

Cross-border business of Swiss banks in Germany

The treaty on collaboration in the fields of taxation and financial markets signed by Switzerland and Germany on 21 September 2011 focuses on taxation, and in particular on income from capital investment. It also includes a protocol aimed at improving the exemption procedure for Swiss banks in Germany, a move designed primarily to accelerate the process. This protocol gives us cause to look ahead and consider the legal framework which will apply to Swiss banks engaging in cross-border business in Germany. In terms of compliance the new treaty will make it easier for Swiss banks to venture into Germany, although they also face new challenges and as yet unexplored terrain when doing business with private customers.

The Swiss perspective

Viewed from the Swiss perspective, it may at first seem odd that the protocol deals solely with cross-border business of Swiss banks in Germany and not vice versa. However, there is a straightforward answer: whereas the German regime is fairly restrictive, Swiss rules on cross-border business into Switzerland from other countries are extremely liberal. Clearance from the Swiss Financial Market Supervisory Authority (*FINMA*) is only necessary if the foreign bank employs people in Switzerland who, on a permanent and commercial basis, work in or are based in Switzerland

(article 2 (1) of the Swiss Foreign Banks Ordinance (*Auslandbankenverordnung*). Cold calling and occasional visits by foreign bank employees to Switzerland do not require permission. Other rules apply to collective investment schemes (securities funds), for which the protocol anticipates a reciprocal arrangement.

From the Swiss perspective, an important aspect of future cross-border business involving Swiss banks in Germany is that a breach of foreign law can lead to sanctions in Switzerland, not just in Germany. This comes as no surprise because as long ago as 1999, *FINMA* was arguing that the risk of breaching foreign regulations should be treated in the same way as all other risks. In the years that followed, *FINMA* imposed sanctions on a number of Swiss banks which were in breach of foreign law. The events which brought these issues to the attention of the public were the interventions of *FINMA* in 2009 in connection with UBS AG's activities in the US and the publication of *FINMA*'s "Legal Risks" position paper on 22 October 2010. In its paper, *FINMA* made it very clear that in future it would be setting its sights on cross-border business. The implication of this is that Swiss banks which wish to continue marketing cross-border services in Germany will now have to carefully analyse the legal framework and associated risks and take measures to eliminate or minimise risk. *FINMA* also expects a compliant service model to be defined for Germany. Whereas the 2010

position paper focused primarily on compliance with foreign supervisory and regulatory legislation, the protocol in the September 2011 tax treaty extends the legal requirements to be observed by Swiss banks to expressly include German investor and consumer protection rules.

German supervisory law

Market access for Swiss banks

The protocol will make it easier for Swiss banks to access the German market because there is no longer a distinction between different customer categories (institutional investors, private clients). This overcomes the problem where in the past some clients did not fall into either category. Also, it will no longer be necessary for business with new clients to be brokered through a German bank or through the German branch of a bank from the European Economic Area. In future it will be sufficient for Swiss banks to verify their client's identity in a manner which complies with German money-laundering legislation. Under the new, more relaxed regime, Swiss banks will also have to apply German investor and consumer protection rules in Switzerland with regard to their business in Germany. Compliance with this requirement will be monitored by *FINMA*. The German Financial Supervisory Authority (*BaFin*) will be allowed to take part in this monitoring process.

Market access for Swiss securities funds

An agreement to be made between *FINMA* and *BaFin* will also establish which Swiss securities funds are to be regarded as UCITS-compliant. It will then be much easier to market these funds in Germany, and business in the German market will no longer have to be routed via Luxembourg, a strategy frequently adopted in the past.

Jurisdiction

Since 1 January 2011, jurisdiction and the recognition and enforcement of judgments in German-Swiss relations have been subject to the 2007 Lugano Convention. In future, under articles 16 (1) and 15 (1c) German private customers will be able to sue Swiss banks for compensation in a German court at their place of residence provided the Swiss bank has specifically targeted the German market. This criterion will be satisfied if the bank has filed an exemption application with *BaFin*. German customers who have used the 2011 tax treaty to manage their tax risks in Germany will now be able to sue Swiss banks in German courts in the same way that they can sue German banks. Under article 17 of the 2007 Lugano Convention, an agreement stipulating that the sole place of jurisdiction is Switzerland is invalid if the Swiss bank has specifically targeted the German market.

Applicable law

Under article 6 (2) of the Rome I Regulation, business activity directed at the German market is the crucial factor for mandatory application of German investor and consumer protection law to contracts between a Swiss bank and its German clients – even if such contracts contain a valid choice of Swiss law.

German investor and consumer protection

German investor and consumer protection legislation is extensive, but the following three areas are particularly relevant.

1. Revocation rights

German consumer protection law contains many instances where the consumer is granted the right to revoke agreements. These include sections 495 and 355 of the German Civil Code (*Bürgerliches Gesetzbuch*), which apply to loan agreements. A consumer (*Verbraucher*) is defined as anyone who does not act as an independent (*freiberuflich*) or commercial (*gewerblich*) entrepreneur (*Unternehmer*). In other words, a billionaire taking out a Lombard loan would be categorised as a consumer. Other revocation rights are contained in sections 312 and 355 of the German Civil Code for doorstep transactions, sections 312d and 355 for distance contracts and section 126 of the German Investment Act (*Investmentgesetz*) for purchase agreements relating to investment funds. In each case, the two-week revocation period does not begin until the customer has been informed of his revocation rights, as required by law. If he has not been informed of these rights or if he has not been fully informed of them, he can still revoke the contract years later if his investment has failed to perform.

2. Standard terms and conditions

Sections 305 ff. of the German Civil Code contain many provisions which may render standard terms and conditions or standard form contracts invalid in Germany. Standard terms and conditions based on Swiss law generally infringe at least one of these provisions. Swiss banks should therefore not assume that their standard terms and conditions will be suitable for cross-border business with German customers.

3. Investor protection

For many years, the German Federal Court of Justice (*Bundesgerichtshof – BGH*) has been combating – among other things – the granting of kick-backs behind customers' backs. It has ruled that the client must have the opportunity to shift the entire risk of a bad investment onto a bank that has either accepted or granted a kick-back.

Summary: The reform also brings with it new requirements

The relaxation in supervisory requirements will make it easier for Swiss banks to gain a foothold in the German market. However, the new opportunities for business with private customers will also take them into as yet uncharted territory: customers can sue their Swiss bank in a German court, which will always adjudicate according to the applicable German investor and consumer protection rules. Thus the easing of regulatory requirements for Swiss banks seeking to enter the German market brings with it a need to use carefully prepared documentation while increasing the concomitant demands on staff.



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