harm to the Swiss economy, given that CS was globally systemic and the country's second-largest bank.

FINMA, besides having to approve most M&As, sometimes regulates such activity in enforcement decrees by imposing temporary M&A restrictions on institutions that breached supervisory law and must restore compliance with the law or otherwise remediate irregularities (article 31 Financial Market Supervision Act). The regulator argues in such cases that the institution needs to concentrate on remediation and avoid diverting resources and increasing complexity or risks by venturing into acquisitions.

On the other hand, FINMA may welcome or even request (under threat of licence withdrawal) mergers of deficient institutions into other companies. Similarly, it may support the acquisition of an institution suffering from financial troubles like a liquidity shortage. Such was the case with Sberbank (Switzerland) AG in the wake of Russia's attack on Ukraine and the resulting sanctions; FINMA enabled the sale of the shares by the Russian parent

company to a Geneva conglomerate in 2022. In the ***Credit Suisse*** case, the Federal Council and the Swiss National Bank played a much more prominent role than FINMA, as they had to provide the necessary credits and guarantees and to enact an emergency ordinance.

Law stated - 25 Mai 2024

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 articles 3-terand 30);
- 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 - 25 Mai 2024

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?

Financial markets supervisory law

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 3ter and 3bis BA). 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 3quater BA). 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 to banks for situations of impending insolvency, where FINMA may order a restructuring, in particular an asset sale to another bank or a bridge bank to ensure the continuation of banking services (article 30, paragraphs 2 and 3 BA). Since 2023, FINMA has also been 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 and 3-quater BA requiring an additional FINMA licence (see above) apply by analogy (article 43 FinIA). The special rules for banks set out above for situations of impending insolvency also apply by analogy to securities firms (article 67, paragraph 1 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 change of the legal form).

Since 1 January 2024, in situations of impending insolvency analogous rules have applied as for banks (see above); previously, a restructuring was only practical in the case of a bankruptcy, forcing this route even if the company could have been stabilised otherwise. The new law has introduced specific restructuring provisions outside a bankruptcy (articles 52a-52m ISA).

Corporate law

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 target needs to obtain FINMA's approval for the surrender of its licence, while the acquiring entity needs to change its articles of association if its purpose or business area changes. 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. (Except for the insurance sector, where each merger 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.

In an emergency threatening 'serious disruption to public order or internal or external security' (article 185, paragraph 3 Federal Constitution), in particular concerning a systemically important bank, the Federal Council may deviate from these provisions. It did so in the merger of Credit Suisse Group into UBS in 2023 by declaring various provisions of the Merger Act inapplicable, in particular the need to obtain the approval of the general assemblies of the companies (see article 10a – in the meantime repealed – of the Ordinance on Additional Liquidity Assistance Loans and the Granting of Federal Default Guarantees for Liquidity Assistance Loans from the Swiss National Bank to Systemically Important Banks of 16 March 2023).

Competition and takeover law

Depending on the market share of the entities, merger filing requirements under the Cartel Act may apply. For listed entities, public takeover rules under FinMIA must be complied with.

Law stated - 25 Mai 2024

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 cbis BA). 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 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

Since 2024, persons with a qualified participation have been 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). Already before, FINMA was authorised to 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 could – and still can – relate to the acquirer.

Law stated - 25 Mai 2024

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 the latter 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 (the individuals as such do not need a licence or registration). Later director and officer changes in banks, securities firms and insurance companies must be approved by FINMA as well. For other financial institutions, prior (de facto) approval is generally sought to ensure that FINMA has no reservations regarding fitness and properness.

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, to enable FINMA to effectively exercise its supervision, the bank must be managed from Switzerland (article 10 Banking Ordinance), namely, key persons of the executive management must be available in Switzerland and the chairman, or at least the vice-chairman, of the board of directors must be domiciled there.

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 and 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 and 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.

The insurance company does not need to be managed from Switzerland, and there are thus no attendant residence requirements, except that a person representing foreign insurance companies under a general power of attorney must reside in Switzerland (article 16, paragraph 1 ISO).

Law stated - 25 Mai 2024

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 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 under 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 did not recuse himself despite conflicts of interest (FINMA enforcement case 2021/10).

Law stated - 25 Mai 2024

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 December 2023 the Federal Council submitted an Investment Screening bill to Parliament, aimed at state-controlled foreign investors targeting companies in particularly critical sectors(media release). The covered sectors include defence, electricity, water, health, telecoms, transport as well as systemically important banks and financial market infrastructures. For the latter, the acquisition of companies with revenues of 100m Swiss francs would be subject to approval by the State Secretariat for Economic Affairs (SECO), on top of the existing FINMA approval requirements.

Today, while there are no general foreign investment controls, the background and nationality of a person acquiring a qualified participation in a financial institution may already be considered by FINMA in notification or approval processes or ongoing supervision. 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.

Law stated - 25 Mai 2024

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 (Comco) 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) 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 (ie, in case of a rescue merger), their interests may be given priority (ie, the concentration may be approved even though it could not under 'pure' competition law reasons), and FINMA decides in place of Comco (article 10, paragraph 3 CA). Accordingly, it approved the UBS/CS merger in March 2023, though only provisionally (under article 32, paragraph 2 and article 33, paragraph 2). A definitive decision is still outstanding; it will take into account the legally prescribed opinion from Comco of October 2023.

Even in the case of a FINMA competence under article 10, paragraph 3, Comco remains competent for subsequently preventing unlawful, abusive practices if the resulting bank is a dominant undertaking or an undertaking with relative market power (article 7).

The above-mentioned turnover triggering the duty to notify ComCom is calculated under a special rule for certain financial companies (article 9, paragraph 3 CA): for banks and other financial intermediaries subject to the accounting regulations set out in the BA, 'turnover' is replaced by 'gross income', which 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 - 25 Mai 2024

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:

- share deals (ie, acquisition of a stake in a licensed entity);
- asset deals (acquisition of all or part of the assets, either as partial universal succession pursuant to article 69 et seqq. Merger Act (MA) or singular succession, or in the case of insurance companies, portfolio transfers under the Insurance Supervision Act (ISA)); or
- referral agreements for the transfer of certain customer portfolios.

Share deals may be followed by a group-internal merger post closing. Mergers (by absorption) are also used for (other) intra-group transactions. Otherwise, they have been less common in recent years.

Share deals are regularly used in transactions where the – often non-Swiss – purchaser 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 and want 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 (leaving a residual 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) is to be transferred. With referral agreements, a buyer only pays for the clients that actually enter into a new client relationship.

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

For public companies, the structures commonly used are mergers, tender offers or asset sales. The UBS/CS merger in 2023 took place as a share deal; anything else would not have been possible within the very short timespan available.

Law stated - 25 Mai 2024

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 if bylaws and organisational regulations need to be adapted, and in the case of insurance transactions where the business plan must be adjusted.

The timing may be extended in the case further clarifications e.g. on incoming shareholders are required, and/or approvals must be sought also in foreign jurisdictions, in particular if FINMA has to coordinate on consolidated supervision with foreign regulators.

Law stated - 25 Mai 2024

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 as to transactions in other sectors.

One tax aspect that is of particular relevance for M&A transactions in the financial services industry is Swiss stamp duty: if the seller, the buyer or a person acting as intermediary in the sale of shares is a securities dealer within the meaning of the Stamp Duty Act, which includes licensed banks and securities dealers (besides other Swiss entities holding securities with a book value of more than 10 million Swiss francs), a stamp duty of 0.15 or 0.3 per cent of the purchase price is levied on the sale of shares in Swiss and non-Swiss companies, respectively. This should be appropriately considered when drafting the cost and tax clauses of the SPA.

Asset deals pursuant to the Merger Act are exempt from the stamp duty. Nonetheless, for Swiss-domiciled individual sellers, a share deal tends to be more attractive than an asset deal, as capital gains resulting from the sale of shares held as private assets are generally tax free income in Switzerland, which is not the case for the proceeds of an asset deal.

For real estate funds, the Federal Supreme Court has confirmed that cantons may levy a real estate transfer tax if the fund management is transferred from one fund management company to another pursuant to article 39 (or 39a) FinIA (decision 9C_312/2023 of 7 December 2023; BGE 148 II 121). In the (few) cantons who use this competence, the tax may practically be prohibitive. It can be avoided by a corporate merger of the fund management companies or a share deal between them (which, however, necessarily encompasses any funds managed by the acquired company).

Law stated - 25 Mai 2024

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 as to how to include and specifically address ESG factors in their M&A activity, though as part of their diligence duties, they (and their directors and officers) are obliged to take into account ESG risks (and conversely opportunities/upsides) with a potential direct or indirect (eg, via reputational harm) financial impact, and laws and regulations increasingly say so explicitly (see, eg, the draft FINMA Circular 'Nature-related financial risks'). In practice, specific ESG due diligence has become increasingly standard.

For conflict minerals and child labour specifically, Swiss law has been imposing various supply chain due diligence and transparency duties on Swiss companies (subject to thresholds and exemptions) since 1 January 2023. To avoid legal and reputational risks arising from non-compliance with these new rules, acquirers should include these aspects in their M&A due diligence.

ESG matters have also 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. Further regulatory and legislative measures are in preparation (see, eg, the above-mentioned draft Circular 'Nature-related financial risks').

Furthermore, with customer demand for ESG-focused or -compliant products at a very high and generally still growing level, the offering of such products by a target is an increasing factor in acquisitions and their pricing.

Law stated - 25 Mai 2024

Political and policy risks

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

Political and policy risks are generally very limited in Switzerland, including in the financial industry. It is, however, advisable to pre-sound with FINMA early in the process if the parties are uncertain whether FINMA sees potential hurdles approving 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 (usually applicable not only for the future, but also for past facts) and policy changes should be addressed. In practice, risks, including legal risks related to political and policy concerns and legacy matters, are often excluded from a transaction by choosing an asset deal, specifically carving out such political or legacy risks.

Law stated - 25 Mai 2024

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 - 25 Mai 2024

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 third-party consent and notification requirements (eg, under finance arrangements or change of control/non-transfer and other provisions in contractual agreements), a key question in financial services M&A transactions is if and in what form clients of the bank or other FINMA-licensed financial services provider need to consent to effect a transfer of the legal

relationship, in particular to safeguard banking secrecy and the analogous secrecies for other financial institutions.

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 4quinquies Banking Act (BA) allows foreign parent companies to access Swiss secrecy-protected data as far as necessary for their consolidated supervision; this is usually complemented by broader intra-group information exchange provisions in the form of client waivers of banking secrecy and data protection).

In the case of an asset deal by singular succession, the transfer of contractual relationships in principle requires the consent of the counterparty. An exception applies to transfers of dormant accounts (article 37*l* BA) and transfers ordered by FINMA in the case of an insolvency or risk thereof (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, with the clients being given adequate time to oppose a transfer, is sufficient. 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 may 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 companies, 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 - 25 Mai 2024

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. Besides law firms, 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 may be provided in the due diligence, the buyer cannot directly review the client portfolio, credit book, etc. It is, however, possible that the target 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 - 25 Mai 2024

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 specific compliance due diligence are advisable. A special focus should also be put on cybersecurity, in particular as the financial services industry is both sensitive-data intensive and increasingly relying on online business. In addition, owing to the increased requirements and expectations regarding ESG issues, ESG due diligence is advisable and more and more common.

Law stated - 25 Mai 2024

Emerging technologies

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

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

Law stated - 25 Mai 2024

PRICING AND FINANCING

Pricing

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

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

Law stated - 25 Mai 2024

Purchase price adjustments

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

Sometimes, purchase price adjustments after closing are agreed in the SPA, based on the development of the AuM or net new money in that period (eg, 12 or 18 months). If so, it is important to clearly define and contractually ring-fence the basis of the calculation of the AuM (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 - 25 Mai 2024

Financing

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

As long as regulatory capital requirements are safeguarded, there are no notable regulatory issues affecting the choice of financing arrangements. Leveraged transactions are, however, less common than in other sectors, and the Swiss Financial Market Supervisory Authority would only accept PE structures (if at all) subject to specific additional requirements.

Law stated - 25 Mai 2024

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 financial institutions regulatory provisions in a broad sense (Swiss Financial Market Supervisory Authority (FINMA) requirements; outsourcing requirements; conduct rules);
- anti-money laundering (AML) and KYC requirements (including the banking industry's self-regulation (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 should be put 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 three cantonal courts (including Geneva) and of us, the duty to forward retrocessions in the absence of a waiver does not apply to this type of relationship, the Berne and Zurich Commercial Courts and part of learned writing take the opposite view; the Federal Supreme Court left the question open repeatedly.

Compliance with foreign laws is also relevant, as their breaches may simultaneously constitute a breach of Swiss proper business conduct and risk management requirements. Foreign law may directly apply to Swiss financial institutions, even if they provide services cross-border without a presence outside Switzerland, or even if they merely route transactions through a country such as the US via correspondent banks. Thus, compliance with law representations may include foreign sanction, embargo and corruption laws, tax laws and cross-border provision of services laws.

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

In share deals, it is rather uncommon, however, for the ***target*** to directly grant warranties, as it is generally not a party to the SPA (and becomes part of the buyer following the transaction). Rather, warranties are generally granted by the seller.

Law stated - 25 Mai 2024

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 the relevant issues at a specific target are. Commonly, specific indemnities are requested for regulatory or criminal investigations based on identified issues (eg, 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 - 25 Mai 2024

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 - 25 Mai 2024

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 - 25 Mai 2024

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, foreign tax (evasion), anti-money laundering or KYC matters; and (2) the calculation and development of the

assets under management, in particular in connection with a post-closing price adjustment mechanism.

A distinction must be made between: (1) a breach of representations and warranties leading to compensation or indemnification (mostly explicitly foreseen in the sales and purchase agreement); and (2) contractual violations (such as of covenants) leading to damages .

In addition to the indemnifications in the case of breach of representations and warranties, in particular the following remedies are possible in the case of a contractual breach: specific performance; compensatory damages; and suspension of performance of its own obligations. An unwinding of the transaction is often contractually excluded.

Law stated - 25 Mai 2024

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, ordinary Swiss courts are often agreed as the forum for dispute resolution. When Zurich is the chosen venue, parties often refer to the specialised Zurich Commercial Court that takes on a case if competent. Arbitration with a seat in Switzerland is also regularly used.

Law stated - 25 Mai 2024

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 2024/2025.

On 6 September 2023, the Federal Council submitted a bill to parliament with amendments to the Swiss Banking Act, introducing in particular a public liquidity backstop (PLB) for systematically important banks, as already employed by emergency ordinance in the takeover of Credit Suisse Group by UBS in March 2023. The bill will be debated in 2024/2025.

Economically, we expect M&A activity to remain subdued as long as macroeconomic conditions do not fundamentally change, in particular by a lowering of interest rates.

Law stated - 25 Mai 2024