



Access to the Swiss Financial Market The Evolving Legal Regime

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Swiss Perspective

- The Swiss perspective extensively depends on the EU perspective
- Financial reforms
 - EU compatibility
 - Swiss Finish
- Questioning equivalence as a market access mechanism



Outline

Perspectives on Equivalence	Illustrations
Extraterritoriality and Cross-Border Coordination	Collective Investment Schemes
Reciprocity Principle, Contingency and Mutual Recognition	Financial Market Infrastructures and Financial Institutions
Regulation at the Point of Sale and National Treatment	Provision of Financial Services
Regulation at the Point of Production and Automatic Recognition	Product Disclosures
Unilateral Recognition	Corporate Sustainability Reporting



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Extraterritoriality and Cross-Border Coordination



Extraterritoriality and Cross-Border Coordination

- Evolving Approach
 - Territoriality Principle
= Home country regulation
 - Effects doctrine and extraterritoriality
= Host country regulation
 - Cross-border coordination
= Equivalence



The Case of Collective Investment Schemes

- Application of the Collective Investment Schemes Act (CISA) to inbound cross-border financial services
- Art. 120(1) CISA: Foreign-based funds subject to FINMA approval if they are offered to non-qualified investors in Switzerland
- Art. 120(2) CISA: Conditions, including:
 - Equivalence assessment
 - Home state supervision
 - Cooperation agreement between FINMA and home state authority
- No reciprocity
- Benefit to Swiss financial services providers



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Reciprocity Principle and Contingency





Reciprocity Principle and Contingency

- Use of contingent equivalence as a market mechanism
- Reciprocity principle
- Bargaining tool
- Competitiveness of financial services providers
- Limited outcome



The Case of Financial Market Infrastructures

- Art. 40 FinMIA: Participation of foreign participants in Swiss trading venues
 - Regulatory authorisation by FINMA
 - Art. 41 FinMIA: Participation of Swiss participants in foreign trading venues
 - Regulatory recognition by FINMA
 - Art. 60 FinMIA: Foreign-based central counterparties
 - Regulatory recognition by FINMA
- + Reciprocity principle
- Art. 95 FinMIA: Market conduct rules in the realm of derivatives trading
 - Substituted compliance



The Case of Financial Institutions

Financial Institutions Act (FinIA)	Branches	Representations
Duty of foreign financial institutions to obtain FINMA's authorisation in the event of permanent physical presence in Switzerland	Art. 52	Art. 58
Authorisation conditions Including appropriate home country supervision	Art. 53	Art. 59
Mutual recognition based on equivalence International treaties allowing foreign financial institutions to open branches or representations without requiring FINMA's authorisation	Art. 52(3)	Art. 58(3)
Reciprocity principle FINMA's discretion	Art. 54	Art. 59(2)



Home Country *versus* Host Country Supervision

- Cross-border activity without physical presence
 - Without registration requirement in the host country
 - With registration requirement in the host country [e.g. foreign-based investment advisers]
- Foreign financial institution with permanent physical presence
 - Branching requirement
 - Representative office requirement
- Subsidiarization requirement
 - [e.g. EU 2021 Banking Package]

Home country supervision



Home country consolidated supervision



Host country supervision



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Regulation at the Point of Sale *versus* Regulation at the Point of Production





Regulation at the Point of Sale *versus* Regulation at the Point of Production

- Regulation at the point of sale
 - National treatment
 - Host state regulation
 - Setback in terms of global financial markets
 - Duplicative rules
- Regulation at the point of production
 - Equivalence
 - Home state regulation
 - Automatic recognition
 - Avoiding duplicative rules



The Case of the Provision of Financial Services

- Investment advice and asset management under the Financial Services Act (FinSA)
- National treatment with respect to certain provisions
 - Art. 7ff FinSA: Rules of conduct, including suitability test and appropriateness test
 - Art. 28 FinSA: Registration of foreign-based investment advisers
 - Art. 77 FinSA: Duty of foreign-based providers to affiliate with an ombudsman
- Duplicative rules



The Case of Product Disclosures

- Art. 35 FinSA: Prospectus Requirement
 - Art. 54 FinSA: Equivalence and recognition of EU law
 - Art. 70 FinSO: Review and recognition of foreign prospectuses
- Art. 58 FinSA: Key Information Document (KID)
 - Art. 59 FinSA: Equivalence
 - Art. 87 and Annex 10 FinSO: Recognition of the EU KID for PRIIPS
- No reciprocity
- Competitiveness of Swiss issuers and financial services providers



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Unilateral Recognition





Unilateral Recognition

- Extraterritoriality
- Cross-border coordination
- Recognition of foreign rules without any expectations in terms of reciprocity
- Avoiding duplicative rules



The Case of Corporate Sustainability Reporting

- Extraterritorial reach of the EU Corporate Sustainability Reporting Directive (CSRD)
 - Mix-and-match model of host country regulation and equivalence
- Art. 964a-c Code of Obligations (CO): Swiss rules inspired from the EU Non-Financial Reporting Directive (NFRD)
 - Currently no attempt to continue to follow EU developments
 - Equivalence: Unilateral recognition
 - Foreign rules implemented by Swiss companies operating on a cross-border basis



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An Outlook on Equivalence Determinations



An Outlook on Equivalence Determinations

Elements that typically play a role

- Cooperation agreement
- Comparability
 - Comparable regulation
 - Effective supervision
 - Effective enforcement
- Reciprocity

Rule of law question

- Legal question versus political question
- Rule-by-rule comparison *versus* holistic approach
- Comprehensiveness *versus* vagueness
- Prerequisites *versus* discretion



Conclusion

- Different reactions to the extraterritoriality of EU law
 - Initial attempt to act as a model student
 - Application of the reciprocity principle
 - Attempt to seek mutual recognition
 - National treatment
 - Eventually unilateral recognition
- Common objectives
 - Cross-border coordination
 - Competitiveness of Swiss issuers and financial services providers