Banking Regulation Comparative Guide

SABETI LEGAL + BORY & ASSOCIÉS AVOCATS

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1.Legal framework

1. 1. Which legislative and regulatory provisions govern the banking sector in your jurisdiction?

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The financial market legislation governing the banking sector in Switzerland derives from a number of sources. The key statutes include:

- the Financial Market Supervision Act of 2007;
- the Banking Act of 1934;
- the Financial Institutions Act of 2018;
- the Financial Services Act of 2018;
- the Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading of 2015;
- the Federal Act on Combating Money Laundering and Terrorist Financing in the Financial Sector of 1997; and
- the Collective Investment Schemes Act of 2006.

These statutes are supplemented by various implementing ordinances enacted by the Federal Council or the Swiss Financial Market Supervisory Authority FINMA (FINMA). Their practical application is further specified by FINMA in corresponding circulars.

In addition, the Swiss Bankers Association and other industry associations have issued regulations in many areas, some of which have been adopted by FINMA as binding minimum standards.

1. 1. Which legislative and regulatory provisions govern the banking sector in your jurisdiction?

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There are two main laws governing the banking sector in Switzerland:

- Banking Act: This applies to banks providing services in and/or from Switzerland.
- Financial Market Supervision Act: This led to the creation of the Swiss Financial Market Supervisory Authority (FINMA) and contains the main provisions relating to FINMA's supervision of banks and other players in the financial sector that need a licence to operate.

Other important laws include:

- the Financial Services Act;
- the Financial Institutions Act;
- the Anti-money Laundering Act;
- the Financial Market Infrastructure Act;
- the Collective Investment Schemes Act;

- the Insurance Supervision Act; and
- the Law on the Issuance of Mortgage Bonds.

These laws are supplemented by a large number of ordinances issued by the Swiss Federal Council (Swiss government) and FINMA. The latter also issues circulars that specify how it applies the financial market supervision legislation.

Finally, the Swiss banking sector is subject to self-regulation which complements and implements the banking regulations. The Swiss Bankers Association is the main self-regulatory body.

1. 2. Which bilateral and multilateral instruments on banking have effect in your jurisdiction? How is regulatory cooperation and consolidated supervision assured?

Switzerland
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International supervisory cooperation with foreign supervisory authorities is one of FINMA's core international activities.

International supervisory cooperation is ensured through:

- multilateral or bilateral agreements;
- mutual administrative assistance (the bilateral exchange of information in the traditional sense);
- on-site inspections; and
- colleges – that is, platforms for cooperation between several supervisory authorities in relation to a financial group or conglomerate.

FINMA has concluded a large number of bilateral agreements with the most important foreign authorities. The agreements facilitate cooperation with these authorities and can be a prerequisite for the authorisation of Swiss regulated entities in a foreign financial market or vice versa.

FINMA is also a party to multilateral agreements – in particular, the Multilateral Memorandum of Understanding and the Enhanced Memorandum of Understanding of the International Organization of Securities Commissions. These multilateral agreements define an international standard for supervisory cooperation.

In the area of international cooperation, Switzerland is a member of the following main bodies:

- the Financial Stability Board;
- the Basel Committee on Banking Supervision;
- the Financial Action Task Force on Money Laundering;
- the International Association of Insurance Supervisors; and
- the International Organization of Securities Commissions.

The international standards issued by these various bodies are not directly applicable. To be so, they must be implemented under Swiss law. The automatic international exchange of information in tax matters, based on the Common Reporting Standard of the Organisation for Economic Co-operation and Development, is one example of international standards that are the subject of a specific law in Switzerland. In addition, Switzerland has a specific law implementing the Foreign Account Tax Compliance Act Agreement with the United States.

1. 2. Which bilateral and multilateral instruments on banking have effect in your jurisdiction? How is regulatory cooperation and consolidated supervision assured?

Switzerland
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Switzerland participates in several international bodies which have a significant influence on Swiss banking regulation – in particular:

- the Financial Stability Board;
- the Bank of International Settlements;
- the Basel Committee on Banking Supervision (BCBS); and
- the International Organization of Securities Commissions.

Furthermore, Switzerland is a member of the Financial Action Task Force (FATF) and the Organisation for Economic Co-operation and Development (OECD).

Among others, Switzerland has implemented:

- the capital adequacy rules of the Basel Accord (Basel I, II and III) issued by the BCBS;
- the recommendations of the FATF relating to anti-money laundering; and
- the automatic exchange of information based on the common reporting standard of the OECD.

Furthermore, Switzerland has entered into an intergovernmental agreement with the United States for cooperation to facilitate the implementation of the Foreign Account Tax Compliance Act.

In order to ensure the effective supervision of internationally active financial institutions, FINMA works with foreign supervisory authorities and participates in specific supervisory and enforcement proceedings, as well as in the resolution of issues concerning financial institutions within the framework of international supervisory cooperation. This takes place on the basis of the Swiss legal provisions, some of which are supplemented by international treaties or specified in non-binding international administrative agreements.

For further details on consolidated supervision, please see question 5.1.

1. 3. Which bodies are responsible for enforcing the applicable laws and regulations? What powers (including sanctions) do they have?

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FINMA is the single integrated financial market supervisory authority, responsible for the supervision of banks, securities firms, stock exchanges and collective investment schemes, as well as for the private insurance sector.

FINMA's primary tasks are:

- to protect the interests of creditors, investors and policyholders; and
- to ensure the proper functioning of the financial markets.

To this effect, FINMA is responsible for licensing, prudential supervision, enforcement and regulation.

Under the dual supervisory system in the banking sector, FINMA largely relies on the work of recognised audit firms, which carry out direct supervision and on-site audits; while FINMA retains responsibility for overall supervisory and enforcement measures.

FINMA can also appoint an independent and suitably qualified person to investigate circumstances relevant for supervisory purposes at a supervised person or entity, or to implement supervisory measures that it has ordered (an investigating agent).

Where a supervised person or entity violates the provisions of legislation or where there are any other irregularities, FINMA must ensure the restoration of compliance with the law. In case of serious violations of supervisory provisions, FINMA may impose the following sanctions:

- issue a declaratory ruling;
- prohibit the person responsible from acting in a management capacity at any supervised entity;
- publish its supervisory ruling;
- confiscate any profits that a supervised person or entity or a person in a management position has made; and
- revoke the licence of a supervised person or entity, or withdraw its recognition or cancel its registration.

The Swiss National Bank (SNB) is primary responsible for the determination of systemically important banks and their systemically important functions (please also see question 5.2). Furthermore, the regulatory framework stipulates that capital requirements may be increased temporarily in certain cases. Decisions on the activation, deactivation and level of this countercyclical capital buffer will be made by the Federal Council, upon the proposal of the SNB (please also see question 4.2). Other than that, the SNB controls the money supply by giving commercial banks access to central bank money (deposit accounts) and thus influencing credit formation within the banking system. In this role, it can also act as a 'lender of last resort'. It is also responsible for facilitating and ensuring the operation of cashless payment systems. Finally, the SNB collects statistical data – including from banks – for the following purposes:

- to fulfil its monetary policy functions;
- to fulfil its oversight functions with respect to payment and securities settlement systems;
- as part of its contribution to the stability of the Swiss financial system;
- on behalf of international organisations of which Switzerland is a member; and
- for its balance of payments and for statistics on the international investment position.

1. 3. Which bodies are responsible for enforcing the applicable laws and regulations? What powers (including sanctions) do they have?

Switzerland
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FINMA’s legal mandate is to protect:

- stakeholders of the financial markets, including customers, investors and insured persons; and
- the proper functioning of these markets.

It is the main authority responsible for enforcing financial market legislation in Switzerland.

The prudential supervision of the Swiss financial sector is FINMA’s core task. It is carried out with a forward-looking approach.

A Swiss peculiarity is that FINMA delegates a large part of this supervision to private auditing companies. This is the so-called dual system of supervision.

Prudential supervision is risk oriented. In this respect, FINMA has divided Swiss banks into five supervisory categories according to size, complexity and risk structure.

In the event of a violation (suspected or proven) of the financial market supervisory laws, FINMA has several enforcement instruments at its disposal, which it applies on a case-by-case basis.

These enforcement tools (which can be applied cumulatively) are:

- provisional measures;
- restoration of the legal order;
- reprimand;
- a ban on exercising a management function for an individual;
- a ban on practising for an individual;
- publication of FINMA’s enforcement decision (‘name and shame’);
- the seizure of illegally acquired profits;
- withdrawal of a licence;
- liquidation; and
- the bankruptcy of a supervised institution.

FINMA is also empowered to issue a ban on a person that has carried out an activity subject to financial market supervisory laws without having previously obtained the relevant authorisation.

FINMA does not have the legal authority to impose fines on legal entities or individuals that have violated financial market supervisory laws. However, it does have the power to seize illegally acquired profits.

FINMA regularly calls on third-party specialised firms (eg, lawyers and auditing firms) to assist it in the implementation of these enforcement measures.

If there is a suspicion that a criminal offence has been committed, FINMA will contact the competent criminal authorities, which will decide whether to initiate criminal proceedings. Civil disputes fall under the jurisdiction of the ordinary courts and/or of the Swiss Banking Ombudsman (mediation body).

1. 4. What are the current priorities of regulators and how does the regulator engage with the banking sector?

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FINMA recently published its Risk Monitoring 2022 report, which details the main risks identified by FINMA for the next three years.

These risks are as follows:

- Interest rate risk: Inflationary pressure has led to a tightening of monetary policy with central banks raising key rates.
- Credit risk in mortgage financing.
- Credit risk in other loans: In particular, these are linked to the rise in commodity and energy prices.
- Market risk: The risk of yield spreads on corporate bonds (due to rising inflation and the global economic slowdown).
- Cyber risks: FINMA has just finalised the revision of Circular FINMA 2008/21 "Operational Risks – Banks" to better reflect the evolution of this risk. The new Circular FINMA 2023/1 "Operational Risks and Resilience – Banks" will enter into force on 1 January 2024.
- Money laundering and sanctions: Switzerland is one of the main locations for cross-border wealth management for private clients. A reputational risk for Swiss banks and the financial centre as a whole is linked to this risk.
- Access to the European market: The European Union is considering tightening the conditions of access to its market for banks located in non-EU countries wishing to offer their services to clients in the European Union.

FINMA is in regular contact with the banks on these issues.

Decentralised finance – which refers to a wide range of applications based on blockchain infrastructures that enable financial applications such as trading or credit transactions – is also a particular focus of FINMA.

1. 4. What are the current priorities of regulators and how does the regulator engage with the banking sector?

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In November 2016 FINMA published its strategic goals and priorities for the period 2017 to 2020. These include:

- ensuring that banks and insurance companies have strong capitalisation;
- making a sustainable positive impact on the conduct of financial institutions, especially in money-laundering prevention;
- mitigating the 'too big to fail' problem through viable emergency plans and credible resolution strategies;

- contributing to the protection of creditors, investors and insureds through structural change in the financial industry;
- pushing for the removal of unnecessary regulatory obstacles to innovative business models;
- promoting principle-based financial market regulation and equivalence with relevant international requirements; and
- ensuring that the cost of supervision remains stable and further efficiency gains can be achieved.

FINMA has also published its latest risk monitor report in December 2019. The risk monitor report provides an overview of what FINMA believes are the most important risks currently faced by supervised institutions and describes the resulting focus of its supervisory activity. The six principal risks identified by FINMA for supervised institutions and the Swiss financial industry are:

- the persistent low interest rate environment;
- a possible correction in the real estate and mortgage market, especially in the investment property segment;
- cyberattacks;
- the disorderly abolition of London Inter-bank Offered Rare benchmark interest rates;
- money laundering; and
- increased impediments to cross-border market access, particularly in the European Union.

2.Form and structure

2. 1. What types of banks are typically found in your jurisdiction?

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Currently, there are 248 licensed banks in Switzerland, of which:

- two are big banks that are global systemically relevant banks (UBS AG and Credit Suisse AG), and three are systemically relevant banks or banking groups (Zurich Cantonal Bank, Raiffeisen Switzerland and PostFinance);
- 24 are (partly) state-owned cantonal banks;
- 60 are regional banks or savings banks;
- 71 are foreign-controlled banks (ie, controlled by significant foreign shareholders); and
- 24 are Swiss branch offices of foreign banks.

2. 1. What types of banks are typically found in your jurisdiction?

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As at the end of 2021, Switzerland had 239 banks, divided into the following categories:

- Twenty-four cantonal banks: These banks are subject to specific cantonal regulations. They operate in principle in the canton where they have their headquarters. They are active in all areas, but mainly in savings deposits and mortgages, as well as in wealth management for some of them.

- Four large banks: These are economically important institutions that offer the full range of banking services, particularly in the field of investment banking. These institutions are part of a financial group and are active worldwide. This category includes:
    - UBS AG and its Swiss subsidiary, UBS Switzerland AG; and
    - Credit Suisse AG and its Swiss subsidiary, Credit Suisse (Suisse) AG;

  Due to the fact that UBS Group recently acquired the Credit Suisse Group, this categorization will necessarily be reviewed by the competent authorities.
- Fifty-nine regional banks/savings banks: These focus on traditional interest-bearing business (mortgages, corporate loans, customer deposits in the form of savings and investments). They are active at the regional level.
- One *Raiffeisen* bank. The activities and geographical scope of this bank are similar to those of the regional banks/savings banks. The main difference is that it is a Swiss-wide group with a 'parent company'. The parent company carries out the operational and strategic tasks of the group and acts as guarantor for all liabilities of the *Raiffeisen* bank at national level. The banks are jointly and severally liable.
- Thirty-six wealth management banks: These banks are mainly active in wealth management for Swiss and international clients.
- Five private bankers: These conduct similar activities to wealth management banks. The difference lies in their legal form and in the fact that private bankers, as natural persons, are jointly and severally liable for the commitments of their institution.
- Seventeen other banks: These banks do not meet the requirements of the other categories of banks and have no significant common features.
- Sixty-seven foreign-owned banks: These are active in all areas, with some focusing on investment banking and wealth management for clients based abroad.
- Twenty-six branches of foreign banks: These conduct similar activities to foreign-owned banks. The main difference is that, as branches, they do not have their own legal personality (they are economically and legally subordinate to their parent company abroad).

2. 2. How are these banks typically structured?

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The Banking Act does not prescribe a specific legal form.

Nevertheless, the vast majority of banks are structured as companies limited by shares (corporations). Some are privately owned, while others are listed on the stock exchange.

The cantonal banks are mostly public law institutions with their own legal personality. The *Raiffeisen* bank is a cooperative company. Finally, private bankers are incorporated as:

- sole proprietorships;
- general partnerships;
- limited partnerships; or
- limited partnerships with shares.

2. 2. How are these banks typically structured?

Switzerland
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Swiss banking regulation does not prescribe a specific legal form for banks. In practice, however, most banks are structured as corporations, while some are organised as cooperatives. Furthermore, cantonal banks generally operate as entities subject to cantonal public law.

Partnerships and even sole proprietorships may also run a banking business (so-called ‘private bankers’). The distinguishing feature of private bankers is that one or more individuals bear unlimited personal liability for the bank’s commitments. This is the main reason why only five banks are structured in this way in Switzerland.

The term ‘private banker’ is not to be confused with the term ‘private bank’, which mainly describes the focus of the latter’s business activities on asset management and investment advice for wealthy private clients (ie, private banking services). As opposed to ‘private bankers’, the typical ‘private bank’ is structured as a corporation, which limits the liability of its owners.

2. 3. Are there any restrictions on foreign ownership of banks?

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If foreigners directly or indirectly hold more than half of the voting rights or in any other way exercise a controlling influence over a bank to be organised in accordance with Swiss law, the Swiss Financial Market Supervisory Authority (FINMA) may make the corresponding licence contingent on additional conditions. In particular, FINMA may require that:

- the country in which the foreigners controlling the bank are domiciled guarantee reciprocity (not applicable to member states of the General Agreement on Trade and Services of the World Trade Organization; or
- the bank’s corporate name does not indicate or suggest that the bank is in some way Swiss.

If a bank is part of a financial group or financial conglomerate, FINMA may make the licence dependent on the agreement of the relevant foreign supervisory authority. Furthermore, FINMA may request that the bank be subject to adequate consolidated supervision by a foreign supervisory authority.

For the purpose of the above, a ‘foreigner’ is:

- a natural person who possesses neither Swiss citizenship nor a Swiss residence permit; or
- a legal entity or partnership that is domiciled abroad or, if it is domiciled in Switzerland, that is controlled by persons as defined above.

An additional licence must be obtained if the bank comes under a controlling foreign influence after its inception. In this regard, please also see question 9.2.

Analogous restrictions apply to banks organised under foreign law that seek to obtain a licence for a Swiss branch or representative office.

2. 3. Are there any restrictions on foreign ownership of banks?

Switzerland
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In order to operate in Switzerland, foreign-owned banks must meet the same legal requirements as Swiss-owned banks.

In addition, they must meet the following criteria:

- The country of domicile or registered office of each foreign person (natural or legal) holding a qualifying interest must guarantee reciprocity. 'Foreign' means:
  - natural persons who are not Swiss citizens or do not have a permanent residence permit in Switzerland; and
  - legal entities which have their registered office abroad or which, if they have their registered office in Switzerland, are owned by foreign natural persons who are neither Swiss citizens nor have a permanent residence permit.

  Qualified participation, whether direct or indirect, is reached if the person concerned holds more than half of the votes or otherwise controls the concerned bank.
  Reciprocity need not be verified if international agreements to this effect exist (eg, with member states of the World Trade Organization).
- The name of the bank must not lead to the conclusion that the bank is Swiss or suggest that it is Swiss.
- If the bank is part of a group or a financial conglomerate, the Financial Market Supervisory Authority (FINMA) may condition the grant of authorisation on the agreement of the competent foreign authorities, which must carry out consolidated supervision including the Swiss banking institution.

If a foreign holder of qualified participations changes, or if a Swiss-owned bank is about to be transferred to a foreign ownership, an additional authorisation must be requested from FINMA.

Finally, the above conditions also apply in principle to branches and representative offices of foreign banks in Switzerland.

2. 4. Can banks with a foreign headquarters operate in your jurisdiction on the basis of their foreign licence?

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Any bank that wishes to offer banking services in or from Switzerland must first obtain a licence from FINMA. In other words, a foreign bank that wishes to carry out such activity in Switzerland cannot rely solely on its foreign licence (no passporting).

Depending on the activities it wishes to carry out in or from Switzerland, the foreign bank must determine whether it is appropriate to open a subsidiary, a branch or a representative office. The legal requirements vary according to the type of structure chosen.

Under certain conditions, foreign banks that provide certain cross-border wealth management services to clients established in Switzerland, but without establishing a physical presence in Switzerland, are not required to obtain a prior authorisation from FINMA. However, their client advisers must be entered in a Swiss register of advisers.

Client advisers of foreign banks subject to prudential supervision in their home country may benefit from an exemption – that is, they are not required to register in the advisers' register, provided that they limit their services in Switzerland to professional and institutional clients.

If the foreign bank carries out an activity in or from Switzerland that is subject to FINMA authorisation without having obtained such authorisation, FINMA may order enforcement measures against the foreign bank and against the natural persons who head the foreign bank.

2. 4. Can banks with a foreign headquarters operate in your jurisdiction on the basis of their foreign licence?

Switzerland
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Switzerland generally does not accept the passporting of foreign licences into Switzerland. Therefore, all foreign banks wishing to establish a physical presence in Switzerland – whether through a subsidiary, a branch or a representative office – must first obtain a licence from FINMA.

However, foreign banks that provide financial services to Swiss-based customers merely on a cross-border basis (ie, without establishing a physical presence in Switzerland) are not required to obtain a licence from FINMA. Instead, their client advisers must be registered on a Swiss advisers register, as stipulated in the Financial Services Act. Exemptions are available for client advisers of foreign banks that are subject to prudential supervision in their home country, provided that they limit their service offering in Switzerland to professional and institutional clients within the meaning of the Financial Services Act.

3.Authorisation

3. 1. What licences are required to provide banking services in your jurisdiction? What activities do they cover?

Switzerland
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Under the Banking Act, 'banks' are defined as enterprises that are active principally in the field of finance and that:

- accept or offer to accept deposits from the public on a professional basis (ie, from more than 20 persons) of more than CHF 100 million to finance any number of persons or companies with which

they do not form an economic unit;
- accept or offer to accept deposits from the public on a professional basis of up to CHF 100 million and invest or pay interest on the public deposits; or
- refinance themselves significantly with loans from more than five banks that do not own any significant holdings in them to finance any number of persons or companies with which they do not form an economic unit of their own.

The Banking Act provides for two types of licences:

- Banking licence: A banking licence must be obtained by enterprises that intend to engage in any of the activities described above.
- Fintech licence (also known as a banking licence ‘light’): Fintech licences are granted for companies that are mainly involved in the financial sector and intend to accept public deposits on a commercial basis of up to CHF100 million without investing, paying or promising to pay interest on these deposits (ie, ‘fintech companies’). While fintech companies are not technically considered ‘banks’, they are subject to a similar – though less restrictive – regulatory regime.

Banks and fintech companies must obtain authorisation from the Swiss Financial Market Supervisory Authority (FINMA) before engaging in business operations.

Natural persons and legal entities without a banking licence are prohibited from using the term ‘bank’ or ‘banker’ in their company name, and from accepting deposits from the public on a professional basis.

The Swiss banking system is based on the model of universal banking. This means, in principle, that every bank can provide all core and ancillary banking services, including:

- deposit taking;
- lending;
- asset management (with respect to both individual client portfolios and collective assets);
- investment advice; and
- payment services.

The specific activities that a bank actually performs must be described in its articles of association and organisational regulations, which are subject to approval by FINMA. This means that any expansion of the service offering initially approved in the licensing process must be re-approved by FINMA.

Up until the implementation of the Financial Institutions Act, banks engaged in securities trading required not only a licence under the Banking Act, but also a separate licence as securities dealer under the former Stock Exchange Act. Pursuant to the licensing cascade introduced by the Financial Institutions Act, such double licensing is no longer necessary for banks.

3. 1. What licences are required to provide banking services in your jurisdiction? What activities do they cover?

Switzerland
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For the purposes of the Banking Act, a 'bank' is defined as any party that is principally active in the financial business and that:

- accepts or offers to accept deposits from the public on a professional basis in excess of CHF 100 million to finance an indefinite number of natural persons and legal entities with which it does not form an economic unit;
- accepts or offers to accept deposits from the public on a professional basis up to a maximum of CHF 100 million and invests or remunerates these deposits; or
- refinances itself to a significant extent with several banks that do not have a significant interest in its capital in order to finance for its own account, in any manner whatsoever, an indeterminate number of natural persons or legal entities with which it does not form an economic unit.

A bank is engaged on a 'professional basis' if it:

- accepts over a long period of time more than 20 deposits from the public or crypto-assets in collective deposit; or
- calls on the public to obtain deposits or crypto-assets in collective deposit, even if it subsequently obtains less than 20 deposits from the public or crypto-assets.

On the other hand, anyone that accepts deposits from the public or crypto-assets in collective deposit for an amount of up to CHF 1 million is not acting in a professional capacity as long as no interest transactions are carried out (sandbox entity). In this case, customers must be informed in advance that:

- the Financial Market Supervisory Authority (FINMA) does not supervise the sandbox entity; and
- these deposits are not covered by the deposit guarantee.

Once a banking licence has been obtained, the authorised institution can carry out any banking activity in Switzerland (universal banking model). In particular, it can operate as:

- a securities house (securities trader);
- a collective asset manager;
- a wealth manager; or
- a trustee (cascade authorisation system).

In order to be better positioned in the fintech field and to promote innovation, a new licence was introduced in 2019 for anyone that:

- accepts deposits from the public on a professional basis up to CHF 100 million; or
- calls on the public to obtain deposit and does not invest or remunerate them.

Obtaining a fintech license is subject to relaxed legal and regulatory requirements. A company that has obtained such a licence is not considered as a bank.

3. 2. What requirements must be satisfied to obtain a licence?

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The main formal requirements to obtain a banking license are as follows:

- a minimum fully paid-up capital of CHF 10 million;
- a business plan showing that capital adequacy, risk diversification and liquidity requirements can be met on an ongoing basis;
- proper business conduct by the holders of qualified participations, the board members and the senior executives;
- a precise description of the field of activity and the geographical scope of activity in the articles of association, the company contract or the regulations (the field of activity must correspond to the financial possibilities and the administrative organisation of the bank);
- effective management of the bank from Switzerland;
- clear separation between the board of directors and the senior executives;
- effective separation of internal functions – in particular lending, trading, wealth management and transaction execution;
- effective risk management – in particular through appropriate identification, limitation and control of risks (eg, market, credit, loss, transaction execution, liquidity, image, as well as operational and legal risks);
- effective internal control system and internal auditing independent of management;
- the appointment of a recognised audit company for the authorisation procedure;
- the appointment of a recognised supervisory audit firm for ongoing supervision;
- for applicants under foreign control, a guarantee of reciprocity by the countries of domicile of the holders of qualified participations; and
- if the bank is part of a financial group, adequate consolidated supervision by a recognised supervisory authority.

3. 2. What requirements must be satisfied to obtain a licence?

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For a banking licence to be granted, the applicant must demonstrate that it meets all licensing requirements – in particular, the following:

- fully paid-up minimum capital of at least CHF 10 million (according to law; in practice, FINMA generally requires at least CHF 20 million);
- a business plan showing that compliance with capital adequacy, risk diversification and liquidity rules may be ensured at all times;
- a guarantee of irreproachable business activity by qualified participants and members of the board of directors and the executive management;
- a precise factual and geographical description of the business in the articles of association, partnership agreement and business rules;
- the management of the bank from Switzerland;
- separation of the board of directors and the executive management;
- effective separation of internal functions – in particular lending, trading, asset management and settlement;

- effective risk management – in particular appropriate identification, limitation and monitoring of market, credit, default, settlement, liquidity, reputational, operational and legal risks;
- an effective internal control system, including independent risk control, compliance and internal audit functions;
- the appointment of a recognised audit firm for the application process;
- the appointment of a recognised regulatory audit firm for ongoing supervision;
- for applicants under foreign control, reciprocal rights on the part of the countries in which qualified participants are domiciled; and
- if the bank is part of a financial group, adequate consolidated supervision by a recognised supervisory authority.

3. 3. What is the procedure for obtaining a licence? How long does this typically take?

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To obtain a banking licence, a respective application must be filed with FINMA in an official Swiss language (ie, German, French or Italian). The application must cover general information on the applicant as well as information on specific aspects, including:

- direct and indirect participations;
- members of the board of directors and the executive management;
- business activities and internal organisation;
- business plan;
- regulatory auditors;
- application auditors;
- additional requirements for foreign controlled banks or securities dealers; and
- additional requirements for applicants belonging to a group operating in the financial business sector.

The application must be supplemented by detailed supporting documentation. The content of the application and the necessary supporting documents are described in detail in corresponding guidance published on FINMA's website.

Prior to filing the application with FINMA, an audit of the intended set-up must be performed by a recognised audit firm (application audit).

Furthermore, applicants are generally advised to arrange a meeting with FINMA representatives to present their licensing projects and receive initial feedback before submitting their application.

The licensing process typically takes about six to nine months from initial filing of the application. The length of this process depends on the quality, completeness and complexity of the application. Applications from entities outside Switzerland must also take into account the time it takes to obtain a response from the competent foreign supervisory authorities.

3. 3. What is the procedure for obtaining a licence? How long does this typically take?

Switzerland
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As a first step, it is recommended to write to or meet with FINMA in order to present the broad outlines of the banking project. FINMA can then issue a non-binding opinion on the submitted file.

If FINMA does not raise major concerns against the project, a complete file must be submitted in a Swiss national language (German, French or Italian). A file submitted in English will not be taken into account.

FINMA will review the file and ask any questions it deems relevant before issuing its decision. FINMA will also contact the auditing firm mandatorily retained by the applicant company and liaise with foreign supervisory authorities, if necessary.

The length of the procedure before FINMA depends on:

- the quality of the file submitted;
- whether it is complete; and
- its complexity.

The workload of FINMA is another criterion that must be taken into account. Finally, if the application for authorisation has a foreign component, the duration of the procedure will also depend on the responsiveness of the foreign supervisory authorities.

Adequate time must be allocated for the preparation and compilation of the documentation to be filed with FINMA.

The entire procedure (preparation and compilation of the file and its review by FINMA) takes approximately 12 to 18 months. However, this period can be extended depending on the specificities of each case.

4.Regulatory capital and liquidity

4. 1. How are banks typically funded in your jurisdiction?

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The source of funding for banks depends on:

- their size;
- their complexity; and
- their activities in Switzerland and/or internationally.

The main sources of funding are as follows:

- customer deposits;
- bonds issued by banks;
- money market instruments – that is, securities traded on the money market with a maturity of up to one year. In Switzerland, the traditional money market instruments are domestic bills of exchange, treasury bills and treasury notes. The main foreign investments include commercial paper and certificates of deposit; and

- interbank financing – this is a market reserved to banks to exchange certain short-term financial assets between one day and one year. It is an over-the-counter market.

4. 1. How are banks typically funded in your jurisdiction?

Switzerland
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As regards debt financing, the main funding sources for banks are money market instruments, interbank funding, customer savings accounts, other customers' deposits and bonds. As regards equity financing, please see question 4.2.

The most appropriate funding for a specific bank depends on the bank's size and business activity, among other things.

4. 2. What minimum capital requirements apply to banks in your jurisdiction?

Switzerland
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The fully-paid up share capital of a Swiss bank must amount to at least CHF 10 million. However, in practice, the Swiss Financial Market Supervisory Authority (FINMA) generally requires a bank to have additional capital of CHF 10 million or more, depending on the intended scope of the bank's business activities.

In addition, banks are subject to capital adequacy requirements based on the Basel III framework, which have been further specified in the Capital Adequacy Ordinance and in various circulars issued by FINMA. Pursuant to the ordinance, banks must hold a minimum required capital of at least 8% of their risk-weighted assets. Depending on its supervisory category, a bank must, in principle, hold an additional capital buffer of between 2.5% and 4.8% of its risk-weighted positions. Furthermore, the Swiss Federal Council may, upon request of the Swiss National Bank, require banks to hold a countercyclical buffer of a maximum of 2.5% of their risk-weighted positions in Switzerland to counteract excessive credit growth or to enhance the banking sector's resilience against the risk of excessive credit growth. Currently, the countercyclical buffer has been set at 2%. Certain banks with a balance-sheet amount of at least CHF 250 billion must also hold an extended countercyclical buffer of up to 2.5% of their risk-weighted positions. In addition, FINMA may require a bank to hold additional capital if the minimum required capital and countercyclical buffer do not sufficiently cover the specific risks of the bank. Finally, a bank must also maintain a 3% minimum leverage ratio based on non-risk-weighted assets.

For systemically important banks, additional requirements apply. In particular, they must:

- have sufficient own funds to be able to continue their business activities even in the event of major losses (going-concern capital requirements); and
- permanently hold additional funds to ensure a possible restructuring and winding-up (gone-concern capital requirements).

On the other hand, small banks in supervisory Categories 4 and 5 that are particularly liquid and well capitalised can apply to FINMA for an exemption from the detailed capital adequacy requirements described above. Following a pilot phase of several months, the so-called 'small banks regime' has been formally implemented, effective as from 1 January 2020. To qualify for the small banks regime, a bank must satisfy the following conditions:

- simplified leverage ratio of at least 8%;
- average liquidity ratio of at least 110%; and
- refinancing ratio of at least 100%.

4. 2. What minimum capital requirements apply to banks in your jurisdiction?

Switzerland
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The minimum capital requirement is CHF 10 million, fully paid up. However, the Financial Market Supervisory Authority (FINMA) will set a minimum threshold depending on the activities of each bank and the risks of these activities, in application of the Capital Adequacy Ordinance.

This ordinance implements in Switzerland the Basel III standards, promulgated by the Basel Committee on Banking Supervision, which aim to strengthen the provisions governing banks' capital and liquidity. The section on bank liquidity is addressed in question 4.3.

Every bank operating in Switzerland must have an adequate amount of capital, both individually and on a consolidated basis.

Non-systemic banks – that is, the vast majority of banks in Switzerland whose failure would not have a significant impact on the Swiss economy and financial system – must have a total capital of at least 10.5% of their risk-weighted positions. This percentage is composed as follows:

- minimum capital of 8%;
- a capital buffer that varies from 2.5% to 4%, depending on the category to which the bank concerned belongs; and
- for systemic banks (ie, UBS, Credit Suisse, the Raiffeisen Group, the Zurich Cantonal Bank and Postfinance), a higher total equity capital which includes other calculation criteria. Once again, due to the recent acquisition of the Credit Suisse Group by the UBS Group, this categorization will be reviewed.

Finally, small banks (Category 4 and 5 banks) benefit from certain exemptions and quantitative and qualitative reliefs, allowing them to reduce certain direct and indirect costs:

- a simplified leverage ratio of at least 8%;
- an average liquidity ratio (12-month short-term liquidity ratio (LCR)) of at least 110%; and
- a refinancing rate of at least 100%.

4. 3. What legal reserve requirements apply to banks in your jurisdiction?

Switzerland
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The Basel III standards for qualitative and quantitative liquidity requirements for banks are implemented by the Liquidity Ordinance and FINMA Circular 2015/2 “Liquidity Risks – Banks”.

The minimum reserve requirements, as set out in the National Bank Ordinance, currently amount to:

- 2.5% of the relevant liabilities – that is, all short-term liabilities (up to a maximum of 90 days) denominated in Swiss francs; and
- 20% of the liabilities to clients in the form of savings and investments.

As a general rule, each bank must have sufficient liquidity at all times to be able to meet its payment obligations, including in a crisis situation.

In addition, each bank must keep sufficient liquidity reserves at all times:

- to be able to cope with any sudden deterioration of its liquidity; and
- to ensure the medium and long-term viability of its financing.

In the same way as for equity capital, each bank must have sufficient liquidity, at both the individual and consolidated level. The level of liquidity is set according to the size and nature of each bank, as well as the scope, complexity and risks of its activities.

Three types of assets are included in the minimum liquidity reserves:

- current coins;
- banknotes; and
- sight deposits held by the bank with the Swiss National Bank.

The Liquidity Ordinance provides for two minimum standards for banks:

- the LCR, which was introduced to ensure that banks hold a liquidity buffer to offset the increase in net outflows under a 30-day stress scenario; and
- the net stable funding ratio, which is intended to ensure that a bank’s funding stability over a one-year horizon is assured in the long term.

4. 3. What legal reserve requirements apply to banks in your jurisdiction?

Switzerland
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The quantitative and qualitative requirements for the minimum liquidity for banks are set out in the Liquidity Ordinance, which implemented Basel III’s liquidity requirements into Swiss law. The provisions of the ordinance have been further specified in FINMA Circular 2015/2 “Liquidity Risks – Banks”.

With the revision of the ordinance as of 1 January 2015, a liquidity coverage ratio (LCR) has been introduced for short-term liquidity in accordance with international liquidity standards. The LCR requires banks to hold sufficient high-quality liquid assets to survive for at least 30 days in the event of a liquidity stress scenario. Banks must report their LCR on a monthly basis to the Swiss National Bank (SNB).

Banks which hold deposits that are subject to depositor preferences (privileged claims) must maintain additional liquid assets to cover their respective obligations. Further, the National Bank Ordinance requires banks to keep minimum reserves consisting of Swiss franc denominated coins, banknotes and sight deposit accounts with the SNB. The corresponding reserve requirement is currently set at 2.5% of the bank's relevant Swiss franc denominated liabilities as defined in the ordinance.

Following delays in the introduction of a net stable funding ratio (NSFR) on the EU and US financial markets, the implementation of an NSFR in Switzerland had also been postponed so far. However, given that the European Union will now be introducing the NSFR by mid-2021, it is currently planned to revise the Liquidity Ordinance and bring the NSFR into force in Switzerland within the same timeframe.

For systemically important banks, additional requirements apply. In particular, they must have enough liquidity to meet their payment obligations even in exceptionally stressful situations.

On the other hand, small banks benefit from less restrictive LCR requirements as further described in FINMA Circular 2015/2 "Liquidity Risks – Banks".

5.Supervision of banking groups

5. 1. What requirements apply with regard to the supervision of banking groups in your jurisdiction?

Switzerland
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Under the Banking Act, two or more companies are deemed to be a financial group if:

- at least one company acts as a bank or securities firm;
- they are active primarily in the financial sector; and
- they form an economic unit and, due to the circumstances, it is assumed that one or more individual companies are legally obliged or factually forced to assist other group companies.

The Swiss Financial Market Supervisory Authority (FINMA) may subject a financial group to group supervision if the group manages a Swiss bank or securities firm in Switzerland, or if the group is actually managed from Switzerland.

As part of its consolidated supervision, FINMA reviews, among other things, whether the financial group:

- is adequately organised;
- has an adequate internal control system;
- adequately records, mitigates and monitors risks in connection with its business activities;
- is managed by individuals that guarantee proper business conduct;
- adheres to the capital adequacy regulations; and

- disposes of adequate liquidity.

5. 1. What requirements apply with regard to the supervision of banking groups in your jurisdiction?

Switzerland
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Under the Banking Act, a ‘banking group’ is a group of companies that are linked by economic unity or by an obligation to assist each other. The group is primarily engaged in financial activities and includes at least one bank or securities firm.

If one of the participating companies is an insurance company, it is a financial conglomerate.

The content and scope of group supervision are determined by the Financial Market Supervisory Authority (FINMA) on a case-by-case basis. In particular, FINMA checks whether the banking group:

- has an adequate organisation;
- has an internal control system that enables it to identify, limit and control business risks;
- is managed by persons with a proper business conduct;
- respects the separation between operational management, senior management, supervision and control;
- complies with capital adequacy and risk diversification requirements;
- has sufficient liquidity;
- correctly applies the accounting regulations; and
- has a recognised, independent and professional auditing company.

Finally, consolidated supervision is exercised in addition to the supervision of each individual company.

5. 2. How are systemically important banks supervised in your jurisdiction?

Switzerland
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There are five systemically important banks. The Swiss National Bank determines whether a bank is systemically important.

These banks are subject to more intensive supervision and must have increased capital and liquidity buffers, as well as a preventive stabilisation and contingency plan. FINMA also establishes a resolution plan for these banks which should allow them to stabilise in case of a crisis.

Internationally active systemic institutions are subject to even more stringent requirements than domestically active systemic institutions.

5. 2. How are systemically important banks supervised in your jurisdiction?

Switzerland

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The Swiss National Bank (SNB) has designated five banks or banking groups as systemically important. Two of these are global systemically important banks and three are other systemically important banks.

Since the financial crisis, several amendments to the banking regulations have been implemented that address capital adequacy requirements, leverage ratios and liquidity requirements, with specific and more stringent requirements for SIBs (please also see question 4). In addition, the FINMA is putting more emphasis on risk management and corporate governance requirements.

5. 3. What is the role of the central bank?

Switzerland
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The SNB has no specific role in the supervision of banking groups as such. With respect to its involvement in the supervision of systemically important banks, please see questions 1.3, 4.2 and 5.2.

5. 3. What is the role of the central bank?

Switzerland
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The central bank in Switzerland is the Swiss National Bank (SNB). It is responsible for defining Switzerland's monetary policy and has the exclusive right to issue coins and banknotes.

As such, the SNB does not play a particular role in the day-to-day supervision of banks. It is the SNB that defines which banks are systemically important.

6.Activities

6. 1. What specific regulations apply to the following banking activities in your jurisdiction: (a) Mortgage lending? (b) Consumer credit? (c) Investment services? and (d) Payment services and e-money?

Switzerland
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(a) Mortgage lending?

The Capital Adequacy Ordinance is the main applicable regulation – in particular:

- Article 44, which deals with the countercyclical capital buffer (at the request of the Swiss National Bank (SNB), the Federal Council can oblige banks to maintain a countercyclical capital buffer of up to 2.5% (in the form of Tier 1 capital) for their mortgage business); and
- Article 72 on the risk weighting for mortgage loans (the main rule is that the higher the loan-to-value ratio, the higher the risk weighting and thus the capital adequacy requirements for banks).

The Swiss Bankers Association (SBA) – the private umbrella organisation to which the vast majority of Swiss banks belong – also plays an important role. The SBA has issued two guidelines that are recognised as minimum prudential standards by the Financial Market Supervisory Authority (FINMA). These are:

- the Guidelines on Minimum Requirements for Mortgage Loans; and
- the Guidelines on Assessing, Valuing and Processing Loans Secured against Property.

FINMA considers credit risk in mortgage financing as one of the seven main risks.

(b) Consumer credit?

Consumer credit is regulated by the Consumer Credit Act, which came into force in 2001 and was last revised in 2019.

This law replaced the former federal law, as well as any cantonal laws. Its purpose is to prevent individuals from falling into a state of over indebtedness.

Under Swiss law, a 'consumer' is a natural person who enters into a consumer credit agreement for a purpose that can be considered unrelated to his or her commercial or professional activity.

All forms of commercial credit granted to consumers are in principle covered by the law, including leasing agreements and, to a certain extent, credit and customer cards, where the contractual provisions give the customer the right to choose a credit option (ie, where he or she can pay the amount on the invoice in instalments without being considered in default).

The law applies only to credits with a value of between CHF 500 and CHF 80,000. The maximum interest rate – set by the Federal Council and reviewed annually – is:

- 10% for cash credits, contracts for the financing of goods or services and leasing contracts; and
- 12% for credits granted in the form of an advance on a current account or on an account linked to a credit card or a customer card with a credit option.

(c) Investment services?

The Financial Services Act came into force on 1 January 2020, with a transitional period of two years. Therefore, most of the new legal requirements came into force on 1 January 2022. The Financial Services Ordinance supplements the abovementioned law.

According to the law, 'financial services' include:

- the acquisition or disposal of financial instruments;
- the receipt and transmission of orders in relation to financial instruments;
- the administration of financial instruments (wealth management);
- the provision of personal recommendations on transactions with financial instruments (investment advice); and
- the grant of loans to finance transactions with financial instruments.

The act aims to strengthen the protection of the clients of financial service providers and to establish comparable conditions for the various financial service providers. In addition, it sets out requirements for the fair, diligent and transparent provision of financial services and regulates the offering of securities and other financial instruments.

The new law introduces, among other things:

- rules on the classification of clients (private, professional, institutional); and
- rules of conduct (duty to inform, verification of suitability and appropriateness, duty to document and report, transparency and due diligence in relation to client orders).

(d) Payment services and e-money?

The Financial Market Infrastructure Act and its implementing ordinance came into force on 19 June 2015. This law regulates the organisation of financial market infrastructure and sets the rules of conduct for participants in securities and derivatives trading on these markets.

Article 81 of the Financial Market Infrastructure Act defines a ‘payment system’ as an entity that clears and settles payment obligations based on uniform rules and procedures.

The Federal Council can impose specific requirements on payment systems, especially with regard to capital, risk distribution and liquidity, if required by the implementation of internationally recognised standards. The SNB has certain powers in connection with the Swiss Interbank Clearing (see below).

The operator of a payment system needs a licence from FINMA only if:

- the functioning of the financial markets or the protection of the financial market participants requires it; and
- the payment system is not operated by a bank.

There is only one payment system in Switzerland that is considered to be systemically important: the Swiss Interbank Clearing, which is operated on behalf of and supervised by the SNB.

Subject to the abovementioned reservation, and given that Switzerland applies the principle of technological neutrality in financial regulation, there are no specific provisions governing payment services or electronic money in the financial regulations. It is a matter of applying the various existing prudential regulations on a case-by-case basis to determine whether a payment service provider should be subject to regulation.

6. 1. What specific regulations apply to the following banking activities in your jurisdiction: (a) Mortgage lending? (b) Consumer credit? (c) Investment services? and (d) Payment services and e-money?

Switzerland
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(a) Mortgage lending

Mortgage lending is primarily governed by the following regulations issued by the Swiss Bankers Association (SBA), which have been recognised by the Swiss Financial Market Supervisory Authority (FINMA) as binding minimum standards:

- SBA Guidelines on Minimum Requirements for Mortgage Financing: These regulate the minimum requirements for the application of the lower risk weighting of mortgage-secured positions in accordance with the provisions of the Capital Adequacy Ordinance.
- SBA Guidelines on Assessing, Evaluating and Processing Mortgage-backed Loans: These contain the key principles to be reflected in a bank's internal policies with respect to the lending activity, credit monitoring and reporting.

(b) Consumer credit

Consumer credits are governed by the Consumer Credit Act of 23 March 2001 and its implementing ordinance (please also see question 10.1).

The Consumer Credit Act governs various types of credit, including cash loans, current account overdraft facilities, accounts overdrawn with the tacit acceptance of the bank, credit cards and customer cards with credit options, non-cash loans (in particular consumer finance and hire purchase), payment extensions and similar financing facilities, as well as certain leasing agreements. On the other hand, credit arrangements that are properly secured or amount to less than CHF 500 or more than CHF 80,000, or that must be repaid within three months, are generally not within the scope of the act.

The Consumer Credit Act is designed to offer borrowers improved protection against overindebtedness resulting from consumer credits. The main elements of the legislation are as follows:

- a mandatory check of the borrower's credit capacity, to be carried out by the lender;
- an obligation on the part of the lender to report the consumer credit granted to a dedicated information office;
- an obligation to comply with the maximum interest rate set by the Federal Council;
- a right of revocation on the part of the borrower; and
- a ban on aggressive advertising for consumer credit.

(c) Investment services

The Financial Services Act of 15 June 2018 and its implementing ordinance establish the requirements for honesty, diligence and transparency in the provision of financial services, and govern the offering of financial instruments. Among other things, the act includes regulations on client segmentation and rules of conduct regarding client information, suitability and appropriateness testing, documentation and accountability and best execution.

Banks are generally subject to the Financial Services Act whenever they provide the following 'financial services':

- the acquisition or disposal of financial instruments;
- the receipt and transmission of orders relating to financial instruments;
- the administration of financial instruments (portfolio management);
- the provision of personal recommendations on transactions with financial instruments (investment advice); and

- the granting of loans to finance transactions with financial instruments.

(d) Payment services and e-money

The Swiss regulations contain no specific provisions governing payment services or e-money. Instead, Switzerland relies on the flexibility and technology neutrality of existing financial market regulations.

Consequently, it must be assessed in each individual case whether a payment service provider falls within the scope of Swiss financial market laws. In particular, the Banking Act, the Financial Institutions Act, the Anti-Money Laundering Act, the Consumer Credit Act and the National Bank Act may apply. Moreover, the implementing ordinances of these laws and the circulars of FINMA must be taken into account.

In order to ease the Swiss regulatory regime for providers of innovative financial technologies, various amendments have recently been introduced to the Swiss banking regulation specifically exempting certain activities from the requirement to obtain a banking licence (please see question 15.2). Depending on the individual circumstances, providers of payment services may also benefit from these exemptions.

Notwithstanding the foregoing, if deemed necessary for the proper functioning of the financial market or the protection of financial market participants, payment systems that are not operated by banks may require a specific licence from FINMA under the Financial Market Infrastructure Act of 19 June 2015.

7.Reporting, organisational requirements, governance and risk management

7. 1. What key reporting and disclosure requirements apply to banks in your jurisdiction?

Switzerland
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Banks are subject to various reporting requirements, including with regard to the Swiss National Bank (SNB), the Swiss Financial Market Supervisory Authority (FINMA), Swiss trading venues and trade repositories.

In particular, banks must submit detailed financial data to the SNB on a semi-annual basis in accordance with FINMA Circular 2008/14 “Supervisory Reporting – Banks”. Such data is processed by the SNB and forwarded to FINMA for the latter’s supervisory activities. In addition, banks must periodically provide statistical data to the SNB. Among other things, this includes:

- reporting on interest rate risk (quarterly);
- reporting on minimum reserves/liquidity (monthly);
- reporting on large exposures (quarterly); and
- reporting on new mortgages (quarterly).

Further, banks must notify FINMA of any changes in the facts on which FINMA based its authorisation (eg, changes in the organisation or business activity). If the changes are of material significance, the bank must obtain prior authorisation from FINMA.

Finally, banks must generally report transactions in securities that are admitted to trading on a trading venue in Switzerland to the venue's disclosure office. Likewise, where a bank engages as a counterparty in certain over-the-counter derivatives transactions, such transactions must be reported to a recognised trade repository.

In addition to the reporting and notification requirements described above, banks must generally provide adequate information to the public. To this effect, FINMA has issued FINMA Circular 2016/1 – "Disclosure Requirements – Banks" specifying the disclosure obligations in relation to:

- capital adequacy;
- liquidity;
- corporate governance;
- interest rate risk; and
- remuneration.

7. 1. What key reporting and disclosure requirements apply to banks in your jurisdiction?

Switzerland
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Banking institutions in Switzerland have different obligations towards different regulatory bodies. They must report various information of a financial, statistical and qualitative nature to:

- the Swiss National Bank (SNB);
- the Financial Market Supervisory Authority (FINMA);
- the external auditor; and/or
- trading venues.

Pursuant to FINMA Circular 2008/14 "Supervisory Reporting Banks", banks must provide annually to the SNB and their external auditor detailed financial data, including the annual financial statements. Banks must also disclose every semester their semestrial financial statements to the SNB and their external auditor. The SNB processes this information and then despatches it to FINMA. This information enables FINMA to implement an analysis and rating system to carry out its risk-oriented supervision.

In addition, to fulfil its supervisory and stability function, the SNB has a legal obligation to collect from banks statistical banking data in relation to:

- interest rate risks;
- the issuance of new mortgages;
- large exposures; and
- financial reserves.

On top of disclosing their annual financial statements and their yearly external audit report, banks must report in advance to FINMA any material change in their organisation and seek authorisation before implementing them. Additionally, any fact that is prudentially relevant under the Banking Act (including any cyberattack – see question 11.2) must be reported to FINMA.

Banks must also publish their annual financial statements and make them available to the public (except for so-called 'private banks', which do not publicly seek deposits). FINMA Circular 2016/1 "Disclosure Requirements – Banks" sets out further details of the publication requirements and especially the topics that must be reported. Recently, FINMA has required banks to disclose their climate-related financial risks.

Finally, federal regulations (the Financial Market Infrastructure Act and FINMA Circular 2018/2 "Duty to report securities transactions") and stock exchange rules require banks (as well as certain other participants) to report certain transactions in securities.

7. 2. What key organisational and governance requirements apply to banks in your jurisdiction?

Switzerland
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In addition to the usual corporate law requirements arising from the Code of Obligations, the key organisational and governance requirements are mainly to be found in the Banking Act and its ordinance, as well as FINMA Circular 2017/1 "Corporate Governance – Banks". The circular provides detailed guidance about the requisite bodies and structure of banking institutions. Some of the requirements depend on the categorisation of banks, in Categories 1 to 5 (from highest to lowest risk).

Irrespective of their categorisation, all banks must have:

- a board of directors;
- an executive board; and
- internal and external audit, risk and compliance functions.

The board of directors is responsible for guidance, supervision and control. It sets the strategy of the bank and takes decisions on all major changes, investments and divestments. It must have management expertise and expert knowledge in all the key aspects of the business. One-third of its members must be independent. Institutions in supervisory Categories 1 to 3 must establish an audit committee and a risk committee; banks in Category 3 may combine these in a single committee. The circular requires further that systemically important institutions appoint, at least at group level, a compensation and nomination committee. In parallel, banks whose securities are listed on a recognised Swiss stock exchange but which are not necessarily considered as systematically important must also appoint a remuneration committee.

The executive board is a separate body and its members may not be part of the board of directors. Additionally, as it is responsible for the daily management of the bank, it is also responsible for the operational business activities, which are implemented based on the business strategy and the targets set by the board of directors.

FINMA Circular 2017/1 "Corporate Governance – Banks" further provides that banks must ensure that the internal control bodies are clearly separated from the revenue-generating units.

Finally, the circular also applies to financial groups and conglomerates. While considering the characteristics of group structures, governance and risk management must adhere to the standards set by the circular.

7. 2. What key organisational and governance requirements apply to banks in your jurisdiction?

Switzerland
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The organisational and governance requirements applicable to banks are stipulated in the Banking Act and Banking Ordinance, and are further concretised in Circular 2017/1 – "Corporate Governance – Banks", issued by FINMA.

Among other things, banks must generally have a board of directors consisting of three or more members, none of whom may also be a member of the executive management. Furthermore, at least one-third of the board members must be independent (ie, without any other relevant business or ownership ties to the bank). Larger banks must implement a risk committee and an audit committee; while systemically important banks must also establish a nomination and compensation committee at a group level.

The executive management of a bank must consist of at least two members, including a chief executive officer and a chief financial officer. Systemically important banks must also appoint a chief risk officer to the executive management.

Furthermore, banks must ensure effective internal segregation between the lending business, trading, asset management and settlement, and must implement an effective internal control system. The latter includes, among other things:

- control activities that are integrated into work processes;
- appropriate risk management and compliance processes; and
- adequate control functions – in particular, an independent risk control and compliance function.

In addition, an internal audit function must be implemented.

Finally, the bank's business activities and corresponding processes must be properly described in the bank's internal policies and guidelines.

According to the principle of proportionality, these requirements must be implemented taking into account the size, complexity, structure and risk profile of the individual bank.

7. 3. What key risk management requirements apply to banks in your jurisdiction?

Switzerland
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The key risk management requirements applicable to banks are stipulated in the Banking Act and Banking Ordinance, and are further concretised in Circular 2017/1 – "Corporate Governance – Banks" issued by FINMA.

In general, banks must address the main features of risk management, as well as the responsibilities and the procedure for approving transactions involving risk in their internal policies and guidelines. In particular, they must record, limit and monitor market, credit, default, settlement, liquidity and reputational risks, as well as operational and legal risks. To this effect, the executive management must develop a risk policy, as well as the basics of the institute-wide risk management for approval by the board of directors.

Additional requirements with respect to the handling of specific risks are outlined in various FINMA circulars, such as:

- FINMA Circular 2008/20 – "Market Risks – Banks";
- FINMA Circular 2008/21 – "Operational Risks – Banks";
- FINMA Circular 2015/02 – "Liquidity Risks – Banks";
- FINMA Circular 2017/07 – "Credit Risks – Banks"; and
- FINMA Circular 2019/02 – "Interest Rate Risks – Banks".

7. 3. What key risk management requirements apply to banks in your jurisdiction?

Switzerland
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The key risk management requirements are to be found in:

- the Banking Act and its ordinance;
- FINMA Circular 2017/1 "Corporate Governance – Banks";
- FINMA Circular 2008/20 "Market Risks – Banks";
- FINMA Circular 2008/21 "Operational Risks – Banks", which will be replaced by the new FINMA Circular 2023/1 that will enter into force on 1 January 2024;
- FINMA Circular 2015/02 "Liquidity Risks – Banks";
- FINMA Circular 2017/07 "Credit Risks – Banks"; and
- FINMA Circular 2019/02 "Interest Rate Risks – Banks".

FINMA conducts risk-oriented supervision, which provides for tighter risk standards for banks in Categories 1 to 3 and a certain degree of relaxation for banks in Categories 4 and 5 (small and well-capitalised banks).

The risk policy and risk appetite are set by the executive board and approved by the board of directors. The risk policy broadly deals with significant risks, risk tolerance and risk limits, including in relation to:

- financial risks;
- credit risks;
- anti-money laundering risks;
- reputational risks; and
- IT risks.

Internally, risk controls are undertaken by independent control bodies, which must have direct access to the board of directors.

Institutions in supervisory Categories 1 to 3 must:

- appoint a chief risk officer; and
- have a separated risk control function and compliance function as independent control bodies.

Risk control ensures the systematic monitoring of quantitative and qualitative risks and the conduct of stress tests. In addition, risk control:

- is responsible for developing and operating an adequate risk monitoring system; and
- must be consulted on the launch of new products or the expansion of existing products.

7. 4. What are the requirements for internal and external audit in your jurisdiction?

Switzerland
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Every banking institution must establish an internal audit function, which may be outsourced if certain conditions are met. In accordance with FINMA Circular 2017/1 “Corporate Governance – Banks”, the Institute of Internal Auditing Switzerland sets the qualitative requirements to be met by the internal audit function. Its work is also standardised based on the International Standards for the Professional Practice of Internal Auditing, as issued by the Institute of Internal Auditors.

The internal audit function has direct access to the board of directors or to its audit committee. It discharges its assigned duties in an independent fashion.

Also according to FINMA Circular 2017/1 “Corporate Governance – Banks”, it has unlimited rights of inspection, information and audit within the institution and its consolidated companies. The size of the internal audit unit reflects the size, complexity and risk profile of the institution.

Furthermore, banks must appoint an external audit firm, often referred to as FINMA’s ‘extended arm’. The audit firm conducts a thorough risk assessment and *ad hoc* assessments to ensure current and future compliance of the considered banking institution with prudential requirements if necessary. All audit results are submitted to FINMA by the audit firm in a standardised audit report.

Audit firms are subject to the supervision of the Federal Authority of Supervision of Audit Firms (FAOA) and must have the appropriate FAOA licence to be able to perform a banking audit.

7. 4. What are the requirements for internal and external audit in your jurisdiction?

Switzerland
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As part of their internal control system, banks must establish an internal audit function that is independent of the executive management and that reports to the board of directors (or the audit committee, if applicable). The tasks of the internal audit function may be performed by an internal team or outsourced to a qualified external service provider.

The internal audit function must meet the qualitative requirements of the Swiss Association for Internal Audit. Its work is based on the International Standards for the Professional Practice of Internal Auditing issued by the Institute of Internal Auditors.

In addition to an internal audit, banks must appoint an independent audit firm recognised by FINMA to act as regulatory auditors. The regulatory auditors are appointed by the bank's board of directors and are tasked with assessing whether the bank is in compliance with the Banking Act, as well as other relevant regulations and self-regulatory guidelines. The regulatory auditors are themselves supervised by the Federal Audit Oversight Authority and typically also act as statutory auditors responsible for auditing the bank's financial statements.

The audit report of the regulatory auditors is submitted to the bank's board of directors and to FINMA. If the audit reveals any irregularities with respect to applicable legislation or regulations, the auditors set a deadline for the bank to remedy the issue. If such deadline lapses unused (or immediately, in the case of serious violations or irregularities that may jeopardise the interests of the bank's creditors), the auditors must inform FINMA.

While FINMA has increased its own on-site audit activity over the last couple of years, it heavily relies on the audit work performed by the regulatory auditors. For this reason, the regulatory auditors are often referred to as 'the extended arm of FINMA'.

8.Senior management

8. 1. What requirements apply with regard to the management structure of banks in your jurisdiction?

Switzerland
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The Banking Act requires the adequate internal organisation of a bank, which means – among other things – that the corporate bodies for supervision and management must be functionally and personally segregated. The board of directors and the executive management of the bank must therefore be two separate corporate bodies with no personal overlaps (ie, no member of the board of directors may be part of the executive management and vice versa).

For further details, please also see question 7.2.

8. 1. What requirements apply with regard to the management structure of banks in your jurisdiction?

Switzerland
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As a general principle, the fit and proper test requires that the structure of a bank, considered both as a whole and at individual level, be fit and proper to function.

Financial Market Supervisory Authority (FINMA) Circular 2017/1 "Corporate Governance – Banks" sets out further principles for the senior management organisation. Among other things, the board of directors – which is responsible for the overall strategy of the bank – must be functionally and personally segregated from the executive board. In addition, the management structure must be segregated from the control functions, which must operate independently.

8. 2. How are directors and senior executives appointed and removed? What selection criteria apply in this regard?

Switzerland
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The members of the board of directors are appointed by:

- the general meeting of shareholders for banks organised as corporations limited by shares; and
- the general assembly of the members for banks organised as cooperatives.

Banks organised as partnerships are subject to different rules; as are certain cantonal banks, in which some members of the board of directors are appointed by state bodies.

Senior executives are appointed by the board of directors.

FINMA must approve any appointment in the board of directors or the executive board, as well as certain heads of control units.

As a general principle, all board members and senior executives are subject to proper business conduct rules, which extend to all character-related and professional factors.

Based on Circular 2017/1 "Corporate Governance – Banks", the prerequisites for appointment to the board of directors or executive board of a banking institution include:

- management experience;
- knowledge of the banking sector; and
- special knowledge of financial, legal and compliance, risks and new technologies.

The criterion of independence also plays a key role for the board of directors, as at least one-third of the board of directors must consist of independent members (unless exceptions are approved by FINMA).

8. 2. How are directors and senior executives appointed and removed? What selection criteria apply in this regard?

Switzerland
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Members of the board of directors may be appointed and removed only by the shareholders of the bank. This requires a duly called shareholder meeting with an agenda providing for the respective appointment or removal. Significant shareholders are entitled to request the board to convene an extraordinary shareholders' meeting and put the requested items on the agenda. In contrast, members of the executive management are generally appointed or removed by the board of directors by means of a corresponding resolution.

The selection criteria for board members must consider applicable banking regulations and supervisory practice (see in particular Swiss Financial Market Supervisory Authority (FINMA) Circular 2017/1 – "Corporate governance – banks"). This means that the board of directors in its totality must have adequate management expertise and the prerequisite specialist knowledge and experience of the banking and financial services sector. It must also be diversified to the extent that all key aspects of the business – including finance, accounting and risk management – are adequately represented. Moreover, at least one-third of the board of directors must consist of independent members with no relevant (current or former) commercial links to or participation in the bank, as further defined in FINMA Circular 2017/1.

Both members of the executive management individually and the overall body must have adequate management expertise, as well as the specialist knowledge and experience of banking and financial services required to ensure compliance with licensing requirements in the context of the bank's operational activities.

8. 3. What are the legal duties of bank directors and senior executives?

Switzerland
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The bank's board of directors is the governing body for guidance, supervision and control. In this role, it has in particular the following duties (see FINMA Circular 2017/1 – "Corporate governance – banks"):

- Business strategy and risk policy: The board of directors sets out the business strategy and defines guiding principles for the bank's corporate culture. It is also responsible for issuing internal regulations, establishing and monitoring an effective risk management function and managing overall risks.
- Organisation: The board of directors is responsible for establishing an appropriate business organisation and issues the rules and regulations required to achieve this.
- Finances: The board of directors bears ultimate responsibility for the financial situation and development of the bank. This means that the board must approve/sign off the capital and liquidity plans, the annual report, the annual budget, the interim financial statements and the financial objectives for the year.
- Personnel and other resources: The board of directors is responsible for ensuring that the bank has appropriate levels of personnel and other resources (eg, infrastructure and IT), and oversees the personnel and remuneration policies. If required, the board appoints and removes the members of its committees, the members of the executive management, the chair of the executive board and the chief risk officer.
- Monitoring and control: The board of directors must oversee the work of the executive management. It is thus responsible for ensuring that there is both an appropriate risk and control environment within the bank and an effective internal control system. Moreover, it appoints and monitors the internal audit function, mandates the regulatory audit firm and assesses its reports.
- Major structural changes and investments: The board of directors is responsible for decisions on major

changes to the bank and group structure, major changes in significant subsidiaries and other strategically important projects.

The bank's executive management is responsible for operational business activities which reflect the business strategy and the targets and resolutions of the board of directors. This means it has in particular the following duties (see FINMA Circular 2017/1):

- managing day-to-day business, operational revenue and risk management, including managing the balance-sheet structure and liquidity and representing the bank *vis-à-vis* third parties in operational matters;
- submitting applications regarding transactions for which the bank's board of directors is responsible or for which its approval is required, and issuing rules for regulating business operations; and
- developing and maintaining effective internal processes, an appropriate management information system, an internal control system and the necessary technological infrastructure.

8. 3. What are the legal duties of bank directors and senior executives?

Switzerland
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Under general corporate law, members of the board of directors and senior executives have a duty of loyalty and fidelity towards the company.

The Banking Act and FINMA Circular 2017/1 "Corporate Governance – Banks" outline these duties in further detail. According to the circular, the board of directors is responsible for setting out the business strategy and setting the tone of the corporate culture ('tone from the top'). It is responsible for approving the risk policy and basic features of risk management. It is also responsible for establishing an appropriate organisation and bears ultimate responsibility for the financial situation of the banking institution. Finally, it signs off on:

- the capital and liquidity plans;
- the annual report;
- the annual budget; and
- the financial objectives.

It also sets out the remuneration rules.

The senior executives are responsible for the operational business activities, which reflect the business strategy and the targets and resolutions of the board of directors. It is also responsible for managing the day-to-day business, operational revenue and risk management, including and issuing rules for regulating business.

8. 4. How is executive compensation in the banking sector regulated in your jurisdiction?

Switzerland
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Banking executive compensation is subject to:

- the Code of Obligations – in particular, the section on excessive compensation with respect to listed companies; and
- FINMA Circular 2010/1 "Compensation Scheme".

The remuneration scheme is an integral part of the organisation of a financial institution and is signed off by the board of directors. The remuneration scheme must follow certain principles set out in the circular. It must not create incentives for the taking of inappropriate risk and instead should motivate employees to contribute to the long-term success and stability of the bank. Those main goals are detailed in 10 guiding principles set out in the circular.

For listed (banking) companies, the Code of Obligations provides for an annual vote of the general meeting of shareholders on the remuneration packages of members of the board of directors and the executive board. Additionally, the Code of Obligations prohibits certain transactions by senior management which could lead to conflict of interests.

8. 4. How is executive compensation in the banking sector regulated in your jurisdiction?

Switzerland
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As one of the regulator's responses to the financial crisis of 2008/09, FINMA Circular 2010/1 – "Minimum standards for compensation schemes of financial institutions" entered into force on 1 January 2010 and was amended as per 1 January 2017. This circular aims to increase the transparency and risk orientation of compensation schemes in the financial sector and contains 10 remuneration principles.

These principles impose no absolute or relative cap on compensation. However, FINMA requires that variable remuneration (ie, any part of the compensation that is at the discretion of the employer or contingent on performance criteria) depends on long-term sustainable business performance, considering assumed risks and costs of capital. Consequently, a significant portion of the remuneration must be payable under deferral arrangements. Moreover, the bank's compensation policy must be disclosed to FINMA on an annual basis.

At present, the compensation principles defined in FINMA Circular 2010/1 are mandatory only for banks with capital or solvency requirements in excess of CHF 10 billion (currently only UBS AG and Credit Suisse AG). However, other banks are recommended to take into account the compensation principles as best practice guidelines for their internal remuneration policies. In justified cases, FINMA may require a bank which is not obliged to fulfil the compensation principles to implement some or all of these standards. This may be appropriate in view of the risk profile of the bank, its business activities or its business relationships, or if its remuneration scheme entails excessive risks.

For listed banks, as for other listed companies in Switzerland, the provisions of the Ordinance against Excessive Compensation in Stock Exchange Listed Companies of 1 January 2014 apply. In particular, this ordinance provides that the general assembly must vote on an annual basis on the remuneration for the members of the board of directors, board of advisers and executive board. In addition, certain payments are prohibited, including severance packages, bonuses for internal restructuring and advance payments.

9.Change of control and transfers of banking business

9. 1. How are the assets and liabilities of banks typically transferred in your jurisdiction?

Switzerland
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Traditionally, most transactions taking place in the Swiss banking industry are structured as share deals. However, in recent years an increasing number of transactions have been structured as asset deals.

9. 1. How are the assets and liabilities of banks typically transferred in your jurisdiction?

Switzerland
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The main framework for transferring assets and liabilities in Switzerland remains private share deals based on the Code of Obligations, which gives extensive freedom to the parties to arrange the deal as they deem fit.

The Merger Act allows for mergers, disinvestment and the transfer of assets and liabilities. The transfer of assets and liabilities allows for the statutory transfer of businesses or part thereof. While not as widely used as share deals, statutory transfers under the Merger Act have recently been gaining traction as an increasing number of banks have restructured their assets or are considering this.

It is likely that consolidation (mergers, acquisitions and assets transfers) in the banking sector will continue as the cost base for many banks increases without a corresponding increase in income.

9. 2. What requirements must be met in the event of a change of control?

Switzerland
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A change of control is considered both at the individual level and at the corporate level.

According to the Banking Act, any natural or legal person that intends to hold or cease to hold, directly or indirectly, a qualifying holding in a bank organised under Swiss law must report to the Financial Market Supervisory Authority (FINMA) in advance. The threshold of this qualifying threshold is set at 10% of the voting rights.

This duty to inform also applies if the holding reaches, exceeds or falls below the thresholds of 20%, 33% or 50% of the capital or voting rights.

To be approved by FINMA, such controlling persons must warrant that they will be unable to influence the bank in a way that would be incompatible with prudent and sound management. FINMA has the authority to check whether these requirements are fulfilled and to refuse to allow the transaction if it considers that this is not the case. FINMA's approval must therefore be obtained prior to any transaction closing.

At the corporate level, as soon as it becomes aware of it, and at least annually, a bank must also inform FINMA of the identity of any person that reaches, exceeds or falls below the abovementioned thresholds.

A Swiss bank must also apply for additional licensing if persons abroad (defined as natural persons who are not Swiss citizens or do not have a permanent residential permit and legal persons which are incorporated and domiciled abroad or domiciled in Switzerland but are controlled by persons abroad):

- acquire, directly or indirectly, holdings that amount to more than half of the voting rights; or
- are in another manner in a position of control.

Listing rules, including *ad hoc* publicity rules, also apply to banking institutions that are listed on a recognised stock exchange.

9. 2. What requirements must be met in the event of a change of control?

Switzerland
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According to the Banking Act, individuals or legal entities must notify the Swiss Financial Market Supervisory Authority (FINMA) prior to directly or indirectly acquiring or selling qualified equity interests in a bank. A person or entity holds a qualified equity interest if it holds at least 10% of the capital or voting rights of a bank or otherwise influences the bank in a significant manner. Such notification requirement also applies whenever qualified equity interests are increased or decreased and thus reach, exceed or fall below the threshold of 20%, 33% or 50% of the capital or voting rights, respectively. Moreover, the bank itself must notify FINMA of persons that fall under this requirement as soon as it has knowledge and at least once a year.

Since FINMA has the authority to refuse a person as a shareholder of a bank, it is highly recommended to obtain approval before the closing of a transaction.

Generally, there are no restrictions on the types of entities or individuals that may hold a qualified equity interest in a bank. However, individuals or legal entities that hold, directly or indirectly, a qualified equity interest in a bank must ensure that their influence will not have a negative impact on the prudent and reliable business conduct of the bank. Thus, the bank's shareholders and their activities may be of relevance for the granting and maintenance of a banking licence. The following may constitute a negative influence:

- a lack of transparency or integrity;
- unclear organisation;
- financial difficulties; or
- a link to a criminal or sanctioned organisation.

Should FINMA conclude that the conditions for the banking licence are no longer met due to a (new) shareholder with a potentially negative impact, it may suspend the voting rights in relation to that qualified equity interest or, as a last resort, withdraw the licence.

If the bank becomes subject to foreign control (ie, if foreigners hold, directly or indirectly, more than one-half of the voting rights or have otherwise a controlling influence on the bank), a new additional licence must be obtained (Article 3ter of the Banking Act). The Banking Act defines a 'foreigner' as:

- an individual who is not a Swiss citizen and has no permanent residence permit for Switzerland; or
- a legal entity or partnership that has its registered office outside of Switzerland or, if it has its registered office in Switzerland, is controlled by individuals as defined in the first point above.

It is the duty of the Swiss bank to obtain the requisite additional licence before completing a transaction. Licensing requirements include the following:

- The corporate name of the (newly) foreign-controlled Swiss bank must not indicate or suggest that the bank is controlled by Swiss individuals or entities; and
- The country in which the owners of a qualified equity interest are domiciled must grant reciprocity (ie, it must be possible for Swiss residents and Swiss entities to operate a bank in the respective country).

Moreover, FINMA may request that the bank be subject to adequate consolidated supervision by a foreign supervisory authority if it forms part of a financial group or conglomerate.

10.Consumer protection

10. 1. What requirements must banks comply with to protect consumers in your jurisdiction?

Switzerland
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Swiss regulatory law does not provide for a bank-specific legal framework for consumer protection.

However, credits granted to individuals for purposes other than business or commercial activities, in the range of CHF 500 to 80,000, are subject to the Consumer Credit Act, provided that the consumer is not obliged to reimburse the credit within less than three months. The Consumer Credit Act also applies to leases and credit cards where the consumer has the right to pay the outstanding balance in instalments. In this regard, please also see question 6.1(b).

A consumer credit contract must be concluded in writing and include various mandatory provisions, including a right of revocation and the effective annual interest rate, taking into account all costs. The maximum effective annual interest rate permissible for consumer credits is defined by the Federal Council on an annual basis (Article 14 of the act). This is currently set at 10% for cash loans and 12% for credit cards.

Moreover, the new Financial Services Act of 2018, which entered into force as of 1 January 2020, aims to strengthen investor protection rights – in particular, in relation to retail clients. The act introduced new rules of conduct and extensive disclosure obligations for banks and other financial services providers. The level of client protection differs according to the client's classification (retail, professional or institutional) under the act. The act also contains measures designed to facilitate the enforcement of clients' rights. Particularly worth mentioning are:

- the client's right to be provided with a comprehensive copy of all documents and records of the service provider concerning the client relationship; and
- the ombudsman system, requiring all service providers – not only banks – to be affiliated with an ombudsman recognised by the Federal Department of Finance.

Finally, in relation to national and international banking transactions with consumers under the Swiss Code of Civil Procedure, the Lugano Convention or the Swiss Private International Law Act, depending on the countries involved, specific consumer protection rules may apply to determine the competent jurisdiction.

10. 1. What requirements must banks comply with to protect consumers in your jurisdiction?

Switzerland
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The Swiss legislative system includes various provisions and laws aimed at protecting (banking) customers.

In particular, since January 2020, the Financial Services Act and its implementing ordinance have sought to enhance customer and investor protection and improve the transparency of financial products. According to the Financial Services Act, banking clients are categorised into three categories: retail, professional and institutional. Depending on their categorisation, customers enjoy a different level of protection.

This classification requires from the bank:

- a detailed suitability assessment;
- the provision of comprehensive information; and
- access to an appropriate universe of financial instruments.

In terms of loans, the Consumer Credit Act applies to onerous credits (with interest or other charges) where:

- repayment is spread over instalments for more than three months; and
- the loan amount is between CHF 500 and CHF 80,000, excluding interest and charges.

However, it does not apply to mortgaged loans.

According to the Consumer Credit Act:

- interest for cash loan amounts may not exceed 10% per year; and
- the interest rate for credit and customer cards, as well as for current account overdrafts, may not exceed 12% per year.

These maximum rates are reviewed and fixed periodically by the Federal Council.

The Consumer Credit Act sets out various conditions of both a formal and material nature for the grant of consumer loans. Where a loan is granted in serious breach of the act, all claims of the lender are forfeited. In case of minor breach, interests and loan related costs are not due.

Finally, the Unlawful Competition Act provides for certain obligations in respect of advertising and unfair market practice. The act applies to general business conditions, but thus far the Swiss courts have regularly held that banking relationships do not *per se* fall within its scope. As a result, it is extremely difficult to challenge banks' general conditions in Switzerland.

10. 2. How are deposits protected in your jurisdiction?

Switzerland
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The regulation, supervision and stability of the system in general aim to protect banking depositors. If nevertheless a bank were to become bankrupt, the Swiss deposit insurance scheme (esisuisse) would kick in.

All banks that accept client deposits must be part of esisuisse and contribute financially to it (by providing collateral in securities or in money). The funds held by esisuisse currently amount to CHF 8 billion

In case of bankruptcy, cash deposits of up to CHF 100,000 per client will be paid out immediately from the bank's available funds (so-called 'privileged deposits'). If there are insufficient available funds, esisuisse will step in and proceed with disbursements of up to CHF 100,000. Retirement savings are not included in the privileged deposits. However, claims for the repayment of retirement savings up to CHF 100,000 per client fall within Category 2 of claims and will be paid after salary claims.

Clients in Switzerland and abroad enjoy the privileges described above provided that their assets are booked in Switzerland.

Under bankruptcy law, assets such as securities, units in collective investment schemes and physical precious metals that are held in custody remain the property of the customer and, in the event of bankruptcy, are normally ring-fenced and returned to the customer.

10. 2. How are deposits protected in your jurisdiction?

Switzerland
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Depositor protection in Switzerland is based on a three-tiered system. As a first step, bank deposits (excluding retirement savings) of up to CHF 100,000 per client (privileged deposits) are immediately paid out from the remaining liquidity of the failed bank (Article 37a of the Banking Act). With regard to the applicable liquidity requirements in general, please see question 4.3.

If the bank's available liquidity is insufficient to cover all privileged bank deposits which are booked in Switzerland, the depositor protection scheme is used as a second step to pay out privileged deposits (so-called 'secured deposits'). All banks domiciled in Switzerland accepting client deposits are legally required to participate in the depositor protection scheme (Article 37h of the Banking Act).

As a third step, privileged deposits are treated preferentially. They are paid out at the same time as other second creditor class claims in the event of bankruptcy. Unlike cash deposits, assets such as shares, units in collective investment schemes and other securities held in custodial accounts qualify as client property. In the event of bankruptcy, all such assets are segregated and released to the client (Article 37d of the Banking Act).

11.Data security and cybersecurity

11. 1. What is the applicable data protection regime in your jurisdiction and what specific implications does this have for banks?

Switzerland
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The Swiss legal framework does not provide for a specific data protection regime applicable to banks or other financial institutions. The protection of the privacy and the fundamental rights of individuals and legal entities in relation to their data is set out in the Federal Act on Data Protection of 1992. The act is based on the concept that not more client-related information than required may be collected (principle of proportionality and data minimisation). Furthermore, it defines the legal requirements for permissible data processing in order to protect data against possible abuses.

Data protection aims to protect the right to informational self-determination. This refers to the principle that individuals and legal entities should be able to determine for themselves the disclosure and use of their own data. The Federal Act on Data Protection therefore contains various possibilities for data subjects to exercise their privacy rights.

The requirements under the act apply only to the processing of so-called ‘personal data’. Such data is legally defined as “all information relating to an identified or identifiable natural person” (eg, by reference to an identifier such as a name, an identification number, location data or an online identifier, or to one or more factors specific to the identity of that natural person).

Pursuant to Article 7 of the Federal Act on Data Protection personal data must be protected against unauthorised processing through adequate technical and organisational measures. Applicable minimum standards are set forth in the Federal Data Protection Ordinance. For banks, relevant security standards are further specified in Swiss Financial Market Supervisory Authority (FINMA) Circular 2008/21 – “Operational risks – banks”. Annex 3 of this circular sets out nine principles for the proper handling of electronic client data (so-called ‘client identifying data’ (CID)). The requirements stipulated therein are primarily of a technical nature and include the issues of managing an independent supervisory body, appropriate security standards for infrastructure and technology, and risk identification and control in relation to CID confidentiality. Against this background, banks must establish a comprehensive framework for ensuring the confidentiality of client data in the age of digitalisation and globalisation.

Finally, in March 2019 the Swiss Bankers Association (SBA) published guidelines for the use of cloud services in the banking sector. The SBA guidelines aim to define the conditions under which banks can migrate CID to a cloud environment. In order to achieve this aim, the SBA provides its interpretation of certain relevant laws and regulations, including Article 47 of the Banking Act (‘banking secrecy’), the Federal Act on Data Protection and FINMA Circulars 2018/03 – “Outsourcing – banks and insurers” and 2008/21 – “Operational risks – banks”.

According to the SBA guidelines, it is permissible to allow a cloud provider and/or its subcontractors to process CID in cleartext (ie, neither encrypted nor anonymised/pseudonymised), provided that such processing is necessary for the secure and reliable operation of the cloud and is subject to strict conditions (eg, in terms of frequency and duration of the processing, reasons for the processing). The position of the SBA is based on the view that the cloud provider and its subcontractors must be considered as agents within the meaning of Article 47, paragraph 1 of the Banking Act, and are therefore bound by banking secrecy. In case of a cloud provider located in Switzerland, this argument seems reasonable. However, if the cloud provider is based abroad, the matter is more complex – particularly in the case of data requests from local authorities – and legal uncertainties remain.

With respect to banking secrecy matters, please see question 12.2.

11. 1. What is the applicable data protection regime in your jurisdiction and what specific implications does this have for banks?

Switzerland
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The main data protection framework is found in the Data Protection Act, enacted on 19 June 1992. A major revision to the Data Protection Act will enter into force in September 2023.

For banks specifically, the main protective provision is to be found in Article 47 of the Banking Act, which provides for strict banking secrecy.

Article 47 provides for criminal penalties at various degrees for the unlawful disclosure of facts that are subject to banking secrecy. The scope of secrecy is interpreted broadly and covers all business and personal facts stemming from the business relationship between the client and the bank.

Banks are also subject to the privacy provisions of:

- Article 28 of the Civil Code (protection of personality); and
- Article 398 of the Code of Obligations (duty of loyalty from the bank to the client).

Many of the obligations arising from the various provisions overlap.

11. 2. What is the applicable cybersecurity regime in your jurisdiction and what specific implications does this have for banks?

Switzerland
Sabeti | Legal + Bory & Partners

There is no cybersecurity regime *per se* in Switzerland. Cybersecurity risks are treated as operational risks that all banks must manage in an appropriate manner and according to their risk tolerance.

That said, Financial Market Supervisory Authority (FINMA) Circular 2008/21 "Operational Risks" sets out the regulatory expectations in relation to IT risks and cyber risks in particular. The emphasis is placed on client-identifying data, which must be appropriately protected.

According to the circular, the executive board must appropriately document the IT risk management in line with the IT strategy and the bank's risk tolerance.

Regarding cyber risks specifically, the executive board must also document the management of cyber responsibilities in an appropriate way. The management of cyber risks requires an efficient strategy and clear roles and responsibilities. At a minimum, the policy must:

- identify potential cyberattack risks specific to the financial institution, especially regarding critical data and infrastructure;
- protect business processes against cyberattacks;
- allow for the rapid identification of cyberattacks;
- facilitate a response to cyberattacks with immediate and targeted measures and the continuation of business operations; and
- ensure the rapid restoration of normal business operations after cyberattacks through appropriate measures.

In addition, the executive board regularly orders vulnerability scans and penetration tests to protect critical and/or sensitive IT data and systems against cyberattacks. These should be conducted by qualified personnel with appropriate resources.

The new Circular 2023/1, which will enter into force on 1 January 2024, expands these obligations.

Finally, successful or partially successful important cyberattacks must be reported within 24 hours to FINMA and a detailed account must be forwarded within 72 hours.

11. 2. What is the applicable cybersecurity regime in your jurisdiction and what specific implications does this have for banks?

Switzerland
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The Swiss legal framework does not provide for a specific cybersecurity regime. As far as banks are concerned, FINMA Circular 2008/21 – "Operational risks – banks" contains provisions on technological infrastructure including critical aspects of dealing with cyber risks.

The circular requires banks to adopt an integrated and systematic approach to countering threats in the virtual world. The approach must include specific measures for the governance, identification, protection, detection, response and recovery of threatened systems and services in connection with cyber risks and attacks.

12.Financial crime and banking secrecy

12. 1. What provisions govern money laundering and other forms of financial crime in your jurisdiction and what specific implications do these have for banks?

Switzerland
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Switzerland has strict regulations in place to combat money laundering and terrorist financing, based on the international standards of the Financial Action Task Force. The backbone of the Swiss anti-money laundering framework is the Federal Act on Combating Money Laundering and Terrorist Financing of 1997, including its implementing ordinances. For banks, the duty to identify contracting parties and determine the identity of beneficial owners is further specified in the Agreement on the Swiss Banks' Code of Conduct with regard to the Exercise of Due Diligence (CDB). The CDB is revised periodically and exists in its current version as CDB 20. It is enacted by the Swiss Banking Association as self-regulation in the form of a code of conduct and approved by the Swiss Financial Market Supervision Authority (FINMA).

Banks and other financial intermediaries must comply with a range of due diligence and disclosure requirements in relation to combating money laundering and terrorist financing, including the following:

- Verify the identity of the contracting partner and establish the beneficial owner of the assets brought in;
- Clarify the financial background and purpose of the business relationship or transactions, if the business relationship or transaction appears unusual or if there are indications that the funds stem from criminal activity or serve to finance terrorism;
- Record and clarify in greater detail business relationships and transactions with increased risk, such as business relationships with clients in high-risk countries or with politically exposed persons;
- Implement the necessary organisational measures to prevent money laundering and financing of terrorism, including issuing internal directives, training staff and performing inspections; and
- Report to the Money Laundering Reporting Office (of the Federal Department of Justice and Police) if there is any suspicion of money laundering in a business relationship.

Audit firms recognised by FINMA monitor compliance with these requirements on an annual basis. Moreover, FINMA may also perform own on-site inspections or mandate third-party experts for such investigations. If FINMA discovers any breach of the law or other irregularity, it will take measures to correct them and may implement sanctions as provided by law.

12. 1. What provisions govern money laundering and other forms of financial crime in your jurisdiction and what specific implications do these have for banks?

Switzerland
Sabeti | Legal + Bory & Partners

Switzerland has a comprehensive and very tight money-laundering framework that applies not only to banks, but also to all financial intermediaries (eg, asset managers, family offices, lawyers and trust officers). The legislative framework follows the principles, standards and guidelines set forth by the Financial Action Task Force.

According to Article 305*bis* of the Criminal Code, money laundering is a criminal offence which carries a maximum penalty of five years' imprisonment and/or large fines. A failure to identify clients and/or clarify transactions and a failure to report anti money-laundering breaches also constitute criminal offences.

The Anti-money Laundering Act and its two implementing ordinances (the Anti-Money Laundering Ordinance and the Financial Market Supervisory Authority-enacted Anti-money Laundering Ordinance) require banks and all other financial intermediaries to comply with stringent due diligence and disclosure requirements in respect of client identification and transactions. Banks are also subject to the Agreement on Swiss Banks' Code of Conduct Regarding the Exercise of Due Diligence, which is issued by the Swiss Bankers Association and sets out the duties of banks relating to the identification of contracting partners and controlling persons or beneficial owners.

12. 2. Does banking secrecy apply in your jurisdiction?

Switzerland
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As discussed in question 11.1, banking secrecy applies in Switzerland. It protects legal and natural persons against unauthorised access by the state or third parties. Breach thereof is a criminal offence which carries a maximum penalty of three years' imprisonment and/or a fine (five years' imprisonment if the perpetrator acted to obtain a financial advantage). The client is the owner of the secrecy and can consent to disclosure of facts covered by banking secrecy.

However, banking secrecy is not absolute and there are numerous provisions that define limits to banking secrecy in both domestic and international cases. In certain family, debt collection, administrative, tax and criminal matters, banking secrecy can be lifted against the client's will by order of the competent authority. Internationally, requests for criminal or administrative (tax) mutual assistance may also lead to a lifting of the banking secrecy against the client's will.

In addition to the US Foreign Account Tax Compliance Act, Switzerland has entered into automatic exchange of information agreements for tax purpose (AEIAs) with at least 101 countries. AEIA standards (based on the Organisation for Economic Co-operation and Development models) require banks to collect clients' financial information, including all types of investment income and account balances, where those clients are foreign tax residents. The bank must then transmit this information to the Federal Tax Administration, which in turn will forward it to the relevant country.

Finally, banking secrecy can also be lifted with the consent of the client. All banks include consent to the lifting of the banking secrecy in their general terms and conditions for certain matters, such as required disclosures for the purchase of securities or the completion of international wire transfers.

12. 2. Does banking secrecy apply in your jurisdiction?

Switzerland
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According to Article 47 of the Banking Act, banks incorporated in Switzerland (including Swiss branches and representative offices of foreign banks) are subject to a duty of confidentiality (banking secrecy) towards their clients. The disclosure of client information to third parties is prohibited in this context.

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However, banking secrecy is not absolute and may be waived by the client. Moreover, it does not apply under certain exceptional circumstances, such as in the event of disclosure obligations to a Swiss public or judicial authority. In this context, practical cases include:

- civil proceedings (eg, pertaining to inheritances or divorces);
- debt recovery and forced liquidation proceedings;
- criminal proceedings (particularly in the case of tax fraud);
- proceedings by the supervisory authority; and
- proceedings relating to the cross-border exchange of information.

In particular, in relation to tax matters, bank-client confidentiality has recently undergone a far-reaching transformation. Driven by developments at the international level, greater importance has been given to transparency in Switzerland *vis-à-vis* tax and supervisory authorities. With the implementation of the automatic exchange of information for tax purposes (AEO»), Swiss banks have become subject to new obligations imposed by the legal framework which relies on the Common Reporting and Due Diligence Standard issued by the Organisation for Economic Co-operation and Development. With AEOI, bank and safekeeping account information is automatically submitted to the tax authorities in the participating countries on an annual basis.

13.Competition

13. 1. What specific challenges or concerns does the banking sector present from a competition perspective? Are there any pro-competition measures that are targeted specifically at banks?

Switzerland
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In recent years, the trend of consolidation in Swiss banking has continued at a steady rate. The number of regional and foreign-controlled banks fell by 50% in a little more than two decades. The main reason for this decline is the pressure on margins in retail banking. In particular, banks are challenged by tougher regulations, leading to substantially higher costs for risk management and compliance. Moreover, in light of the new automatic exchange of information for tax purposes, foreign-controlled banks in Switzerland have reconsidered their business. Given this, the trend towards fewer but larger banks is unsurprising.

The competition regulations applicable to banks are no different from these applicable to other industries. In particular, no pro-competition measures are targeted specifically at banks. The backbone of the Swiss competition is the Federal Act on Cartels and other Restraints of Competition original of 1995.

Like companies from other sectors, banks are supervised by the Competition Commission and its Secretariat in relation to the control of:

- agreements between undertakings (Article 5 of the Cartel Act);
- abuses of a dominant position (Article 7 of the Cartel Act); and
- concentrations between undertakings (Articles 9 and following of the Cartel Act).

Nevertheless, two main peculiarities applicable to the banking sector must be taken into account.

First, the Competition Commission must in principle be notified of a concentration between undertakings where, in the year preceding the concentration, the participating undertakings:

- realised a worldwide turnover of CHF 2 billion or a turnover in Switzerland of CHF 500 million Swiss francs; and
- at least two of the participating undertakings realised a turnover of CHF 100 million in Switzerland (Article 9, paragraph 1 of the Cartel Act).

In the case of banks that are subject to the accounting rules set out in the Banking Act, it is not the turnover but the gross income from ordinary business activities that must be considered when calculating the turnover.

Second, the Swiss Financial Market Supervisory Authority (FINMA), rather than the Competition Commission, is competent to approve the merger of banks if the merger is likely to cause prejudice to the banks' creditors; the Competition Commission must be invited to submit an opinion in this regard (Article 10, paragraph 3 of the Cartel Act). This notwithstanding, every bank merger must also be reported to the Competition Commission. In order to preserve the competence of FINMA in individual cases, the Competition Commission must inform FINMA immediately of any notification of proposed mergers of banks within the meaning of the Banking Act.

13. 1. What specific challenges or concerns does the banking sector present from a competition perspective? Are there any pro-competition measures that are targeted specifically at banks?

Switzerland
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The Swiss economy withstood the COVID-19 pandemic quite well. However, in 2022 the economic environment was affected by negative interest rates, which came to an end in September 2022. The war in Ukraine and rising global inflation rates implied a downturn in the economic environment which may also inevitably affect banks.

Consolidation in the banking sector has continued, as Switzerland had 243 banking institutions in 2020 but just 239 in 2021 (Swiss Banking, Banking Barometer 2022, Figure 2, p7).

Access to the European market is still not satisfactorily regulated, as the Swiss/EU negotiations have stalled. Swiss banks have appealed to the Swiss government to improve the conditions for market access. The provision of financial services to EU-domiciled clients is a key export sector for Switzerland, as domestic banks manage assets totalling around CHF 1 trillion belonging to EU-based clients (Swiss Banking, Banking Barometer 2022, Figure 2, p7).

Meanwhile, negotiations with the United Kingdom are continuing at a fast pace. The negotiations are aimed at the conclusion of a comprehensive financial services agreement, which would include liberalisation and mutual market access in the areas of banking and investment services, asset management, insurance and capital markets (including financial market infrastructure).

The Swiss financial sector accounts for 9% of gross domestic product (State Secretariat for International Financial Matters, Chiffres-clés, April 2022), and the Swiss government is endeavouring to support the competitiveness of this sector.

14.Recovery, resolution and liquidation

14. 1. What options are available where banks are failing in your jurisdiction?

Switzerland
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Swiss law has a comprehensive banking recovery, resolution and liquidation framework, mainly set out in:

- Articles 25 to 32 of the Banking Act; and
- the Financial Market Supervisory Authority (FINMA) Banking Insolvency Ordinance.

As a supervisory authority, FINMA monitors the financial situation of banks on an ongoing basis. If FINMA has concerns about a bank, it will commence intensive monitoring and encourage the bank's executive bodies and shareholders to find definitive solutions to the issues at stake. These might include:

- capital increases;
- cost reductions;
- mergers; and
- the disposal of assets.

If, despite such voluntary measures, a bank is in a situation of real concern – for example, if it has liquidity issues or is overindebted or in breach of capital requirements – FINMA will order protective measures. According to Article 26 of the Banking Act, these measures may include:

- the issuance of instructions to the bank's bodies;
- the appointment of an investigator;
- the appointment of new representatives of the bank;
- the limitation of the bank's activities; and
- a prohibition on making payments or accepting deposits.

A formal restructuring may be then initiated by FINMA if there is a positive outlook of successful completion. One of the prerequisites to the formal restructuring is that the creditors must not be worse off as a result of the restructuring than they would be in the event of an immediate bankruptcy. The restructuring is generally carried out by a FINMA-appointed administrator and is executed under close supervision by FINMA.

The five systematically important banking institutions (Credit Suisse, UBS, Raiffeisen Group, ZKB and Postfinance) are subject to more stringent rules, as they must:

- hold higher capital and liquidity buffers; and
- prepare and maintain resolution plans to be approved by FINMA.

14. 1. What options are available where banks are failing in your jurisdiction?

Switzerland
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The Swiss Financial Market Supervisory Authority (FINMA) is responsible for measures to stabilise banks in the event of a crisis, including the execution of restructuring, liquidation and insolvency proceedings.

If there is substantiated concern that a bank is overindebted or has serious liquidity problems, or if it does not meet the relevant capital adequacy requirements, FINMA may initiate restructuring proceedings if there is a realistic chance of the bank's recovery or ability to continue individual banking services.

In such case FINMA will appoint a restructuring administrator, who will draw up a restructuring plan (Article 28 of the Banking Act). This restructuring plan is subject to approval by FINMA and must be publicly announced. In particular, the plan must ensure that the bank will fulfil the licensing requirements upon completion of the restructuring. If the restructuring plan provides measures that interfere with creditors' rights, the creditors may reject the plan, provided that they jointly represent more than one-half of all third-class claims, according to Article 219, paragraph 4 of the Swiss Debt Collection and Bankruptcy Act of 1989. If the plan is rejected, FINMA may initiate bankruptcy proceedings. An exception applies for systematically important banks, where creditors have no right to reject the restructuring plan.

Possible restructuring tools include the partial or complete transfer of assets and liabilities, as well as contractual relationships, of the bank to another legal entity or to a transitional bank. Moreover, FINMA may initiate capital measures, such as the reduction or creation of new equity, the conversion of debt into equity (debt-to-equity swap), or the write-down of liabilities. The latter two measures are jointly defined as a 'bail-in', which requires both the owners and creditors to carry the costs of recapitalisation. To increase the potential for a bail-in, in 2016 Switzerland implemented the Total Loss-Absorbing Capacity Term Sheet of the Financial Stability Board, requiring internationally active systematically important banks to build-up 'bail-in-able' capital until 2020, in an amount equivalent to at least 14.3% in relation to risk-weighted assets and 4.5% in relation to leverage ratio (subject to potentially receiving a rebate). In 2019, this requirement was extended to domestic systematically important banks, but set at a rate of 40% of the requirements applicable for internationally active systematically important banks, to be built up over eight years.

In addition, the Financial Market Infrastructure Act of 2015 recently included a provision in the Banking Act that allows FINMA to forcibly postpone the termination of agreements. The purpose of this provision is to allow FINMA to take safeguard or restructuring measures without triggering any contractual rights of termination or rights according to Article 27 of the Banking Act. This provision ensures the continuation of contractual relationships during stress situations such as restructurings. Thus, banks must ensure that any new contracts or amendments to existing contracts which are governed by foreign law or provide for foreign jurisdiction are agreed upon only if the counterparty recognises the possibility that FINMA may postpone the termination of agreements where necessary.

The resolution regime in Switzerland, which allows a bank to be restructured rather than liquidated, has been continuously amended over the past few years. For internationally active systemically important banks, the obligation to prepare a recovery plan was introduced in 2013. They were obliged to present their final recovery plans to FINMA by the end of 2019. This obligation was recently extended to nationally active systemically important banks.

14. 2. What insolvency and liquidation regime applies to banks in your jurisdiction?

Switzerland
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The liquidation of insolvent banks is regulated by the Banking Act and the Bank Insolvency Ordinance issued by FINMA.

If there is no prospect of restructuring or if efforts at restructuring fail, FINMA will withdraw the bank's licence, order its liquidation and make this public. Under this order, the bank is no longer entitled to dispose of its assets. FINMA will then appoint a liquidator, who is responsible for conducting and implementing the liquidation proceedings, or will act as liquidator itself.

Claims against the bank (which are recorded in the bank's books) need not be additionally logged by the creditors. They will be automatically considered by the liquidator when drawing up a schedule of claims.

Claims of bank customers are privileged up to the amount of CHF 100,000. These claims are paid out immediately and without the right to set-off (if possible), and rank senior to general creditors in liquidation (see question 10.2). Other than this, no creditor protection or creditor preference regime exists in Switzerland.

If FINMA decides that there is a realistic chance that a bank may be successfully restructured, it may order restructuring proceedings rather than liquidation (see question 14.1).

14. 2. What insolvency and liquidation regime applies to banks in your jurisdiction?

Switzerland
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Articles 33 to 37g of the Banking Act and the FINMA Banking Insolvency Ordinance set out the legal regime applicable to insolvent banking institutions.

If a bank becomes insolvent and there is no realistic prospect of a successful restructuring, FINMA will withdraw the bank's licence and initiate bankruptcy proceedings. The proceedings aim to:

- facilitate the orderly dissolution of the bank;
- minimise the disturbance to the financial markets; and
- maximise the proceeds for creditors.

The bankruptcy is made public by FINMA, which will appoint a bankruptcy liquidator to carry out the necessary steps towards dissolution and liquidation.

Bankruptcy proceedings cover all realisable assets in a bank's possession at the time in question, regardless of whether they are located in Switzerland or abroad. All Swiss and foreign creditors of the bank and its foreign branches are equally entitled to participate in bankruptcy proceedings opened in Switzerland and enjoy the same privileges.

Immediately after the launch of the proceedings, privileged deposits of up to CHF 100,000 per depositor, irrespective of whether they are located in Switzerland or abroad, will be paid out of the bank's available assets.

All remaining shortfalls after payment of the privileged deposits will be paid out in accordance with the hierarchy of claims In principle, claims arising from banking deposits rank in the third class and are paid after employees' claims and pension claims.

15.Trends and predictions

15. 1. How would you describe the current banking landscape and prevailing trends in your jurisdiction? Are any new developments anticipated in the next 12 months, including any proposed legislative reforms?

Switzerland
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The Swiss banking sector is extremely dynamic and the recent take-over of Credit Suisse by UBS will likely be a game changer in the banking landscape with important shifts of clients towards smaller local banks and likely new regulations in the aftermath of the crisis.

Cooperation between fintechs and banks will likely increase (Swiss Bankers Association, Banking Barometer 2022, August 2022, p15), which will further challenge the regulator.

The licensing requirement for private wealth asset managers entered into force on 1 January 2020, with a transition period of three years. This could lead to an increase in the number of funds that are actively managed by banks instead of simply being in their custody, as many (small) private wealth asset managers either did not apply for a licence or might not receive one.

Banks will also need to adapt their operations to the new Data Protection Act, which will enter into force in September 2023.

Furthermore, the deposit protection scheme has been strengthened and the new legislative framework will be implemented in the coming years, requiring banks to adjust their operations accordingly.

The revised Money Laundering Act and its implementation ordinance, which became fully applicable on 1 January 2023, enhance the transparency and know-your customer obligations.

Finally, the Federal Council has signed into force its federal Ordinance on Environmental, Social and Governance Reporting, which will apply to listed and other companies, including banking institutions, as of 1 January 2024. Once the ordinance takes effect, banks will need to:

- report on the impact of climate change on their commercial activities;
- explain the impact of their commercial activities on climate change; and
- take into account sectoral guidelines to present scenario-based prospective climate compatibility analyses.

It is expected that banks will need to obtain professional and specific expertise on these issues, which may lead to an increase in their fixed costs.

15. 1. How would you describe the current banking landscape and prevailing trends in your jurisdiction? Are any new developments anticipated in the next 12 months, including any proposed legislative reforms?

Switzerland
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Following the financial crisis of 2007/2008, the focus of the Swiss regulator has been on efforts to stabilise and strengthen the Swiss financial system, with new and more restrictive rules in particular for systemically important banks (please also see questions 4 and 5.2).

On the other hand, the Swiss Financial Market Supervisory Authority (FINMA) has increased its efforts to ease the regulatory burden for smaller banks. To this effect, it has introduced the 'small banks regime', effective as of 1 January 2020. This regime seeks to increase efficiency in regulation and supervision for small institutions – in particular, liquid and well-capitalised institutions (please also see question 4.2).

The new Financial Services Act, which became effective as of 1 January 2020, introduces new standards of conduct for all providers of financial services (including banks) to improve client protection in line with international standards (in particular Directive 2014/65/EU). It was originally planned to harmonise the requirements for licensing and supervision of all financial services providers in the new Financial Institutions Act, which also entered into force on 1 January 2020. However, it was argued that the existing framework applicable to banks was still adequate. For this reason, banks have been carved out from the scope of application of the Financial Institutions Act.

Finally, various regulations have been introduced to facilitate innovative business models, including fintech models (please see question 15.2).

15. 2. Does your jurisdiction regulate cryptocurrencies? Are there any legislative developments with respect to cryptocurrencies or fintech in general?

Switzerland
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The Swiss regulatory framework does not specifically address fintech businesses. Instead, new regulations governing certain requirements for fintech companies have been designed in accordance with the regulator's technology-neutral approach. This means that business activities with comparable characteristics are generally subject to the same regulatory requirements, regardless of whether they involve new technologies such as distributed ledger technology (DLT) and blockchain applications.

To ease the Swiss regulatory regime for providers of innovative financial technologies (including fintech), the following amendments and additions have been made to the Banking Act and its implementing ordinance:

- Settlement accounts: No banking licence is required if third-party moneys are accepted on interest-free accounts for the purpose of settlement of customer transactions, if the moneys are held for a maximum of 60 days (formerly, the maximum holding period was seven days).

- Sandbox: Companies accepting deposits from the public are exempt from the requirement to obtain a banking licence if:
  - the deposits accepted do not exceed CHF 1 million;
  - no interest margin business is conducted; and
  - the depositors have been informed that the company is not regulated by FINMA and that the deposits are not subject to the depositor protection scheme.
- Fintech licence: Companies mainly involved in the financial sector that intend to accept public deposits on a commercial basis of up to CHF 100 million without investing, paying or promising to pay interest on these deposits (ie, fintech companies) require a licence from FINMA. While such companies are not technically considered banks, they are subject to a similar – though less restrictive – regulatory regime.

Furthermore, FINMA issued guidelines on initial coin offerings (ICOs) in 2018 which were supplemented by additional guidelines in 2019. In these guidelines, FINMA explains its position regarding the supervisory and regulatory framework for ICOs, and provides market participants with information on how it will deal with respective enquiries. In particular, FINMA defines the following three categories of coins/tokens:

- Payment tokens: Payment tokens (synonymous with cryptocurrencies) are tokens which are intended to be used, now or in the future, as a means of payment for acquiring goods or services, or as a means of money or value transfer. Cryptocurrencies give rise to no claims on the issuer. Given that payment tokens are designed to act as a means of payment and are not analogous in function to traditional securities, FINMA will not treat payment tokens as securities and, thus, the corresponding securities regulations generally will not apply. However, they are generally subject to anti-money laundering regulation.
- Utility tokens: Utility tokens are tokens which are intended to provide digital access to an application or service by means of a blockchain-based infrastructure. Utility tokens are considered securities only if they have an investment purpose. As long as the main reason for issuing utility tokens is to provide access rights to a non-financial application of blockchain technology, they are also not subject to anti-money laundering regulations.
- Asset tokens: Asset tokens represent assets such as a debt or equity claim on the issuer. Asset tokens promise, for example, a share in future company earnings or future capital flows. In terms of their economic function, therefore, these tokens are analogous to equities, bonds or derivatives. Tokens which enable physical assets to be traded on the blockchain also fall into this category. Asset tokens are generally treated as securities. Consequently, securities and anti-money laundering regulations generally apply.

Finally, the Federal Council issued draft legislation on the further improvement of the framework conditions for DLT/blockchain in November 2019. The proposal is aimed at increasing legal certainty, removing barriers for applications based on DLT and reducing the risk of abuse. This federal legislation, which is designed as a blanket framework, proposes specific amendments to nine federal acts, covering both civil law and financial market law.

15. 2. Does your jurisdiction regulate cryptocurrencies? Are there any legislative developments with respect to cryptocurrencies or fintech in general?

Switzerland
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The Swiss government and the Financial Market Supervisory Authority (FINMA) recognise that innovation is vital to the development of the banking sector, and that cryptocurrencies will inevitably play a growing role in the financial industry. However, very few banks currently undertake active trading in cryptocurrencies.

While the sale and purchase of cryptocurrencies are not regulated *per se*, certain transactions and operations – including initial coin offerings (ICOs) – fall under stringent rules, such as those on anti-money laundering, trading in securities or banking.

In 2018, in a bid to promote and support the fintech economy, FINMA issued guidelines on ICOs; and since 1 January 2019, the Banking Act has made provision for a fintech licence, which is a banking licence 'light' with more relaxed requirements. A fintech licence allows institutions to accept public deposits of up to CHF 100 million or crypto-assets, provided that these are not invested and no interest is paid thereon. As of November 2022, three fintech authorisations had been granted by FINMA.

Finally, in September 20202, Parliament passed the Distributed Ledger Technology Blanket Act, which selectively adapts 10 existing federal laws and ordinances. The goal of the new legislation is to improve the conditions for blockchain and distributed ledger companies in Switzerland, establishing a competitive environment for innovative financial market technologies.

16.Tips and traps

16. 1. What are your top tips for banking entities operating in your jurisdiction and what potential issues would you highlight?

Switzerland
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In recent years, the Financial Market Supervisory Authority (FINMA) has sent strong signals that it expects banks to be more proactive in the detection and reporting of anti-money laundering. As a result, it is imperative that banks ensure that such cases are detected at an early stage. Further, while in the past very few sanctions were imposed on individuals, FINMA is now investigating and sanctioning senior managers for regulatory breaches.

FINMA has also highlighted that cybersecurity remains a major issue for Swiss banks. Between 2020 and September 2022, 145 cyberattacks were reported to FINMA, which underlines the challenges posed by such risk (source: FINMA Risks Monitoring 2022).

At the same time, high inflation rates and the predicted slowing of the economy have put additional pressure on banks to reduce costs, which inevitably creates tensions between business and control units.

16. 1. What are your top tips for banking entities operating in your jurisdiction and what potential issues would you highlight?

Switzerland

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The Swiss Financial Market Supervisory Authority (FINMA) has increased its enforcement action recently, in particular in relation to breach of market conduct rules and anti-money laundering regulations. While FINMA’s enforcement practice originally focused on banks as entities, it is now putting greater emphasis on actions against the individual executives responsible for violations. Corresponding sanctions include professional bans, publication of decisions (‘naming and shaming’) and the seizure of illegitimate gains.

In addition, and in line with international developments and discussions, FINMA continues to focus more closely on systemic risk issues.

Finally, the sustainable growth of the fintech sector and related innovative business models is likely to be the core challenge for providers of traditional banking services. Therefore, digitalisation of the banking processes should be top of the strategic agenda.

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