Market Access Germany

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Background

On 15 August 2013, the Swiss Confederation and the Federal Republic of Germany decided to intensify their cross-border collaboration in the financial services area. As a result, Switzerland and Germany entered into a Memorandum of Understanding ("MoU") to cover procedural aspects for the cross-border business in the financial industry. The FINMA and the Federal Financial Supervisory Authority in Germany ("BaFin") subsequently issued an Implementation Agreement ("Ausführungs-vereinbarung") to specify the MoU that came into force on 1 January 2014.

Besides the already existing exemption procedure ("Traditionelles Freistellungsverfahren"), banks in Switzerland can now obtain a new exemption from licensing for its cross-border business into Germany by means of the Simplified Exemption Procedure ("Vereinfachtes Freistellungsverfahren"). Contrary to the conventional exemption procedure, this provides Swiss banks with direct access to the German market without having to involve an intermediate German-licensed credit institution ("Anbahnungsinstitut") in order to acquire new German retail clients.

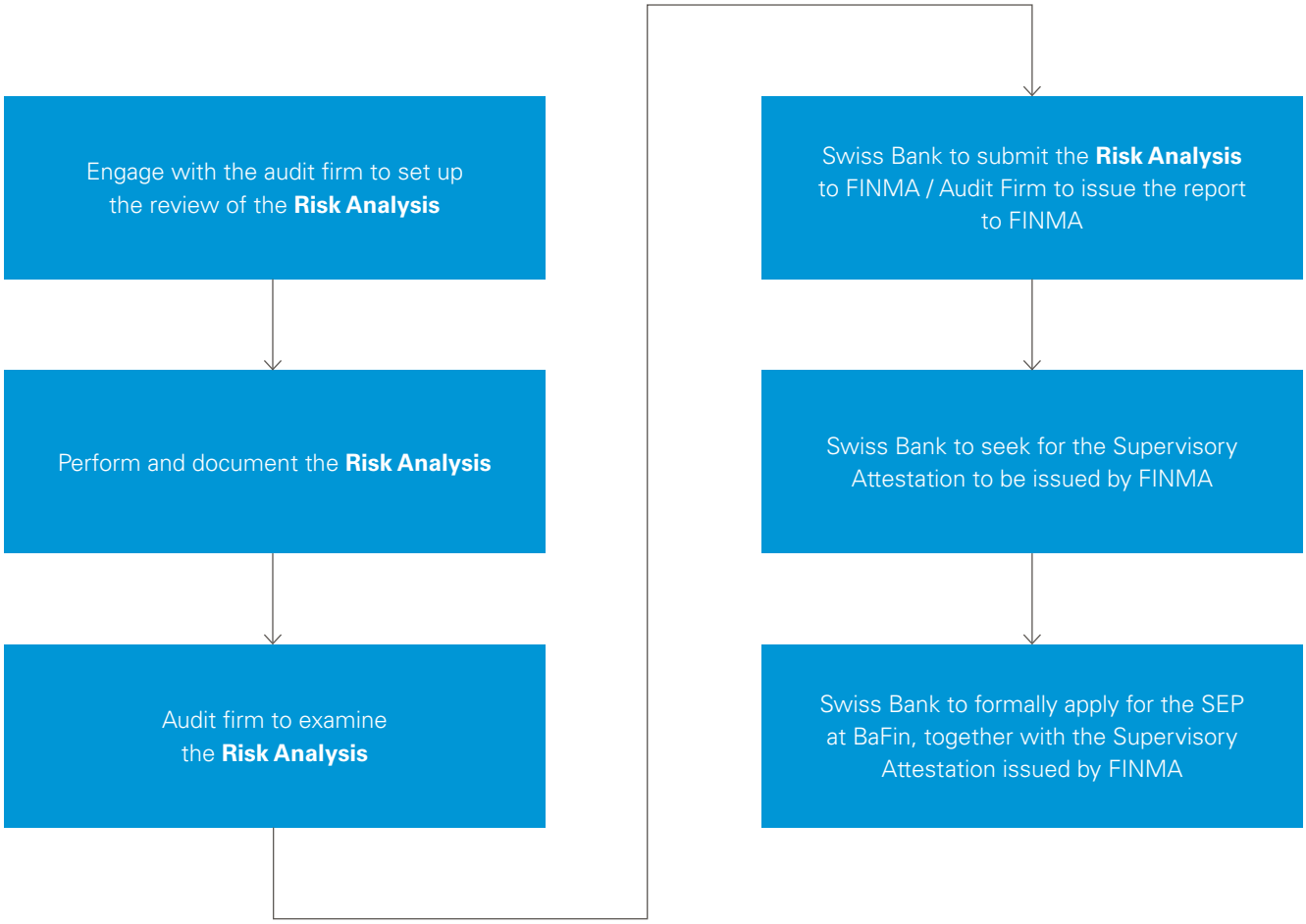
By doing so, Swiss banks however will need to adhere to German consumer protection laws and anti-money laundering regulations[1]. Compliance with these requirements is subject to annual audits by a Swiss audit firm, typically the regulatory auditor.

Application for the Simplified Exemption Procedure ("SEP")

Swiss banks which intend to make use of the SEP need to submit an application to BaFin. This procedure also requires the Swiss bank to seek approval from FINMA. FINMA will issue a so-called supervisory attestation ("Aufsichtsbescheinigung") to BaFin, confirming that the institution in question is a licensed bank allowed to provide these banking and financial services.

A bank can only obtain this supervisory attestation from FINMA if it fulfils a set of requirements. The Swiss bank will need to perform and document a **Risk Analysis** addressing the underlying risk and mitigating controls for the envisaged German cross-border business. The audit firm of the Swiss bank has to assess the appropriateness of the **Risk Analysis** and formally report to FINMA. In summary, the application procedure for a Swiss bank is as follows, whereas some steps may be executed in parallel:

[1] Adherence to the mandatory consumer protection requirements is also required under a conventional/ordinary exemption, but no explicit proof of this has to be provided to BaFin on a regular basis (e.g. audit report).



Key aspects and challenges of the Simplified Exemption Procedure

Due to the bilateral and intergovernmental nature of this agreement, there are a number of **Base Documents**, which set forth the key elements to consider in the SEP application process:

- Procedural aspects of the cross-border business in the financial service industry (Memorandum of Understanding ("MoU"), dated 15 August 2013);
- Specifications to the MoU;
- Specifications to applicable anti-money rules;
- Simplified Exemption Procedure for Swiss banks in the cross-border business with Germany (FINMA Newsletter 54, dated 6 January 2014);
- Information and requirements in relation to the SEP; and
- Legal and reputational risks in cross-border financial services (FINMA Position Paper, dated 22 October 2010).

As some of these documents are not accessible to the public, FINMA will only provide them on request.

Whilst most of the **Base Documents** mentioned above set out the legal and regulatory requirements with respect to German consumer protection and AML rules, FINMA explicitly pointed out a few additional areas which could prove challenging in practice. In order to obtain the Supervisory Attestation from FINMA, the bank has to evidence appropriate mitigation of legal and reputational risks as well as adherence to the requirements set out in the MoU, Implementation Agreement and Document of Understanding. The bank has two options in this matter:

1. The bank provides evidence that all of its German clients are fully tax compliant (regardless whether acquired as part of an existing exemption or reverse solicitation) or that it has not provided services to clients domiciled in Germany in the past; or
2. In case the bank maintains relationships with German clients, it needs to identify any cases where assets might derive from qualified tax offences (reportable matter/act according to German criminal law). If the bank cannot prove that the assets do not stem from qualified tax offences, it needs to check whether the right to report in accordance with Art. 305ter para. 2 of the Swiss Criminal Code applies. FINMA perceives the legal and reputational risks of a client relationship reported by the bank to be mitigated. The **Risk Analysis** has to disclose this accordingly.

The bank also has to demonstrate how it has ensured that all new clients domiciled in Germany are verifiably tax compliant. The Automatic Exchange of Information (AEoI) (period 2017, due to be reported in 2018) will not resolve the issue of tax non-compliant clients as it is mainly a "reporting procedure". However, activities around the AEoI implementation may support banks in its client tax programs.

Another key aspect is that the Swiss bank also needs to properly address the divergence in Swiss and German AML reporting principles/requirements (i.e. when to file a suspicious activity report).

What should the Risk Analysis look like?

The **Risk Analysis** is by far the most time-consuming piece in the SEP application process. It not only requires the bank to document the analysis, but most likely also triggers the implementation of new processes and controls as well amendments to the existing internal control framework. One can argue that it is a helpful exercise and the lessons learned could be leveraged in similar exercises. Nevertheless, it is evident that the performance of the **Risk Analysis** asks for a structured and comprehensive approach taking into account all the requirements and topics in the different **Base Documents** mentioned above. Some of the cornerstones of the **Risk Analysis** are:

- Current and envisaged business strategy/activity/case
- Governance, organization and internal control system
- **Risk Analysis** which interlinks processes & controls, client segments, product & service offerings with the respective legal and regulatory requirements
- Anticipated regulatory changes (e.g. MiFID II, local law and regulations)

Benefits and challenges

As with almost everything else, the SEP comes with benefits but also hurdles, which the bank needs to take. Because of the benefits and challenges associated with the SEP, it remains a strategic decision, which requires the involvement of both the Board of Directors and Management.

Benefits

- The SEP allows the Swiss bank to enter directly into the German market and acquire clients, without the intermediation of a contracted German credit institution ("Anbahnungsinstitut").
- With a SEP, the bank can actively market its services (with limitations) in Germany, for instance, the Swiss bank could organize client events in Germany in its own name.
- The SEP enables the Swiss bank to serve existing German clients better, allowing it to exploit more options.
- Implementing the consumer protection requirements for German clients provides a good opportunity to make the organization ready for future regulatory requirements such as the Swiss Financial Services Act ("FinSA").
- The Board of Directors and Management may regard the SEP as a strategic option complementing the bank's existing strategy.
- Performing this **Risk Analysis** is a good opportunity to re-assess the bank's risks, processes and controls and leverage the findings in certain areas. It may also serve as a gap analysis to bring the bank to the next level in terms of its processes and controls.

Challenges

- German client relationships are subject to an annual audit in the area of German consumer protection and anti-money laundering requirements. This annual audit is to be examined by a Swiss audit firm and includes reporting to the supervisory authorities FINMA and BaFin.
- BaFin, in consultation with FINMA, may request additional on-site inspections.
- The execution and documentation of the **Risk Analysis** requires expert knowledge and sufficient resources (e.g. staff, time)
- The Swiss bank needs to have an appropriate governance and control framework in place in order to anticipate and implement new legal and regulatory requirements (e.g. MiFID II) or amendments thereof.

Impact of MiFID II and the Swiss Financial Services Act

As of January 2018, MiFID II requirements (respectively the corresponding legal implementing acts) will enter into force in the whole European Union. In Switzerland, the Swiss Financial Services Act is currently being debated in the Parliament and is expected to enter into force 2018 or 2019. These two new regulations will have a major impact on the SEP:

Amongst many other topics, MiFID II will govern the requirements for EU market access for financial intermediaries based in so-called third-party countries (non-member state), such as Switzerland. However, based on the currently available governmental draft of the German "Finanzmarktnovellierungsgesetz, FiMaNoG" which will implement MiFID II requirements into German law, we do not expect any major changes to the options available or to the requirements for a conventional/ordinary or simplified exception procedure.

Nevertheless, there will be indirect changes and higher requirements because MiFID II will bring with it more stringent consumer protection rules. However, since the Swiss Financial Services Act will have many similar requirements, the Swiss bank may leverage on this work.

How KPMG can help you

For many Swiss banks, Germany is one of the most important target markets. With the SEP, Swiss banks can tap into the very large and attractive German market. KPMG can support you in the following areas:

- Analysis of the strategic options for accessing the German market with individual recommendations for your institution.
- Gap analysis of your internal guidelines and procedures regarding compliance with German AML, tax and consumer protection requirements.
- Support during the application procedure, representation in front of the authorities.
- Subject-matter expertise provided by our colleagues from KPMG Germany during the whole process.
- Examination of the **Risk Analysis** and reporting to FINMA (for the purposes of the FINMA attestation).
- Yearly audit attestation for FINMA/BaFin regarding the requirements of SEP (AML and consumer protection requirements).

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