

Alessandro Bizzozero and Christopher Robinson

Financial cross-border activities into and out of Switzerland

Translated by Daniel Scheinmann

Schulthess §



Table of contents

Glossary of terms	15
Bibliography	20
Introduction	21

Part I : General aspects

Chapter 1 – The concept of cross-border activity

1.1	Definition	25
1.2	Elements of the definition	27
	A) Financial activity	27
	B) Crossing of borders	29
1.3	Market participants	31
1.4	Sub-categories	32
	A) Cross-border activity with or without a physical presence	33
	B) Direct or indirect cross-border activity	33
	C) Active or passive cross-border activity	33

Chapter 2 – Treaties and international texts on cross-border activity

2.1	Multilateral treaties	35
	A) GATS	35
	A.1 Definition	35

A.2	Historical background	36
A.3	Contents of the treaty	37
A.4	Financial services	39
A.5	Impact on Switzerland	39
B)	OECD Codes	41
B.1	OECD	41
B.2	Generalities on the Codes	42
B.3	Code of Liberalisation of Capital Movements	43
B.4	Code of Liberalisation of Current Invisible Operations	44
B.5	Impact on Switzerland	45
C)	EFTA treaties	46
C.1	EFTA	46
C.2	EFTA Convention	47
C.3	Agreements with third countries	47
C.4	Impact on Switzerland	48
2.2	Bilateral treaties	48
A)	Bilateral treaties with third countries and the EU	48
B)	Bilateral agreements between supervisory authorities	51
C)	Bilateral diplomatic route	52
2.3	International textes concerning Switzerland indirectly	52
A)	European treaties and directives	52
A.1	Treaty on the Functioning of the European Union	53
A.2	Directive 2006/48/EC	54
A.3	Directive 2004/39/EC	56
A.4	UCITS	57
A.5	Directive on Alternative Investment Fund Managers	59
B)	The Lugano Convention	60
C)	Circular Letters of the Basel Committee	62
D)	Treaties between third countries	64

Part II : Cross-border activities from abroad into Switzerland

Chapter 3 – Financial services

3.1	Evolution of the regulatory framework	69
3.2	Cross-border activity into Switzerland with a physical presence	71
A)	Types of presence: generalities	71
B)	Subsidiaries and participations	72
B.1	Necessity of a banking or securities dealer license	72

B.2 Necessity for an additional authorisation	75
B.3 Exercise of banking or securities dealing activities	76
C) Branches	76
C.1 Concept	77
C.2 Licenses	79
D) Agencies	81
E) Representative offices	82
E.1 Concept	82
E.2 Authorisation	84
E.3 Introducing broker	84
F) Detached workers	85
G) Assessment of the situation	86
3.3 Cross-border activity into Switzerland without a physical presence	87
A) Principle	87
B) Exceptions	89
C) Permanent establishment	91
D) Concrete expression	91
E) Venue	93

Chapter 4 – Sale of products

4.1 Foreign collective investment schemes	95
A) Regulatory situation of foreign collective investment schemes	96
A.1 Generalities	96
A.2 Concept of foreign collective investment scheme	97
A.3 Public distribution	99
A.4 Authorisation regime	102
B) Foreign seller of collective investment schemes	104
B.1 Definitions and legal principles	104
B.2 Distributor	105
B.3 The seller is not distributor	107
4.2 Foreign structured products	107
A) Definition	107
B) Regulations	108
4.3 Other foreign products	109
A) Direct solicitation	109
A.1 Principle	110
A.2 Exception	111
B) Listing of foreign products on the Swiss stock exchange	111
4.4 Life insurance policies	113

Chapter 5 – Access to Swiss regulated markets

5.1	Purchase of securities listed on a Swiss stock exchange	117
	A) Principle	117
	B) Obligation to notify	119
5.2	Foreign member of a Swiss stock exchange	121
5.3	Foreign stock exchanges recognised in Switzerland	122

Part III : Cross-border activity out of Switzerland

Chapter 6 – Practice of the regulator

6.1	Extraterritorial application of Swiss law	127
6.2	Adherence to foreign law	130
	A) Public policy	130
	B) Risk management	132
	B.1 Concept	132
	B.2 Internet	132
	C) Fit and proper conduct of business	133
	C.1 Concept	133
	C.2 Foreign markets	134
	D) UBS case: fit and proper conduct of business and adequate organisation	136
	D.1 In general	136
	D.2 Legal foundations of the decision	136
	D.3 Measures against UBS	137
	E) Confirmation of approach	138
	F) Cross-border risks without any cross-border activity: Iran	140
	G) FINMA Position paper on legal risks	140

Chapter 7 – Implementation of the regulator’s expectations

7.1	Internal regulations	143
7.2	Identifying and assessing cross-border risk	144
	A) Establishment of a business model	145
	B) Assessment of risks inherent in business models	147
	B.1 Examination of foreign legislation	148
	B.2 Assessment of an organisation	150
7.3	Decision on the limitation of risks	151
	A) Assessment of the regulatory situation	151

B)	Risk mitigation	152
C)	Decision	152
D)	Specific instructions	152
E)	Training	153
4	Finders and independent asset managers	153
5	Supervision of risks	154
A)	Regular review of business models and of risks	154
B)	Management of licenses	155
B.1	In general	155
B.2	Particularities of products	156
5	Information provided to FINMA	157
A)	Duty of information pursuant to art. 3 BA	157
B)	Other information duties	158
C)	Duty to define the geographical scope of activity	159

Chapter 8 – General issues related to cross-border activity out of Switzerland

1	Concept of a bank and activities that may be conducted by a bank	162
A)	Concept of a bank	162
B)	Banks and other financial activities	163
B.1	Banking activity versus other activities	163
B.2	How to accumulate activities	166
C)	Practical impact for Swiss banks	167
2	Protectionist barriers	169
A)	Direct barriers	169
B)	Indirect barriers	169
B.1	Consumer protection	169
B.2	Market transparency	171
B.3	Fiscal protectionism	172
B.4	Protectionism related to labour law	173
3	Plurality of supervisory authorities	173
4	Plurality of legislative systems	176
A)	Special zones within a State	177
B)	Federal States	179
C)	Dependent territories	179
D)	Islamic banking	180
5	Foreign exchange controls	181
A)	General aspects	181
B)	Examples	182
C)	Impact on Swiss banks	183

Chapter 9 – Exporting services without a physical presence

9.1	Principles governing the export of services without a physical presence	185
	A) Principles of application	186
	A.1 Criterion of territoriality	186
	A.2 Criterion of residency (or personal approach)	187
	B) Thresholds of tolerance	188
	B.1 Solicitation Test	189
	B.2 Performance Test	190
	B.3 Lasting Presence Test	190
9.2	Limitations on practical activity	191
	A) Solicitation	191
	A.1 Direct marketing by a bank	191
	A.2 Indirect marketing by a bank	195
	A.3 Solicitation by a client	199
	B) Conclusion of contracts	201
	B.1 Presentation of contractual forms to the client	201
	B.2 Signing of contractual forms by the client	201
	B.3 Acceptance by the bank	202
	C) Provision of services	204
	C.1 Services rendered in Switzerland	204
	C.2 Services rendered in Switzerland or abroad	205
	C.3 Services rendered abroad	205
	D) Duty to inform	206
9.3	Implications regarding the court of competent jurisdiction and the applicable law	207
	A) Venue	207
	B) Applicable law	208
	B.1 Principle	208
	B.2 Influence of foreign mandatory law	209
9.4	Cross-border licenses	211
	A) Concept	211
	B) Cross-border authorisation	212
	B.1 Belgium	212
	B.2 South Korea	213
	B.3 Denmark	214
	B.4 Finland	215
	B.5 Italy	215
	B.6 Norway	216
	B.7 USA	216
	B.8 India	220
	C) Cross-border registration	220

C.1 Germany	220
C.2 Canada	221
C.3 Israel	222
C.4 The Netherlands	223
C.5 Singapore	224
Permanent establishments	224

Chapter 10 – Export of services with a physical presence

1 General considerations	227
A) Choice of the form of presence and of licenses	227
B) Direct limitations of licenses	228
C) License conditions and operational framework	231
D) Company license and personal licenses	232
E) Hiring of locals	233
F) Cross-border activity for the benefit of the head office	234
2 Subsidiaries	235
A) Licenses	236
A.1 Banking licenses abroad	236
A.2 Securities dealer licenses abroad	238
B) Problems related to legal independence	239
B.1 Corporate governance	239
B.2 Outsourcing	244
B.3 Service Level Agreements	245
C) Problems related to the independence of a business	246
3 Branches	247
A) Problem of licenses	247
A.1 Concept of a branch	247
A.2 Prohibition on the establishment of branches	248
A.3 Activity exercised by a branch in line with the status of the head office	248
A.4 Regulatory framework	249
B) Problems related to the absence of legal independence	250
C) Problems related to the independence of business	250
4 Representative offices	251
A) Concept	251
B) Licenses	254
5 Cross-border instructions	255
6 Consolidated supervision	257

Chapter 11 – Sale of products abroad

1 General aspects of the regulatory framework	259
A) Three-tiered legal system	259

B)	Concept of an investment fund	261
C)	Possibility of investing in foreign products	262
11.2	Authorisation of foreign investment funds	263
A)	Application of the law	263
A.1	Territorial approach	264
A.2	Personal approach	265
B)	Exceptions to the application of the law	265
B.1	Private placements	266
B.2	Passive solicitation	268
C)	Authorisations and notifications	269
C.1	Possibility or impossibility of obtaining an approval	269
C.2	Licenses and notification	
C.3	Restrictions derived from regulations on collective investment schemes	271
D)	Authorisation for products in Switzerland	273
11.3	Requirement to draft a prospectus	274
11.4	Product sales transaction	276
A)	Qualification of a sales transaction and authorisation	276
B)	Reporting and rules of conduct	278
11.5	Other functions performed by a bank	279
A)	Custodian	279
B)	Fund manager	280

Chapter 12 – Access to foreign regulated markets

12.1	Purchase and holding of securities	281
A)	Principle	281
B)	Nominee's license	283
C)	Restrictions on market access	283
C.1	Direct restrictions	283
C.2	Indirect restrictions	288
D)	Segregation	289
E)	Disclosure of investors	290
E.1	Mandatory disclosure prior to an investment	290
E.2	Subsequent disclosure upon request	290
E.3	Spontaneous disclosure	291
F)	Disclosure and bank secrecy	293
G)	Repatriation of profits and sales proceeds	294
12.2	Membership of a foreign stock exchange	295
	Conclusion	297
	List of countries cited	299